



**Independent review of the *Independent  
Commission Against Corruption Act 1988***

**Final Report**

**Bruce McClintock, SC**

January 2005

ISBN0-646-44487-5

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**Inquiry into the  
Independent Commission Against Corruption Act 1988**

31 January 2005

Her Excellency Professor Marie Bashir AO  
Governor of New South Wales  
Office of the Governor of New South Wales  
Level 25, Goldfields House  
1 Alfred Street  
SYDNEY NSW 2000

Your Excellency

In accordance with the Letters Patent issued to me on 11 November 2004, I have reviewed the *Independent Commission Against Corruption Act 1988* and prepared my final report of the results of my inquiry.

I am pleased to present to you my final report.

Yours sincerely

Bruce McClintock, SC



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## **TERMS OF REFERENCE**

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**Mr Bruce McClintock, SC** has been commissioned by the Governor to:

1. review the *Independent Commission Against Corruption Act 1988* (the Act) to determine whether the terms of the Act remain appropriate for securing its objectives, without departing from the Government's intention to retain the Independent Commission Against Corruption (ICAC) as an independent, stand-alone corruption investigation body to ensure accountability in the public sector;
2. specifically consider as part of that review of the Act:
  - (a) whether the functions of ICAC remain appropriate;
  - (b) the definition of corrupt conduct, and the capacity of ICAC to make findings of corrupt conduct;
  - (c) the jurisdiction of ICAC, including the application of the Act to public agencies, public officials, local government, government businesses, outsourced government functions and Members of Parliament;
  - (d) whether ICAC's powers are appropriate to meet its objectives;
  - (e) the adequacy of accountability mechanisms for ICAC;
  - (f) any other matters relating to the operation of the Act.
3. have regard as part of that review of the Act to any relevant material received by the Honourable Mr Jerrold Cripps, QC prior to the revocation of the letters patent dated 23 June 2004.

And deliver a report in writing of the results of the inquiry to the Governor on or before Monday 31 January 2005.



## EXECUTIVE SUMMARY

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On 11 November 2004 I was commissioned by letters patent to take over and conclude an inquiry into the *Independent Commission Against Corruption Act 1988*. That inquiry had been originally commenced pursuant to letters patent issued to the Honourable Jerrold Cripps, QC. On 16 December 2004 I published a draft report and draft recommendations as to changes to the Act for public comment.

This is my final report which I have prepared for delivery to the Governor in accordance with the letters patent issued to me. This final report takes into account the material received by Mr Cripps and the comments that I received as a result of the publication of my draft report. The opinions expressed in this report are, of course, wholly my own.

My terms of reference require me to review the Act to determine whether the terms of the Act remain appropriate for securing its objectives. In reviewing the Act, I am not to depart from the Government's intention to retain ICAC as an independent, stand-alone corruption investigation body.

ICAC was established to promote the integrity and accountability of public administration by investigating, exposing and preventing serious corruption and educating the public about the detrimental effects of corruption. I am satisfied that the terms of the Act remain generally appropriate for securing its objectives.

Some amendments to the Act are required, however, particularly to improve the accountability of ICAC and to make sure its role is properly understood. While submissions to the review have expressed a high level of support for ICAC, there is also a reasonable amount of confusion and concern about its proper role, particularly in relation to Local Government and Members of Parliament. Submissions to the review have expressed concern about ICAC's power to conduct public hearings, the inadequacy of accountability mechanisms for ICAC, and the availability of contempt of ICAC by publication. I propose a number of amendments to the Act to address these concerns.

Many of my recommendations build upon ICAC's current practice. To improve the transparency of ICAC's operations and facilitate understanding about the proper role of ICAC, it is important that the legislation accurately reflects what ICAC actually does and is intended to do.

Two significant changes to the current statutory regime are proposed. The first is to establish an independent Inspector to audit ICAC's operations and deal with complaints about ICAC. The second is to limit the availability of contempt of ICAC by publication. In my view, neither of these changes will limit the efficiency or effectiveness of ICAC. To the contrary, by ensuring that ICAC is subject to scrutiny and critique, without compromising its independence, these proposals will enhance ICAC's performance and public confidence in ICAC.

## ABBREVIATIONS

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The following abbreviations are used in this report:

<b>ICAC</b>	Independent Commission Against Corruption
<b>Act</b>	<i>Independent Commission Against Corruption Act 1988</i>
<b>Parliamentary Committee</b>	Parliamentary Joint Committee on the Independent Commission Against Corruption
<b>DPP</b>	Director of Public Prosecutions

## **RECOMMENDATIONS**

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### **CH 2 – TERMS OF THE ACT**

#### **Objectives and principles**

- R2.1 That the Act be amended to specify that the objectives of the Act are:
- To promote the integrity and accountability of public administration by establishing ICAC as an independent and accountable body:
    - to investigate, expose and prevent corruption involving or affecting public authorities and public officials; and
    - to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and upon our community.
  - To confer on ICAC special powers to inquire into allegations of corruption.
- R2.2 That the Act be amended to provide that, in exercising its functions, ICAC is to:
- direct its attention, so far as practicable, towards corruption that is serious or systemic; and
  - have regard to the responsibility that public authorities and public officials have, with the assistance of ICAC, to prevent and deal effectively with corruption.

### **CH 3 – FUNCTIONS**

#### **Corruption prevention**

- R3.1 That section 16(2) of the Act be amended to add the Ombudsman to the list of persons and organisations that ICAC is required to co-operate with in exercising its corruption prevention and education functions.

#### **Criminal prosecutions**

- R3.2 That, consistent with the current practice adopted by ICAC and the Director of Public Prosecutions (DPP), the Act be amended to provide expressly that ICAC may, after considering the advice of the DPP, institute criminal proceedings arising from its investigations.

## RECOMMENDATIONS

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- R3.3 That section 74A of the Act be amended to change the statement about prosecution that ICAC is required to include in a report under section 74 from ‘whether or not in all the circumstances it is of the opinion that consideration should be given to prosecution’ to ‘whether or not in all the circumstances it is of the opinion that the advice of the DPP should be sought’.
- R3.4 That if administrative measures do not prove effective in reducing delay in the initiation of criminal proceedings, consideration be given to permitting ICAC to commence criminal proceedings without first seeking the advice of the DPP, where ICAC is satisfied that there are reasonable prospects of conviction of a person for offences under its own Act or under Part 4A of the *Crimes Act 1900* (corruptly receiving commissions and other corrupt practices). Parliament might well regard twelve months as an appropriate period for ICAC and the DPP to address and resolve the issues in question.

### CH 4 – CORRUPT CONDUCT

#### Definition of corrupt conduct

- R4.1 That, subject to recommendation R4.2 below, no substantial amendments to the definition of corrupt conduct in sections 7-9 of the Act be made, except to redraft the provisions to more clearly distinguish between corruption by public officials and corruption that adversely affects the performance of public official functions, without involving official wrongdoing.
- R4.2 That consideration be given to amending section 9 so as to clarify the circumstances in which the definition of corrupt conduct applies to Ministers and Members of Parliament and in which findings of corrupt conduct may be made, and, if sub-sections 9(4) and (5) are not repealed, sub-section 9(5) be amended to clarify the meaning of the words ‘a law’ by limiting it to criminal law and statutory law.

#### Findings of corruption

- R4.3 That the power of ICAC to make findings of corrupt conduct be retained, but the Act amended to clarify that:
- (a) ICAC may only make findings of corrupt conduct where satisfied of the existence of conduct which had adversely affected, or would (if engaged in) adversely affect official functions or, similarly, was or would be a criminal offence, disciplinary offence, reasonable grounds for dismissal, or a substantial breach of an applicable code of conduct and
  - (b) ICAC has a discretion to decline to make a finding of corrupt conduct even where the relevant conduct technically amounts to corruption.

### CH 5 – JURISDICTION

#### Generally

## RECOMMENDATIONS

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- R5.1 That there be no change to the jurisdiction of ICAC over:
- public authorities
  - public officials
  - boards appointed by the Governor
  - Government businesses
  - outsourced Government functions
  - private citizens.

### Local Government

- R5.2 That ICAC's jurisdiction over Local Government be amended to:
- Clarify that ICAC may make a recommendation that consideration be given to the suspension of a councillor from civic office on the grounds set out in section 440I of the *Local Government Act 1993*.
  - Replace the power that ICAC has under the *Local Government Act 1993* to present a report stating that '*grounds exist that warrant a councillor's suspension*' with a power to recommend that consideration be given to the suspension of a councillor from civic office on the grounds set out in section 440I of the *Local Government Act 1993*.

### Members of Parliament

- R5.3 That consideration be given to the establishment of a Parliamentary investigator or Parliamentary Committee to investigate minor matters involving Members of Parliament so as to permit ICAC to focus on serious and systemic allegations of corruption or to investigate allegations of corruption that ICAC is unable to investigate because of Parliamentary privilege as preserved by section 122 of the Act.

## CH 6 – POWERS

### Proposals for expanding ICAC's powers

- R6.1 That the police powers to stop, search, seize, detain, arrest, and convey firearms and narcotics for testing, analytical and evidentiary purposes not be conferred upon civilian officers of ICAC.
- R6.2 That, upon the establishment of the Inspector of ICAC as recommended at R7.1, officers of ICAC be permitted to apply for urgent listening device warrants by telephone.
- R6.3 That ICAC be given the power to apply to a Court for a direction as to the disposal of property, where:
- The property is lawfully in the custody of ICAC in connection with an investigation.
  - The property is not required for the purpose of an investigation or other proceedings (such as a criminal prosecution or disciplinary proceedings).
  - There is no person who appears to be lawfully entitled to the property.

## RECOMMENDATIONS

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- R6.4 That the provisions of Part 6 of the *Criminal Procedure Act 1986* (or, if commenced, Part 17 Division 2 of the *Law Enforcement (Powers and Responsibilities) Act 2002*) be adapted, so far as practicable, to apply to the disposal of property on application by ICAC to the Court.
- R6.5 That the power to issue a statutory notice under section 21 of the Act for the production of a statement of information to ICAC not be extended to non-public officials.
- R6.6 That the privileges preserved by section 25(2) in relation to the exercise of ICAC's power of entry under section 23 remain and that the use-immunity under section 26 of the Act that applies to statements, documents or things obtained under objection (following a notice issued under section 21 or section 22) not be extended to documents or things obtained pursuant to the statutory power of entry .

### Hearings

- R6.7 That the Act be amended to rename ICAC's power to conduct private hearings as a power to conduct compulsory examinations. Compulsory examinations would be conducted for the purposes of an investigation, where ICAC is satisfied that it would be in the public interest to do so. Compulsory examinations would be conducted in private and on oath by The ICAC Commissioner or an Assistant Commissioner and carry the protections for affected persons that currently apply to private hearings.
- R6.8 That the Act be amended to rename ICAC's power to conduct public hearings as a power to hold public inquiries. Public inquiries would be held for the purpose of an investigation, where ICAC is satisfied that it would be in the public interest to do so, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements. The powers and privileges that currently apply to public hearings would apply to public inquiries. A public inquiry could be closed to the public for a particular purpose (for example, to hearing closing submissions in private).

### CH 7 - ACCOUNTABILITY

- R7.1 That the Act be amended to provide for the establishment of an independent Inspector of ICAC to:
- Audit the operations of ICAC and assess the effectiveness and appropriateness of its procedures; and
  - Deal with complaints of misconduct by ICAC or its officers.
- R7.2 That the role, powers, and procedures of the Inspectorate be modelled on the provisions applying to the Inspector of the Police Integrity Commission.
- R7.3 That the Commonwealth Government be requested to include the Inspector of ICAC as an authorised recipient of telecommunications product under the *Telecommunications (Interception) Act 1979* (Cth).

## RECOMMENDATIONS

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- R7.4 That consideration be given to removing the Ombudsman's jurisdiction under section 14 of the *Protected Disclosures Act 1994* to investigate protected disclosures concerning corrupt conduct by ICAC on the basis that this function will be the responsibility of the Inspector and the Ombudsman will have jurisdiction to investigate protected disclosures concerning corrupt conduct by the Inspector.
- R7.5 That there be no change to the Parliamentary Committee's statutory oversight of ICAC.
- R7.6 That Part 6 of the Act governing the Operations Review Committee be repealed.
- R7.7 That the Act be amended to provide that ICAC is to provide reasons to a complainant for not investigating, or discontinuing an investigation, of an allegation of corrupt conduct.
- R7.8 That section 76 of the Act be amended to require ICAC to include in its annual report to Parliament the average time taken to investigate complaints and the actual time taken to investigate matters about which an investigation report has been published.
- R7.9 That there be no amendment of the Act to require ICAC to afford procedural fairness to a person before publishing an adverse finding or statement because such an obligation already exists under the common law, it appears that ICAC complies with this obligation and, if it were to fail to do so, the remedy of judicial review is available to require it to do so.
- R7.10 That there be no 'merits' review of findings of ICAC.

### CH 8 – CONTEMPT AND RELATED AMENDMENTS

- R8.1 That section 98 of the Act be amended so that it only applies to contempt in the face or hearing of ICAC.
- R8.2 That either section 80(a) or section 93 of the Act be amended so that threats to the following persons are made the subject of criminal liability:
- counsel assisting ICAC
  - legal practitioners or other persons authorised to appear before ICAC
  - persons giving evidence to or otherwise assisting ICAC.
- R8.3 That the provisions of the Act which set out the procedure for dealing with contempt of ICAC be amended so that:
- A person brought before ICAC is informed of the contempt that he or she is alleged to have committed.
  - It is clear that a certificate presented to the Supreme Court by ICAC certifies the facts that constitute the alleged contempt, and is presumed to be the truth of the certified facts, in the absence of contrary evidence.
  - There is no power to commit for contempt by a statement in writing.

## RECOMMENDATIONS

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R8.4 That, if section 98 is not amended in accordance with recommendation 8.1 above, the Act be amended so that only contempt in the face or hearing of ICAC is capable of certification by ICAC and proceedings for other types of contempt are commenced by ICAC by application to the Supreme Court.

### CH 9 – MISCELLANEOUS AMENDMENTS

R9.1 That the offence of giving false or misleading evidence at an ICAC hearing under section 87 of the Act be amended to:

- Make it an offence to give evidence that is false or misleading in a material particular, knowing that the evidence is false or misleading, or not believing it to be true.
- Apply the provisions of section 331 of the *Crimes Act 1900* so that the Court is not required to identify which evidence is false, where satisfied that one of two irreconcilable pieces of evidence is false to the knowledge or belief of the accused.

R9.2 That the Act be amended to extend the statutory limitation period for the prosecution of breaches of ICAC's non-publication orders under section 112 from six months to two years.



# CHAPTER 1 - INTRODUCTION

## 1.1 Background to the review

- 1.1.1 The establishment of the Independent Commission Against Corruption (ICAC) was an election undertaking of the incoming Coalition Government in 1988. The *Independent Commission Against Corruption Act 1988* (the Act) commenced on 13 March 1989. On that date, ICAC came into existence and the appointment of Mr Ian Temby, QC as ICAC's first Commissioner took effect.<sup>1</sup>
- 1.1.2 The Act has been amended on various occasions since its commencement, mostly for minor or consequential purposes. The most significant amendments of the Act have been in relation to:
- Findings (1990)
  - Public hearings (1991)
  - Codes of conduct for Members of Parliament (1994).
- 1.1.3 The last comprehensive review of the Act was conducted by the Joint Parliamentary Committee on ICAC (the Parliamentary Committee) in 1993. More recently, the Parliamentary Committee has conducted various reviews of specific aspects of the Act.<sup>2</sup> The Act does not contain, as is now commonplace, a mandatory statutory review clause.<sup>3</sup>
- 1.1.4 The current review of the Act arose from a recommendation of the Parliamentary Committee. In March 2004, the Parliamentary Committee considered whether it would conduct a further statutory review of the Act. By a majority decision, it decided instead to recommend an independent judicial review. The Parliamentary Committee wrote to the Premier to this effect on 1 April 2004.<sup>4</sup>
- 1.1.5 On 23 June 2004, the Premier announced the appointment of the Honourable Jerrold Cripps, QC, an Acting Judge of the Supreme Court, to conduct an independent review of the Act.
- 1.1.6 At this time, the Premier stated that he did not support any proposal to abolish ICAC or merge it with other watchdogs, such as the Police Integrity

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<sup>1</sup>The full list of ICAC Commissioners appears as Appendix D to this Report.

<sup>2</sup>A full list of the Parliamentary Committee's reports considered during the review appears as Appendix A to this report.

<sup>3</sup>Most substantive Acts passed by the NSW Parliament since 1996 require the Minister to review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. These statutory reviews typically take place three to five years after the Act has been in operation.

<sup>4</sup>Parliamentary Committee Report 1/53 May 2004 page 2.

Commission, or the Ombudsman.<sup>5</sup> The letters patent issued by the Governor to The Honourable Jerrold Cripps, QC appear at Appendix H to this draft report.

- 1.1.7 Mr Cripps received submissions from, and conducted interviews with, members of the public and stakeholders. However, he did not prepare a report for delivery to the Governor. On Thursday 28 October 2004, the Premier announced that Mr Cripps had been nominated to replace Ms Irene Moss, AO as Commissioner of ICAC.<sup>6</sup>
- 1.1.8 As a result of the proposed appointment of Mr Cripps as Commissioner of ICAC, the Governor revoked the letters patent commissioning Mr Cripps to conduct an inquiry to review the Act. Following the Parliamentary Committee’s approval of his nomination, Mr Cripps was formally appointed as The ICAC Commissioner.
- 1.1.9 On 11 November 2004 I was commissioned by the Governor to take over the independent review of the Act commenced by Mr Cripps. The letters patent issued to me by the Governor require me to:
- review the *Independent Commission Against Corruption Act 1988* (the Act) to determine whether the terms of the Act remain appropriate for securing its objectives, without departing from the Government’s intention to retain the Independent Commission Against Corruption (ICAC) as an independent, stand-alone corruption investigation body to ensure accountability in the public sector;
  - specifically consider as part of that review of the Act:
    - whether the functions of ICAC remain appropriate;
    - the definition of corrupt conduct, and the capacity of ICAC to make findings of corrupt conduct;
    - the jurisdiction of ICAC, including the application of the Act to public agencies, public officials, local government, government businesses, outsourced government functions and Members of Parliament;
    - whether ICAC’s powers are appropriate to meet its objectives;
    - the adequacy of accountability mechanisms for ICAC;
    - any other matters relating to the operation of the Act; and
  - have regard to any relevant material received by the Honourable Jerrold Cripps, QC prior to the revocation of the letters patent issued to him on 23 June 2004.
- 1.1.10 The letters patent require me to report the results of my inquiry to the Governor in writing by Monday 31 January 2005. The letters patent issued to me by the Governor appear at Appendix H to this report.

## 1.2 Scope of the review

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<sup>5</sup> Letter from the Premier to the Chair of the Parliamentary Committee dated 16/4/04.

<sup>6</sup> The appointment of Ms Irene Moss, AO as Commissioner of ICAC expired on 12 November 2004. She was not eligible for re-appointment as a person is not permitted to hold the office of Commissioner for terms totalling more than five years: Schedule 1 item [4] of the Act.

- 1.2.1 The letters patent expressly state that the Government intends to retain ICAC as ‘*an independent, stand-alone corruption investigation body*’. In reviewing the Act to determine whether the terms of the Act remain appropriate for securing its objectives, I am not to depart from the Government’s intention to retain ICAC as an independent corruption investigation body.
- 1.2.2 In my view, the essential features of ‘*an independent, stand-alone corruption investigation body*’ are that:
- It is independent of the Executive.
  - It is separate to other oversight bodies.
  - It is primarily concerned with corruption.
  - It conducts investigations.
- 1.2.3 I have not considered any proposals that would deprive ICAC of these essential features. Such proposals fall outside my terms of reference.
- 1.2.4 The purpose of this inquiry is to review the Act. I am not conducting an inquiry into the performance of ICAC. This is apparent from the letters patent issued to me, the short timeframe in which I have been requested to report and my lack of compulsive powers. It follows that the inquiry has not examined particular operational decisions of ICAC, except to the limited extent that these decisions inform proposals for legislative change.

### **1.3 Process followed by the review**

- 1.3.1 Following the announcement of the inquiry, a small office was established on Level 20, Goodsell Building, 8-12 Chifley Square, Sydney.
- 1.3.2 In July 2004, the inquiry placed advertisements in the major Sydney newspapers calling for submissions on matters falling within the terms of reference.
- 1.3.3 A website was established at [www.lawlink.nsw.gov.au/icacactinquiry](http://www.lawlink.nsw.gov.au/icacactinquiry).
- 1.3.4 The inquiry has received written submissions from over thirty persons or organisations. Appendix B is a list of submissions received by the inquiry.
- 1.3.5 The inquiry conducted numerous interviews with individuals or representatives of organisations with an interest in the inquiry. Appendix C is a list of those interviewed. These interviews were conducted to seek information from stakeholders and other persons.
- 1.3.6 The inquiry has been greatly assisted by the individuals and representatives from organisations who provided written submissions and/or attended interviews with myself and/or Mr Cripps (prior to the revocation of his letters patent). I thank all these persons for generously sharing their views, their experience and, indeed, their time on numerous matters pertinent to the inquiry.

- 1.3.7 The inquiry has made several requests of ICAC for information, including information to respond to matters raised in submissions and interviews. The former Commissioner of ICAC, Ms Irene Moss, AO, the current Commissioner of ICAC, The Honourable Jerrold Cripps, QC, and the senior staff at ICAC have been most helpful and co-operative throughout this process.
- 1.3.8 The inquiry has made requests of the Parliamentary Committee for information, particularly relating to past Parliamentary Committee inquiries and reports. The Parliamentary Committee and its secretariat also have been most helpful and co-operative.
- 1.3.9 On 16 December 2004 I published a draft report and draft recommendations as to changes to the Act for public comment and input. I received 19 submissions from stakeholders and members of the public. The list of submissions received in relation to the draft report appears in Appendix B to this report.
- 1.3.10 The recommendations and conclusions that I express in this my final report have not changed greatly from those published in my draft report, although I have made minor variations to several recommendations<sup>7</sup> to take into account comments and submissions made to me. This report contains one new recommendation that was not included in my draft report.<sup>8</sup> For historical purposes, I have included my original draft recommendations as Appendix F to this report.
- 1.3.11 I have consulted with Mr Cripps in order to effect a smooth handover of the inquiry. As his appointment was so recent, I did not seek the views of Mr Cripps in his role as Commissioner of ICAC prior to the publication of my draft report. I indicated that I might do so prior to finalising and delivering my final report and in late January 2005 I met with Mr Cripps in his role as Commissioner of ICAC.
- 1.3.12 Following my commission to conduct the review, I examined:
- the written submissions and other material received by Mr Cripps from individuals and organisations
  - the minutes of interviews conducted by Mr Cripps
  - past reviews and reports prepared by the Parliamentary Committee
  - various ICAC investigation reports
  - comments that I received on my draft report and draft recommendations as to changes to the Act
  - other relevant material, including legislation and case law concerning ICAC.

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<sup>7</sup> See, for example, R2.1 (objectives of the Act), R3.4 (power of ICAC to commence criminal proceedings without the advice of the DPP), R4.2 (findings of corruption), R5.3 (Members of Parliament), R6.6 (statutory power of entry), R7.4 (role of Ombudsman and the Inspector of ICAC), R8.2 (protection of witnesses).

<sup>8</sup> See recommendation R4.2 discussed at section 4.4.

- 1.3.13 In preparing this final report I have had regard to all of this information. The full list of submissions, persons interviewed by the inquiry, and Parliamentary Committee reports that I have considered appear in the appendices to this draft report.
- 1.3.14 Following examination of this material, I have formed conclusions and recommendations as to changes to the Act which are set out in this report. The conclusions and recommendations are, of course, wholly my own.

# CHAPTER 2 – TERMS OF THE ACT

## 2.1 Objectives of the Act

2.1.1 My initial task is to review the Act to determine whether the terms of the Act remain appropriate for securing its objectives. The first step in undertaking this task is to identify the objectives of the Act.

2.1.2 The Act does not contain an objects clause. The Long Title of the Act is:

*‘An Act to constitute the Independent Commission Against Corruption and to define its functions.’*

2.1.3 The Explanatory Note to the Independent Commission Against Corruption Bill 1988 states that:

*‘The object of this Bill is to constitute an Independent Commission Against Corruption, and to confer on it wide powers, with special emphasis on –*

- *investigating corruption or possible corruption where public officials are involved, either on complaint or reference made to it or on its own initiative; and*
- *educating public authorities and the community generally on the detrimental effects of public corruption and strategies to combat it.*<sup>9</sup>

2.1.4 The objectives of the Act and the role of ICAC which it contemplates are elucidated by the reasons and circumstances which led to ICAC’s creation. The Government of the day decided to establish a new institution with the coercive powers of a Royal Commission to deal with corruption. This was because that Government believed there was a general perception that:

- Significant corruption existed within public administration, even at the highest levels.
- Traditional law enforcement methods and bodies were ineffective at dealing with corruption.
- Corruption was difficult to expose because of its secretive and consensual nature, with no obvious victim. Corruption was often committed by powerful people.<sup>10</sup>

<sup>9</sup> Reproduced in *Hansard* Legislative Assembly 26 May 1988 page 678.

<sup>10</sup> This is a summary of the Government’s reasons for establishing ICAC referred to in the then Premier’s Second Reading Speech *Hansard* Legislative Assembly 26 May 1988 page 673.

- 2.1.5 It should also be recalled that ICAC exists outside, and independently of, institutions which already existed in the criminal justice system. It does not replace the role of law enforcement bodies, nor the responsibility of other agencies to deal with minor allegations. ICAC's mandate is to investigate only the most significant and serious allegations of corruption.
- 2.1.6 Specifically, ICAC does not replace or reduce the responsibility of:
- Police to investigate corruption that is amenable to ordinary methods of criminal investigation.
  - The Director of Public Prosecutions to prosecute criminal activity.
  - Courts to hear and determine criminal charges which may involve corrupt conduct.
  - Individual agencies to deal with corruption allegations and develop corruption prevention strategies.
  - Other oversight agencies, such as the Auditor General and the Ombudsman, to oversee financial accountability and good administrative practice.
- 2.1.7 ICAC has three main powers not generally available to the institutions referred to in the preceding paragraph. It can, through covert investigative techniques and coercive powers, compel the production of documents and answers to determine the truth about corruption allegations. It can expose its findings. It can use the knowledge it has gained from complaints and investigations to inform corruption prevention and education programs. Thus, its roles may be described as investigation (through coercive powers if necessary), determination, and education, all with the ultimate aim of deterring corruption and reducing its incidence in our society.
- 2.1.8 ICAC complements, rather than replaces, the roles performed by other criminal justice institutions and oversight agencies. Its particular focus must be matters for which there is no other remedy – where there are serious allegations of corruption that are not amenable to ordinary policing methods, where there are corruption risks, or where public officials or bodies are unwilling or unable to investigate corruption allegations or implement anti-corruption strategies.
- 2.1.9 ICAC is an inquisitorial body. It is set up to investigate corruption. The clear and fundamental premise underpinning the existing legislative scheme is that ICAC's primary role is to expose the facts, that is, to discover and reveal what actually happened in a possibly corrupt transaction. A corollary is that this role and the outcome of exposing corruption is more important than obtaining criminal conviction of those involved in the corrupt transaction.
- 2.1.10 I am of the view that the manifest objectives of the Act are, thus:
- To establish an independent and accountable body to investigate, expose, and prevent serious corruption involving or affecting public administration.
  - To confer on this body special powers to inquire into allegations of corruption.
  - To promote the integrity and accountability of public administration.

- 2.1.11 In my view, these objectives should be set out in the Act. Although the Act has been operating for over fifteen years without an objects clause, my inquiries have revealed a residual confusion as to the role of ICAC. A clear objects clause may assist dispel this confusion, particularly by making explicit the responsibility of ICAC to expose corrupt conduct.
- 2.1.12 ICAC supports the inclusion of objectives in the Act. ICAC expressed concern, however, that the objectives proposed in paragraph 2.1.10 above place insufficient weight on the education function of ICAC. In my view this is not the case as ICAC's education function is covered by reference to ICAC's responsibility to prevent corruption. Nonetheless I see no reason why explicit mention might not be made of ICAC's education function and I have reformulated the objectives accordingly.
- 2.1.13 ICAC is also of the view that the reference to 'serious' corruption in the proposed objectives will inappropriately limit the functions of ICAC by, for example, restricting the exercise of ICAC's corruption prevention function to those allegations sufficiently serious to warrant investigation.
- 2.1.14 I do not share this view. Section 13 of the Act makes it clear that ICAC's functions are to be exercised with respect to all corrupt conduct. The purpose of referring to serious corruption in the objectives is to emphasise the importance of ICAC focussing its attention, so far as practicable, on serious corruption. I accept that this purpose is adequately achieved by recommendation 2.2 (discussed at section 2.8 below) and on that basis I have removed the reference to 'serious' corruption in the proposed objectives.

**Recommendation R2.1** That the Act be amended to specify that the objectives of the Act are:

- To promote the integrity and accountability of public administration by establishing ICAC as an independent and accountable body:
  - (a) to investigate, expose and prevent corruption involving or affecting public authorities and public officials; and
  - (b) to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and upon our community.
- To confer on ICAC special powers to inquire into allegations of corruption.

- 2.1.15 I turn now to consider each aspect of these objectives for the purpose of determining whether the terms of the Act are appropriate.

## 2.2 Independence

- 2.2.1 The very essence of ICAC, as its name reflects, is its independence. The Act makes it clear that ICAC is not subject to direction or control by the



Government of the day or by any other person. ICAC may act on its own initiative and decide for itself the matters it will investigate, subject only to the power of Parliament to refer a specific matter to ICAC for investigation.<sup>11</sup> ICAC's reports are made directly to Parliament, rather than a Minister.<sup>12</sup> While the ICAC Commissioner is selected by the Government, the Parliamentary Committee may veto a proposed appointment,<sup>13</sup> and the remuneration of The ICAC Commissioner cannot be reduced or withheld during his or her term of office.<sup>14</sup>

- 2.2.2 It has been submitted to me that the Act should be amended so that there is a '*selection process for the Commissioner which guarantees he or she is beyond the reach, range and influence of politicians...*'<sup>15</sup>
- 2.2.3 I have examined the selection process for the appointment of The ICAC Commissioner and I am satisfied that this process is generally appropriate.
- 2.2.4 The method of selecting the ICAC Commissioner is consistent with that which applies to the selection of other public officials responsible for the independent oversight of the Executive, such as the Ombudsman, and the Auditor-General. Moreover, the broad discretion given to The ICAC Commissioner by the Act ensures that ICAC is empowered to exercise its functions independently of the public officials that it may investigate. I do not consider that any amendments to the Act are required in order to secure the independence of ICAC.

## 2.3 Accountability

- 2.3.1 While, as I have just stated, the Act adequately secures the independence of ICAC, serious questions have been raised as to whether the Act adequately deals with the accountability of ICAC. ICAC is a very powerful body because of its possession of the powers I mention in paragraph 2.1.7 above. No entity such as ICAC can be expected to be correct in every decision or every action it takes. Obviously, there should be sufficient accountability safeguards built into the legislation.
- 2.3.2 The challenge is to maintain ICAC's independence (which is critical to the proper performance of its functions) while ensuring it is adequately accountable. I propose a number of draft recommendations in relation to accountability, including the establishment of an independent Inspector to oversee the exercise of ICAC's powers. These proposals are discussed in chapter 7.

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<sup>11</sup> See sections 20 and 73 of the Act.

<sup>12</sup> See section 74 of the Act.

<sup>13</sup> See s64A of the Act.

<sup>14</sup> Schedule 1 item [5] of the Act.

<sup>15</sup> Submission from M Waterhouse.

## 2.4 Investigation

- 2.4.1 Investigation of allegations of corrupt conduct is one of the primary functions of ICAC. In establishing ICAC, the then Premier, Mr Greiner expressed the hope that its corruption prevention role would assume greater importance than its corruption investigation role in the longer term.<sup>16</sup>
- 2.4.2 This has not occurred. This is not surprising, given human nature. Acceptance of the probability that corruption will always be with us reflects current understandings about the nature of corruption. Corruption arises from opportunities. As public administration changes, (for example, due to systematic improvements, technologies, new ways of doing business, change in personnel), new sites for corruption will develop. It cannot be eliminated by the investigation and removal of individual ‘rotten apples’. ICAC also may be required to conduct investigations in areas where agencies have failed to manage corruption risks effectively or where systems have deteriorated over time, creating new opportunities for traditional forms of corrupt conduct. For these reasons, there is an ongoing and important role for ICAC in investigating allegations of corruption.
- 2.4.3 It is essential to understand the nature of the investigation conducted by ICAC. It is not a Court of law, nor is it an administrative tribunal with adjudicative functions. ICAC conducts investigations into the truth of an allegation with a view to making findings of corruption and recommendations for systemic reform. It publishes the results of its investigations.
- 2.4.4 The main differences between ICAC’s investigations and Courts of law are that:
- ICAC is not adjudicating on a defined dispute between litigants. ICAC inquiries may be far broader in scope than adversarial proceedings, and are focussed on what happened and how it can be prevented rather than the criminal or civil liability of an individual.
  - ICAC routinely examines matters subject to public comment, including matters of intense public interest of a political nature. The vast majority of proceedings conducted in Court are not (although there are exceptions).
  - ICAC can compel witnesses to give incriminating evidence. In criminal proceedings before a Court, an accused person cannot be compelled to testify.
  - ICAC has broad powers to restrict publication of its evidence or hold hearings in private. Courts of law generally conduct their proceedings in open Court.
  - ICAC’s hearings are conducted by persons qualified for appointment to high judicial office. Unlike certain criminal and civil proceedings, there is no jury to determine issues of fact.
- 2.4.5 These matters have significance in considering whether the terms of the Act are appropriate. In some respects, those terms do not reflect accurately what ICAC actually does. In particular, the terms of the Act concerning ICAC

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<sup>16</sup> Second Reading Speech, ICAC Bill 1988, *Hansard* Legislative Assembly at page 674.

power to hold hearings, its function with respect to criminal prosecutions, and the application of the law of contempt of Courts to ICAC do not accord with its actual or intended role. I am recommending amendments to the Act to address these concerns (see sections 3.6, 3.2 and 3.8 in chapter 3).

- 2.4.6 Many submissions to the review emphasised the importance of ICAC directing its attention to investigating serious and systemic corruption. I have recommended changes to the Act to address this concern, see section 2.8 below.

## 2.5 Corruption prevention and education

- 2.5.1 A critical question asked by several persons who made submissions to this review is whether ICAC's functions and resources should be directed towards investigation or education and prevention. Some persons criticised ICAC for emphasising education and prevention at the expense of investigations. Others the reverse. This reflects a long-standing debate in the ethics literature between those who advocate reactive investigations into past conduct and those who prefer preventative mechanisms for improving systems and changing cultures.<sup>17</sup>
- 2.5.2 Of course, there is no simple dichotomy between investigation and prevention. The purpose of investigations, particularly those conducted by ICAC, is to prevent corrupt conduct. This may arise by deterring individuals from engaging in corrupt conduct in the future. This is what is referred to in criminal law as general deterrence – it is an important function of an investigation into specific acts of corrupt conduct to let others, who may be tempted, know the consequences if they are caught. It may also arise by bringing about wider change in the way agencies and individuals do business.
- 2.5.3 I agree with the conclusion drawn by a recent study into Australia's integrity systems that '*a key challenge for integrity agencies [is] to direct their resources into investigations that promote organisational reform and cultural change*'.<sup>18</sup>
- 2.5.4 ICAC acknowledges the importance of using investigations to prevent and educate. Its investigation reports are replete with recommendations to address corruption risks. ICAC also helps agencies and individuals to prevent corruption by providing advice and building an agency's resistance to corruption through training and resources. I do not consider that the Act requires amendment to improve the operation of ICAC's corruption prevention education functions.

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<sup>17</sup> For example, see the discussion in Miller, Roberts & Spence *Corruption and Anti-Corruption* Pearson Prentice Hall 2005.

<sup>18</sup> *Chaos or Coherence: Strengths, Challenges and Opportunities for Australia's National Integrity Systems* National Integrity Assessment Draft Report November 2004, Griffith University and Transparency International Australia at page 19.

## 2.6 Exposure

- 2.6.1 The unique and fundamental role of ICAC is to expose corrupt conduct. This role should, in my view, be reflected in the Act.
- 2.6.2 ICAC was undoubtedly intended to act as an independent expositor of corrupt conduct, not just as an ancillary law enforcement mechanism. This much is clear from its powers to conduct its own inquiries, hold public hearings, use evidence obtained under compulsion, and report publicly on its findings.
- 2.6.3 ICAC is uniquely placed to expose corrupt conduct. Reflection of this fact in the legislation may help dispel confusion about the proper role of public hearings conducted by ICAC, and the limited use of criminal convictions as a measure of ICAC's success.

## 2.7 Powers

- 2.7.1 When ICAC was first established there were grave concerns expressed from sections of the community about the risks to civil liberties. These have largely not been borne out.
- 2.7.2 One power exercised by ICAC that remains highly contentious is its power to conduct public hearings. I propose reform to this power so that the Act more clearly reflects the role that hearings of ICAC perform (see chapter 6).

## 2.8 Serious corruption

- 2.8.1 Many submissions to the review emphasised the importance of ICAC directing its attention to investigating serious and systemic corruption. ICAC itself recognises that it has responsibility for:
- 'targeting serious and systemic corruption and corruption opportunities in the NSW public sector.'*<sup>19</sup>
- 2.8.2 The Act does not explicitly confer on ICAC responsibility for targeting the investigation of serious and systemic corruption, although this is implicit in the regime established by the Act.
- 2.8.3 The Act gives ICAC a broad discretion to conduct an investigation on its own initiative or on complaint, report or reference made to it.<sup>20</sup> In deciding whether or not to investigate a matter, ICAC may have regard to such matters as it thinks fit, including whether or not:
- The subject-matter of the investigation is trivial;
  - The conduct concerned occurred at too remote a time to justify investigation; or

<sup>19</sup> ICAC Strategic Plan 2003-2007.

<sup>20</sup> Section 20(1) of the Act.

- The complaint was frivolous, vexatious or not in good faith.<sup>21</sup>
- 2.8.4 The purpose of the investigation is to ascertain the truth of the allegations of corruption and make recommendations for systemic reform. The investigative function of ICAC is essentially inquisitorial, not adjudicative.
- 2.8.5 In exercising its functions, ICAC is to regard the protection of the public interest and the prevention of breaches of public trust as its paramount concerns.<sup>22</sup>
- 2.8.6 Under Part 5 of the Act, ICAC may at any time refer a matter for investigation by another person or body. ICAC is able to monitor and control the investigation conducted by the other person or body. ICAC conducts its investigation function in co-operation with law enforcement agencies and oversight bodies.<sup>23</sup>
- 2.8.7 As ICAC complements, rather than replaces, the role performed by criminal justice institutions, oversight bodies, and agencies, its particular focus should be the matters for which there is no other remedy – where there are serious allegations of corruption that may not be amenable to ordinary policing methods, where there are systemic corruption risks, or where public officials or bodies are unwilling or unable to investigate corruption allegations or implement anti-corruption strategies.
- 2.8.8 In my view, the policy objectives to be achieved by the Act could be strengthened by providing guidance to ICAC in the exercise of its functions. This guidance would not seek to limit the jurisdiction of ICAC to investigate corrupt conduct, nor would it undermine the primary responsibility of ICAC to have regard to the public interest in the exercise of its functions. A statement of principles to be applied by ICAC in the exercise of its functions may assist ICAC to explain its decisions as to whether or not it will investigate particular conduct, especially when subject to pressure from complainants, the media or high profile personalities.
- 2.8.9 The principles to be applied by ICAC might include an acknowledgement that public authorities have, with the assistance of ICAC, a responsibility to deal effectively and appropriately with corruption, and that ICAC’s investigation powers should, as far as practicable, be directed towards serious and systemic corruption.
- 2.8.10 In submissions to the review there was widespread support for including these principles in the Act.

**Recommendation R2.2** That the Act be amended to provide that, in exercising its functions, ICAC is to:

<sup>21</sup> Section 20(3) of the Act.

<sup>22</sup> Section 12 of the Act.

<sup>23</sup> Section 16(1) of the Act.

- direct its attention, so far as practicable, towards corruption that is serious or systemic; and
- have regard to the responsibility that public authorities and public officials have, with the assistance of ICAC, to prevent and deal effectively with corruption.

## 2.9 Conclusion

2.9.1 ICAC promotes the honesty and integrity of public administration by investigating, exposing and preventing serious corruption. After reviewing the material submitted to the review and conducting my own inquiries, I am satisfied that the terms of the Act remain appropriate to securing its objectives.

2.9.2 Some amendments to the Act are required, however, particularly to improve the accountability of ICAC and to make sure its role is properly understood. While submissions to the review expressed a high level of support for ICAC, there is also a reasonable amount of confusion and concern about its proper role, particularly in relation to Local Government and Members of Parliament. Submissions to the review have also expressed concern about ICAC's power to conduct public hearings, the inadequacy of accountability mechanisms for ICAC, and unnecessary and in appropriate restrictions on publications about ICAC. In the following chapters I consider a number of recommendations for amendments to address these concerns.

# CHAPTER 3 - FUNCTIONS

## 3.1 General

- 3.1.1 I am required to consider as part of my review of the Act whether the functions of ICAC remain appropriate.
- 3.1.2 The principal functions of ICAC are set out in section 13 of the Act. They may be summarised as the function to:
- Investigate corrupt conduct.
  - Prevent corrupt conduct.
  - Conduct anti-corruption education.
  - Make findings based on its investigations.
- 3.1.3 The other function of ICAC is to assemble evidence for criminal prosecutions.<sup>24</sup>
- 3.1.4 In exercising its functions, ICAC must regard the protection of the public interest and the prevention of breaches of trust as its paramount concerns.<sup>25</sup>
- 3.1.5 I am satisfied that ICAC's investigation and corruption prevention and education functions remain appropriate. I am also satisfied that ICAC's power to make findings of corrupt conduct remains appropriate, despite some submissions advocating its repeal. I do, however, make suggestions for minor amendments to clarify the circumstances in which findings of corrupt conduct may be made. These are discussed in chapter 4.
- 3.1.6 The discharge of ICAC's functions in relation to criminal proceedings has been the subject of criticism, particularly in relation to the relatively low number of criminal convictions arising from findings of corrupt conduct, and the long delay between publication of an ICAC investigation report and the initiation of criminal proceedings. I propose amendments to the Act to clarify ICAC's role and address concerns about delay.

<sup>24</sup> Section 14 of the Act.

<sup>25</sup> Section 12 of the Act.

### 3.2 Investigation

- 3.2.1 ICAC may conduct an investigation into alleged corrupt conduct:
- On its own initiative
  - On a complaint from any person
  - On report made by heads of public authorities
  - On reference from Parliament.<sup>26</sup>
- 3.2.2 The Act gives ICAC very broad discretionary power to investigate. ICAC may exercise its compulsive powers for the purposes of an investigation, using both overt and covert investigative techniques.
- 3.2.3 In establishing ICAC, the then Premier, The Honourable Nick Greiner envisaged that its corruption prevention role would assume greater importance than its corruption investigation role in the longer term.<sup>27</sup>
- 3.2.4 Although some persons who contributed to this review suggested that ICAC has reduced its emphasis on investigations, my inquiries and the submissions made to me do not bear this out.
- 3.2.5 According to ICAC, *‘Investigations are a major part of ICAC’s work and complement its corruption prevention and education functions.’*<sup>28</sup>
- 3.2.6 In 2003-2004, ICAC commenced 34 investigations and 135 preliminary investigations, in addition to 14 investigations and five preliminary investigations carried over from 2002-2003.
- 3.2.7 ICAC spends more of its budget on investigations, than corruption prevention, education and research. The operating budget for 2002-2003 ICAC investigations was \$6,433,304. The operating budget for 2002-2003 for ICAC corruption prevention, education and research was \$2,415,205.<sup>29</sup>
- 3.2.8 More staff are engaged in the investigation function, than corruption prevention, education and research. ICAC’s full-time equivalent (FTE) staff numbers for February 2004 are listed by division in the table below<sup>30</sup>:

Unit/Division	FTE staffing position for February 2004
Executive	5.0
Corporate Services	21.7
Corruption prevention, education and research	21.7

<sup>26</sup> Section 20 of the Act.

<sup>27</sup> Second Reading Speech, ICAC Bill 1988, *Hansard* Legislative Assembly at page 674.

<sup>28</sup> *Annual Report 2003-2004* page 27.

<sup>29</sup> These figures relate to the direct costs controlled by the relevant function. Source: Parliamentary Committee Report No 3/53 September 2004 *Examination of the 2002-2003 Annual Report of the Independent Commission Against Corruption* at page 29.

<sup>30</sup> Source: Parliamentary Committee Report No 3/53 September 2004 *Examination of the 2002-2003 Annual Report of the Independent Commission Against Corruption* at page 82.



Legal	11.0
Strategic operations	42.3
Assessments	13.6

3.2.9 In its strategic plan, ICAC states:

*'We investigate corruption by:*

- *targeting serious and systemic corruption and corruption opportunities in the NSW public sector*
- *establishing facts and referring matters to others to consider prosecution, discipline and preventative actions*
- *recommending systemic changes to prevent corruption from recurring*
- *conducting hearings and producing reports on our investigations.*<sup>31</sup>

3.2.10 ICAC's investigations are conducted with a view to determining whether:

- Any corrupt conduct has occurred, is occurring or is about to occur;
- Any laws need to be changed for the purpose of reducing the likelihood of occurrence of corrupt conduct; and
- Any methods of work, practices or procedures of any public official or public authority did or could allow, encourage or cause the occurrence of corrupt conduct.<sup>32</sup>

3.2.11 The provisions of the Act appear to me to be generally adequate to secure ICAC's function as an investigator and actual experience does not suggest any need for change in this regard.

### 3.3 Corruption prevention and education

3.3.1 ICAC exercises its corruption prevention and education functions in a number of ways. ICAC's investigations often generate recommendations for change to methods of work, practices or procedures of agencies so as to reduce the likelihood of the occurrence of corrupt conduct.

3.3.2 Instead of investigating a complaint alleging corrupt conduct, ICAC may recommend that the allegation is referred to the corruption prevention, education and research division for consideration of corruption prevention advice to the agency involved. This approach is particularly used where the matter has arisen because of systems weaknesses in the agency.<sup>33</sup>

3.3.3 ICAC's corruption prevention and education program also operates independently of investigations. ICAC provides a corruption prevention advice service, primarily by telephone, to public officials and agencies. ICAC delivers training sessions to public sector organisations and produces a range of publications designed to assist public sector organisations to develop corruption-proof systems and processes. Recent publications include:

- *Managing conflicts of interest in the public sector – guidelines and toolkit*

<sup>31</sup> *Annual Report 2002-2003* Appendix 1 Strategic Plan 2003-2007 page 99.

<sup>32</sup> Section 13(2) of the Act.

<sup>33</sup> See *ICAC Annual Report 2003-2004* at page 42.

- *Developing a statement of business ethics*
- *Providing advice on corruption issues: A guide for Members of NSW Parliament*
- *Providing advice on corruption issues: A guide for NSW Government Councillors*
- *Fact-Finder – A 20-step guide to conducting an inquiry in your organisation*
- *Regulation of secondary employment for Members of the NSW Legislative Assembly: Report to the Speaker of the Legislative Assembly.*

3.3.4 ICAC develops specific anti-corruption strategies in areas where there are serious and systemic corruption risks. For example, ICAC has developed a Local Government Strategy, focussing on tendering and contract administration, development and planning approvals, use of council resources and cash handling.

3.3.5 It is very difficult to measure the effectiveness of ICAC's corruption prevention, education and research functions. Few submissions to the review criticised the direction or focus of ICAC's corruption prevention and education. One submission suggested that ICAC should give greater attention to corruption prevention strategies than education so as to address '*activities that are leading to, or creating an environment of, potential corruption and/or direct corruption*'.<sup>34</sup> I am satisfied that ICAC is aware of the importance of addressing corruption risks and that its corruption prevention and education activities are generally appropriate to this task.

3.3.6 Another issue raised in the review is the degree to which ICAC exercises its corruption prevention and education functions in co-operation with other agencies, including other oversight agencies such as the Ombudsman.

3.3.7 The Act requires ICAC to exercise its corruption prevention and education functions in co-operation with the Auditor-General, educational institutions, management consultants and other persons or bodies that ICAC thinks appropriate.<sup>35</sup>

3.3.8 The Ombudsman has expressed concern that ICAC's anti-corruption education publications may overlap with his own publications on good administrative practice. ICAC advises that it is prepared to, and does, consult with the Ombudsman. In my view, a minor amendment might be made to the Act to specifically include the Ombudsman in the list of agencies that ICAC is required to co-operate with in the exercise of its corruption prevention and education functions.

3.3.9 This will serve to emphasise the potential for overlap between their respective jurisdictions and the need to co-operate in order to maximise the effectiveness of their respective programs. ICAC supports this amendment.

<sup>34</sup> Angus Gordon, General Manager, Pittwater Council.

<sup>35</sup> Section 16(2) of the Act.

- 3.3.10 Aside from this minor amendment, the provisions of the Act appear to me to be adequate to enable ICAC to exercise its corruption prevention and education functions.

**Recommendation R3.1** That section 16(2) of the Act be amended to add the Ombudsman to the list of persons and organisations that ICAC is required to co-operate with in exercising its corruption prevention and education functions.

## 3.4 Criminal prosecutions

### *Introduction*

- 3.4.1 The discharge of ICAC’s functions in relation to criminal proceedings has been the subject of criticism in recent years, particularly from the Parliamentary Committee. This criticism has focussed on the relatively low number of criminal convictions arising from findings of corrupt conduct and the long delay between publication of an ICAC investigation report and the initiation of criminal proceedings.
- 3.4.2 The Act confers limited powers on ICAC with respect to criminal proceedings, with the specific intention of separating the function of investigation from that of prosecution. ICAC has responsibility for assembling evidence admissible in the prosecution of corruption offences for provision to the Director of Public Prosecutions, although the Act makes it clear that this is not a principal function.<sup>36</sup>
- 3.4.3 ICAC may make recommendations that consideration be given to the prosecution of particular persons.<sup>37</sup> It is not, however, entitled to make a finding (or form an opinion) that a specified person is guilty of (or has committed) a criminal offence or disciplinary offence. Nor may ICAC recommend (or form an opinion) that a specified person should be prosecuted for a criminal offence.<sup>38</sup> The Act does not confer any function or power on ICAC to initiate or conduct criminal prosecutions.
- 3.4.4 The separation of the function of prosecution from that of investigation was an important consideration for the then Government in establishing ICAC:

*‘The proposed Independent Commission Against Corruption will not have power to conduct prosecutions for criminal offences or disciplinary offences, or to take action to dismiss public officials. Where the commission reaches the conclusion that corrupt conduct has occurred, it will forward its conclusion and evidence to the Director of Public*

<sup>36</sup> See section 14(1)(a) of the Act.

<sup>37</sup> See section 13(5) of the Act.

<sup>38</sup> See section 74B and section 13(4) of the Act.

*Prosecutions, department head, a Minister or whoever is the appropriate person to consider action.....It is important to note that the independent commission will not be engaging in the prosecutorial role. The Director of Public Prosecutions will retain his independence in deciding whether a prosecution should be instituted.’<sup>39</sup>*

- 3.4.5 When amending the Act to clarify the power of ICAC to make findings of corrupt conduct following the High Court’s decision in *Balog v ICAC*,<sup>40</sup> the then Government again emphasised ICAC’s limited role in relation to criminal proceedings:

*‘It is not for the commission to determine criminality. Nor is it the commission’s role to conduct prosecutions for criminal or disciplinary offences. The Director of Public Prosecutions and other authorities are charged with that responsibility and the commission should not be able to pre-empt the decisions of those authorities to prosecute or not to prosecute.’<sup>41</sup>*

### **Role of the DPP**

- 3.4.6 While the framers of the legislation intended that the Director of Public Prosecutions (DPP) would have responsibility for determining whether to prosecute a matter and to conduct the prosecution, the situation in actual fact is a little different. The DPP, Mr Nicholas Cowdrey AM QC, does not institute criminal prosecutions arising from ICAC investigations. That is ultimately a matter for ICAC. He described his role in relation to ICAC in the following terms:

*‘The Office of the DPP provides advice on the appropriate charges to lay and whether a prosecution has reasonable prospects. It conducts the prosecution. However, it does not lay charges. It is ICAC’s decision to lay charges or not. The Office of the DPP does not investigate any matters. Where the brief of evidence is considered deficient, requisitions are sent to ICAC for more information.’<sup>42</sup>*

- 3.4.7 The relationship between ICAC and the DPP has been formalised in a memorandum of understanding. This memorandum confirms that it is ICAC’s decision whether or not to commence criminal proceedings and that ICAC officers must issue and file the documents to commence the Court proceedings. The memorandum provides that the DPP will take over the prosecution of proceedings instituted by ICAC on or before the first Court date.

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<sup>39</sup> The Hon Nick Greiner, Second Reading Speech for ICAC Bill 1988 *Hansard* Legislative Assembly 26 May 1988 at page 678.

<sup>40</sup> (1990) 169 CLR 625.

<sup>41</sup> Mr Dowd, then Attorney General, Second Reading Speech for ICAC (Amendment) Bill 1990 *Hansard* Legislative Assembly at page 10201.

<sup>42</sup> Interview with the DPP held during the course of this review.

- 3.4.8 To facilitate the commencement of criminal prosecutions by ICAC, employees of ICAC have been declared by regulation to be ‘public officers’ for the purposes of the *Criminal Procedure Act 1986*.<sup>43</sup> This enables ICAC employees to issue court attendance notices to commence proceedings for summary and indictable offences in the same manner as police officers.
- 3.4.9 ICAC’s role in initiating criminal prosecutions sits uncomfortably with the prohibition on ICAC forming an opinion that a person should be prosecuted for a criminal offence,<sup>44</sup> as well as the clearly expressed intention of the framers of the legislation that it would be the responsibility of the DPP to decide whether or not to institute a criminal prosecution.
- 3.4.10 ICAC advises that it does not initiate criminal prosecutions without first seeking the advice of the DPP. ICAC generally commences proceedings in accordance with the advice given by the DPP. There has been one occasion, however, where the advice of the DPP was not followed. In this case, the DPP recommended the laying of criminal charges for breach of a non-publication order under section 112 of the Act, but ICAC declined to do so.<sup>45</sup>
- 3.4.11 There has been no instance brought to the attention of the review of ICAC initiating criminal proceedings contrary to the advice of the DPP. Were ICAC to do so, the DPP could terminate the prosecution.<sup>46</sup>
- 3.4.12 I have given consideration to amendments to the Act to reflect the original intention that ICAC should not have the power to initiate or conduct prosecutions. However, in the absence of any change in position by the DPP, there is no suitable alternative person or body to make the decision as to prosecution and I do not think such amendments are practicable.
- 3.4.13 I am concerned, however, that the current statutory regime does not recognise, in an open and transparent manner, the actual position in relation to criminal prosecutions arising from ICAC investigations. To this end, the Act should be amended to authorise ICAC, after considering the advice of the DPP, to institute criminal proceedings arising from its investigations.
- 3.4.14 ICAC opposes this amendment on the basis that it is unnecessary. In my view however, it is important for the Act to reflect accurately and openly the actual role performed by ICAC.
- 3.4.15 This amendment would also put beyond doubt that the common law rule that any person may commence proceedings alleging the commission of an offence<sup>47</sup> does not apply to ICAC.

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<sup>43</sup> See *Criminal Procedure Act 1986* sections 3 and 173; *Criminal Procedure Regulation 2000* reg 12B.

<sup>44</sup> See sections 13(4) and 74B of the Act.

<sup>45</sup> ICAC sent a warning letter instead.

<sup>46</sup> *Director of Public Prosecutions Act 1986* s9.

<sup>47</sup> See *Brebner v Bruce* (1950) 82 CLR 161. This rule may be modified by statute. For example, proceedings for some offences may only be commenced by, or with the consent of, a particular public official. In addition, the Director of Public Prosecutions has the power to take over and terminate prosecutions.

- 3.4.16 Section 13(4), which provides that ICAC may not form an opinion that a person should be prosecuted for a criminal offence, may also require amendment to make it clear that this provision is subject to the proposed provisions governing the institution of criminal proceedings by ICAC.
- 3.4.17 The power of ICAC to recommend under section 74A of the Act that consideration be given to the prosecution of a specified person also requires revision in light of the fact that it is ICAC that decides, after receiving advice from the DPP, to initiate criminal proceedings.
- 3.4.18 Section 74A of the Act currently requires ICAC to include in a report to Parliament on the results of its investigation, in relation to each person against whom substantial allegations have been made, a statement as to whether or not in all the circumstances ICAC is of the opinion that consideration should be given to the prosecution of the person for a specified criminal offence.
- 3.4.19 It would be more transparent if this provision were to be amended to require ICAC to include a statement as to whether or not in all the circumstances it is of the opinion that the advice of the DPP should be sought as to whether the person should be prosecuted for a specified criminal offence.
- 3.4.20 These amendments will recognise the current practice adopted by ICAC and the DPP in relation to the institution of criminal proceedings. However, these amendments do not address the complaints about delay and insufficient criminal convictions. These matters are discussed below.

**Recommendation R3.2:** That, consistent with the current practice adopted by ICAC and the DPP, the Act be amended to provide expressly that ICAC may, after considering the advice of the DPP, institute criminal proceedings arising from its investigations.

**Recommendation R3.3** That section 74A of the Act be amended to change the statement about prosecution that ICAC is required to include in a report under section 74 from ‘whether or not in all the circumstances it is of the opinion that consideration should be given to prosecution’ to ‘whether or not in all the circumstances it is of the opinion that the advice of the DPP should be sought.’

### ***Criminal convictions***

- 3.4.21 Some submissions to the review have expressed concern that there are insufficient criminal convictions arising from findings of corrupt conduct by ICAC.<sup>48</sup> This is said to reflect either the inappropriateness of ICAC’s findings and recommendations, or that public officials are not being properly brought to account for their corrupt activities.

<sup>48</sup> See also the Parliamentary Committee’s Report No1/53 May 2004 *Regarding the prevention and investigation of misconduct and criminal wrongdoing in involving public officials* at pages 5-6.

- 3.4.22 The number of criminal prosecutions is, however, an imperfect indicator of the performance of ICAC. The principal function of ICAC is to investigate and expose corrupt conduct, not to obtain criminal convictions. ICAC was established because of the difficulties with obtaining criminal convictions for corruption offences. Its focus generally will, and should be, on those matters where it is more important to ascertain what happened than to obtain a criminal conviction.
- 3.4.23 The exposure of corruption by ICAC serves an important deterrent and educative purpose. Importantly, ICAC's investigations are conducted with a view to ascertaining whether any laws, policies, practices or procedures require change in order to minimise opportunities for corruption.<sup>49</sup> ICAC's investigations are designed to modify systems as well as behaviour. For this reason, implementation of ICAC's corruption resistance strategies and corruption prevention recommendations may be considered a key indicator of the performance of ICAC.
- 3.4.24 ICAC reports that the majority of corruption prevention recommendations made in investigation reports have been implemented in some form by the public sector organisations concerned, and that a wide range of public sector organisations have, or are, implementing a range of corruption resistance strategies promoted by ICAC.<sup>50</sup>
- 3.4.25 ICAC submitted to the review *'that there is no justification to change or modify its principal functions as a fact-finding investigative body to one where its primary or principal functions are directed more to securing criminal convictions.'*
- 3.4.26 I agree with ICAC's submission. I do not propose to recommend any changes to the Act to make it a primary function of ICAC to obtain criminal convictions.
- 3.4.27 Where ICAC has admissible evidence that a known person has committed a corruption offence however, it is clearly in the public interest that ICAC take all reasonable steps to facilitate the prosecution of the person for that offence. Where ICAC has recommended that consideration be given to prosecution, it is not inappropriate to examine whether or not prosecution has resulted.
- 3.4.28 In a recent report, the Parliamentary Committee analysed the action taken following findings of corrupt conduct by ICAC.<sup>51</sup> According to this analysis, less than half of the persons against whom a finding of corrupt conduct was made by ICAC were subsequently convicted of a criminal offence (although it is not clear whether recommendations that consideration be given to prosecution were made in each case). The Parliamentary Committee stated:

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<sup>49</sup> See section 13(2) of the Act.

<sup>50</sup> See ICAC research report *Profiling the NSW Public Sector: Functions, risks and corruption resistance strategies*, January 2003 [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au)

ICAC website – RECOS [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au)

<sup>51</sup> Report No1/53 May 2004 *Regarding the prevention and investigation of misconduct and criminal wrongdoing involving public officials*.

*'In a sample of 69 persons who were subject to investigation and a finding of corrupt conduct by the Independent Commission Against Corruption over the period 1998-2003, 29 (42%) were subsequently convicted of an offence, 40 (58%) were not prosecuted or the prosecutions were unsuccessful (and in several cases the successful prosecution related not to alleged corrupt conduct but to an offence committed during the Commission's investigation, eg perjury). In contrast, in a sample of 21 persons for whom internal disciplinary action was recommended by the Independent Commission Against Corruption, 19 (90%) were subject to successful disciplinary action and only 2 (19%) had the action dismissed. The reason for lack of successful prosecutions needs identification.'*<sup>52</sup>

- 3.4.29 The review met with the DPP to discuss the issue of criminal prosecutions following ICAC investigations. The DPP estimated that of the 232 matters that he received from ICAC for advice, 99 (or 43%) have not proceeded for prosecution.<sup>53</sup> The reasons for not proceeding to prosecution are various. They include insufficient evidence, for example, where evidence upon which ICAC has based a finding is inadmissible in criminal proceedings because, for example, of section 37(3) of the Act, or because of perceived unreliability of prosecution witnesses. The DPP may advise that proceedings should not be commenced for discretionary reasons. These are applied on the basis that the prosecution would not be in the public interest, for example, because of the triviality of the alleged offence or due to the personal circumstances of the alleged offender. The DPP advised that since 1991, there have been prosecutions for 119 offences arising from ICAC investigations; of these 81 offences were proven.
- 3.4.30 ICAC informed the review that in the last five years it has *'increased its focus on obtaining evidence in such form as to be admissible in later prosecution proceedings.'* ICAC states that this has had the result of increasing the percentage of persons against whom prosecution action has been commenced to 65% (of all matters referred by ICAC to the DPP for consideration of prosecution action) in the last five years.
- 3.4.31 Neither prosecution nor, still less, conviction, will necessarily follow from a finding of corrupt conduct. This is because ICAC's coercive powers, while available to it to facilitate its investigation of corrupt conduct, do not necessarily or even probably produce information which is admissible in criminal proceedings. Thus, it is inevitable that a proportion of cases where ICAC finds corrupt conduct will not result in any prosecution, even that its findings were appropriate on the information available to ICAC. Nonetheless, and despite efforts in recent years, the number of criminal convictions secured as a result of ICAC's investigations remains somewhat low.

<sup>52</sup> Report No1/53 May 2004 *Regarding the prevention and investigation of misconduct and criminal wrongdoing involving public officials* at page 5.

<sup>53</sup> All figures supplied by the DPP have been computer generated. They are approximate figures only.



- 3.4.32 I do not consider that this reflects the inappropriateness of ICAC’s findings. Aside from the finding by ICAC in 1992 against the then Premier, the Honourable Nick Greiner (which was declared a nullity on appeal), no person or body has suggested to me that specific findings of corrupt conduct made by ICAC have been inappropriate.
- 3.4.33 It may be that ICAC needs to continue to develop its capacity to deliver briefs of admissible evidence to the DPP. In particular, it may be possible for there to be a higher correlation between the persons referred to the DPP by ICAC for consideration of prosecution action and the persons against whom a criminal conviction is ultimately made. The Parliamentary Committee has closely monitored the discharge of this function by ICAC in recent years and will no doubt continue to do so. I do not consider that any legislative changes are required to address this matter at this stage, aside from the matters referred to at recommendation R3.4 below.

### **Delay**

- 3.4.34 Both ICAC and the DPP acknowledge that the initiation of criminal proceedings following an ICAC investigation has been adversely affected by delay.
- 3.4.35 Delay between the commission of a criminal offence and its prosecution is a significant problem. Convictions may be more difficult to obtain as witnesses disappear and memories fade. The affected person’s reputation, employment, and family suffer while awaiting the exercise of prosecutorial discretion.
- 3.4.36 Delay in the context of ICAC investigations may arise due to:
- Delay in ICAC forwarding a brief of evidence to the DPP following the release of its investigation report.
  - Delay in the provision of advice by the DPP following receipt of the brief from ICAC.
  - Delay in ICAC responding to requests from the DPP for further information.
- 3.4.37 The Parliamentary Committee has expressed concern about the delay between the provision of briefs of evidence to the DPP and the initiation of criminal proceedings. Following its recent examination of ICAC’s 2002-2003 annual report, the Parliamentary Committee recommended that:
- ‘The Commission hold discussions with the DPP to examine practical steps to remedy inordinate delays between the date briefs are received and the date a decision is made on whether or not to initiate proceedings.’<sup>54</sup>*
- 3.4.38 The review has held discussions with ICAC and the DPP about the issue of delay. Both ICAC and the DPP acknowledge that there have been delays

<sup>54</sup> Parliamentary Committee Report on Examination of the 2002-2003 Annual Report of the Independent Commission Against Corruption (September 2004) recommendation no 3 page xi.

associated with the laying of charges following ICAC investigations. ICAC, in particular, asserts that it is striving to address this delay. There is some evidence of this. For example, criminal proceedings against The Honourable JR Face following the June 2004 investigation report<sup>55</sup> have already concluded, and in one investigation involving a former correctional services officer, the officer was convicted of corruption offences (uncovered as a result of ICAC's investigation) prior to the publication of ICAC's report.<sup>56</sup>

- 3.4.39 Notwithstanding these efforts, delay remains a problem. ICAC tabulates the prosecutions and disciplinary actions arising from its investigations in its annual reports. The tables reveal delay on the part of both ICAC and the DPP, with adverse results. For example, in 2003-2004, at least one prosecution was not proceeded with (in part) due to the age of the matter and another failed as the accused had left the jurisdiction prior to the commencement of proceedings (some eleven months after the publication of the investigation report). The 2003-2004 annual report records a number of matters for which ICAC is awaiting the receipt of advice from the DPP, as well as a number of matters where the DPP has sent requisitions and ICAC has not yet responded.
- 3.4.40 In one example, the investigation report was published by ICAC in December 2001. The preliminary brief was forwarded by ICAC to the DPP in May 2002. Initial advice was provided by the DPP in April 2003. The DPP did not receive the full brief until November 2003. The DPP spent five months considering the full brief before responding to ICAC. The charges were listed for mention in September 2004, over two and a half years after the publication of the investigation report.
- 3.4.41 Other examples of delay in making decisions on the sufficiency of evidence to warrant prosecution have been provided to this inquiry. A number involve periods of delay which cannot be regarded as satisfactory.
- 3.4.42 The memorandum outlining the relationship between ICAC and the DPP on the conduct of criminal prosecutions arising from ICAC investigations contains timeframes for the provision of information by ICAC and advice by the DPP. However, these do not seem to be observed.
- 3.4.43 ICAC acknowledges that it needs to consider prosecution issues at the time of investigation, not after publication of the investigation report when resources are diverted, investigators leave, and witnesses disappear. ICAC advises that in the last five years it has changed its practices in this regard.
- 3.4.44 While there is some evidence that a conscious effort is being made to address delay, it is my view that improved administrative processes will not eliminate delay so long as ICAC is required to seek the advice of the DPP before initiating proceedings. This requirement means that ICAC and the DPP do not have the externally imposed discipline of the timetables and other time constraints which Courts require once a matter is commenced in Court.

<sup>55</sup> ICAC Report on the investigation into the conduct of the Hon J Richard Face.

<sup>56</sup> ICAC Report on investigation into the introduction of contraband into the Metropolitan Remand and Reception Centre, Silverwater.

- 3.4.45 Once proceedings are initiated, the Court imposes a degree of supervision over the parties. The Court sets the time in which the brief of evidence must be assembled and provided to the defendant. It sets the time at which the proceedings will be heard. The DPP (and other agencies, such as those responsible for the transcription of evidence) will of necessity prioritise those matters for which a Court timetable has been set.
- 3.4.46 It is notable that in the investigation where a former correctional services officer was convicted of corruption offences prior to the publication of ICAC's investigation report,<sup>57</sup> the investigation was conducted jointly with NSW Police. This allowed police officers to lay the charges arising out of the investigation, circumventing the need for ICAC to seek the advice of the DPP before commencing criminal proceedings. Significant delay was thus avoided.
- 3.4.47 Few other agencies operate in accordance with the system adopted by ICAC and the DPP. Police do not routinely seek the advice of the DPP as to the sufficiency of evidence or the appropriateness of charges before instituting criminal proceedings. Many regulatory agencies commence proceedings for the offences under the Acts that they administer. Of course, these agencies do not usually have the extensive coercive powers that have been granted to ICAC.
- 3.4.48 I am satisfied that there has been a pattern of unacceptable delay between ICAC making a recommendation that consideration be given to prosecution and the initiation of criminal proceedings, and that ICAC and the DPP have each, in varying but unidentified degrees, contributed to this delay.
- 3.4.49 Delay is (at least in part) a consequence of separating the investigation function from that of prosecution. The lack of clarity as to who is ultimately responsible for initiating criminal proceedings has contributed to a culture where neither agency accepts that it is their primary responsibility to initiate and conduct timely and effective criminal prosecutions arising out of ICAC investigations.
- 3.4.50 Most submissions to the review<sup>58</sup> opposed legislative change to authorise ICAC to institute criminal prosecutions without first obtaining the advice of the DPP, most commonly on the basis that the distinction between investigation and prosecution should be maintained.
- 3.4.51 The separation of the function of investigation to that of prosecution was an important consideration to then Government when establishing ICAC. Any legislative change to permit ICAC to exercise greater autonomy in instituting criminal proceedings would represent a significant policy shift in the Act. It requires weighing the harm caused by lengthy delay in the initiation of

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<sup>57</sup> ICAC *Report on investigation into the introduction of contraband into the Metropolitan Remand and Reception Centre, Silverwater*.

<sup>58</sup> Including from ICAC, the DPP, the Parliamentary Committee, the NSW Nationals and the Law Society.

criminal proceedings against any harm that may be occasioned by ICAC initiating criminal prosecutions without first seeking the advice of the DPP.

- 3.4.52 If Parliament wishes to reduce the delay between the finalisation of investigation reports and the initiation of criminal proceedings, it might give consideration to whether it wishes to encourage ICAC to exercise greater autonomy in initiating criminal proceedings. This might be particularly useful in routine or uncomplicated matters that fall within ICAC's area of expertise. It would not prevent ICAC from retaining the discretion to seek the advice of the DPP where it requires independent legal advice as to the sufficiency of the evidence or the appropriateness of charges.
- 3.4.53 If the power were to be given, it might apply where ICAC has clear evidence of the commission of corruption in contravention of the criminal offences in Part 4A of the *Crimes Act 1900* (corruptly receiving commissions and other corrupt practices). For example, ICAC may receive intelligence that a public official is about to accept a bribe, and ICAC officers (through covert surveillance or a controlled operation) may observe the actual commission of the offence. Where the evidence clearly demonstrates that a serious corruption offence has occurred it may be in the public interest to permit ICAC to initiate criminal proceedings immediately, without awaiting advice from the DPP.
- 3.4.54 In addition, where an offence under the Act is committed, for example, breach of a non-publication order under section 112, it may be in the public interest to permit ICAC to initiate criminal proceedings, without awaiting advice from the DPP. Offences against the Act are designed primarily to protect the integrity of ICAC and its operations. ICAC may be best placed to judge whether these proceedings should be instituted. Most agencies are permitted to take legal proceedings for an offence against the Act that they administer, although sometimes the consent of a particular public official is required.<sup>59</sup>
- 3.4.55 Permitting ICAC to initiate criminal proceedings without first seeking the advice of the DPP may lead to more charges being laid than at present. Certainly, in each year a number of matters referred by ICAC to the DPP for advice are not proceeded with. In the table in ICAC's 2003-2004 annual report outlining action arising from ICAC's recommendations that consideration be given to prosecution, the DPP advised that prosecution should not be pursued against at least five persons in relation to whom such recommendation had been made.
- 3.4.56 Overzealousness on the part of ICAC could be curbed by the continued responsibility of the DPP to conduct the prosecution of offences arising from ICAC investigations and, if necessary, the exercise of the DPP's power to discontinue proceedings.
- 3.4.57 A further check on the exercise of prosecutorial discretion by ICAC is the role of the Court to determine guilt. ICAC would continue to have no role in determining criminality. It is the responsibility of the Court to be satisfied that

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<sup>59</sup> See, for example, *Rail Safety Act 2002* section 104.

the prosecution has proven that the accused person has committed the offence beyond reasonable doubt. In coming to this conclusion, the Court cannot take into account evidence given to ICAC in breach of the privilege against self-incrimination and any decision by ICAC to initiate criminal proceedings must be based on the available admissible evidence.

- 3.4.58 I am of the view that delays are unlikely to be substantially addressed in the longer term unless ICAC is given specific authority to initiate criminal proceedings arising from its investigations, without first seeking the advice of the DPP, thus bringing the proceedings more quickly under the supervision of the Court.
- 3.4.59 On balance, I am of the view that the harm caused by lengthy delay in the initiation of criminal proceedings is greater than any harm that may be occasioned by ICAC initiating criminal prosecutions without first seeking the advice of the DPP. I would urge that consideration be given to permitting ICAC to do so, particularly in relation to offences under its own Act or under Part 4A of the *Crimes Act 1900* (corruptly receiving commissions and other corrupt practices).
- 3.4.60 I cannot ignore, however, the strong opposition to this recommendation from ICAC and the DPP, although I consider that both bodies have overstated the difficulties involved. ICAC has advised that, as the DPP would eventually take over the prosecution of criminal proceedings, ICAC would be *'very reluctant to commence proceedings without advice from the DPP that there was sufficient evidence to justify those proceedings.'*
- 3.4.61 It should be borne in mind that the vast majority of criminal prosecutions are instituted by police officers, without seeking legal advice. It is difficult to see why ICAC would be any less able than police officers to determine whether an offence has been committed and whether there is sufficient evidence of that offence to warrant prosecution. Moreover in cases where real difficulty is involved, it would always be open to ICAC to seek the advice of the DPP.
- 3.4.62 If Parliament wishes to reduce the delay between the finalisation of investigation reports and the initiation of criminal proceedings, it might give consideration to whether it wishes to encourage ICAC to exercise greater autonomy in initiating criminal proceedings.
- 3.4.63 In light of the significant policy shift that this change involves, it may be prudent to review ICAC's assertion that in recent years it has been working actively with the DPP to take steps to address the issue of delay before doing so.

**Recommendation R3.4:** That, if administrative measures do not prove effective in reducing delay in the initiation of criminal proceedings, consideration be given to whether ICAC should be permitted to commence criminal proceedings, without first seeking the advice of the DPP, where ICAC is satisfied that there are reasonable prospects of conviction of a person for offences under its own Act or under Part 4A of the *Crimes Act 1900* (corruptly receiving commissions and other corrupt practices).

Parliament might well regard twelve months as an appropriate period for ICAC and the DPP to address and resolve the issues in question.

# CHAPTER 4 – DEFINITION AND FINDINGS OF CORRUPT CONDUCT

## 4.1 Introduction

- 4.1.1 The definition of corrupt conduct is crucial to the effectiveness of ICAC as it defines the scope of ICAC’s investigatory jurisdiction.<sup>60</sup> This in turn defines the subject matter of ICAC’s reports to Parliament.<sup>61</sup> The broader the definition of corrupt conduct, the greater is ICAC’s jurisdiction to investigate.
- 4.1.2 There are several issues which arise from the current definition of ‘corrupt conduct’ which appears in sections 7 to 9 of the Act, of varying degrees of importance.
- 4.1.3 The first thing of significance is whether the definition remains appropriate and sufficient to give ICAC jurisdiction to carry out its important investigative and determinative functions. Over the years there have been many criticisms that the statutory language is both over broad and imprecise. Those criticisms have been maintained in submissions made to me and my predecessor.
- 4.1.4 Of less significance, but still important in a number of ways, (including, not least, fostering correct understanding of the scope and aim of the legislation) are matters such as:
- The effect of section 8(2) deals with conduct quite distinct from that of section 8(1) and whether, to emphasise that different nature, the present subsection should be broken out into separate sections.
  - The utility of retaining a list of criminal offences and items of misconduct now set out in Section 8(2)(a) - (y) inclusive.
  - The meaning and effect of sub-sections 9(4) and (5) (particularly the latter) and their utility.
- 4.1.5 There are several aspects of the definition that uniquely apply to Local Councillors and Members of Parliament. ICAC’s jurisdiction over Local Councillors is discussed at section 5.6. Its jurisdiction over Members of Parliament is discussed at section 5.7 and section 4.4 below.

<sup>60</sup> Section 13 of the Act.

<sup>61</sup> Section 74 of the Act.

## 4.2 Appropriateness of definition – general considerations

4.2.1 The appropriateness of the definition of corrupt conduct has been subject to extensive consideration since ICAC was first established. The Parliamentary Committee has given detailed consideration to the definition in its 1993 review of the Act<sup>62</sup> and again in 2001.<sup>63</sup>

4.2.2 The most cogent and powerful criticisms of the definition of corrupt conduct are those of Gleeson CJ in *Greiner v Independent Commission against Corruption*:<sup>64</sup>

*'ICAC Act contains a definition of corrupt conduct which is both wide and, in a number of respects, unclear. One of the most striking aspects of the legislative scheme is a conclusion that a person has engaged in corrupt conduct, which is unconditional in form, is necessarily based on a premise, which is conditional in substance. Part of the definition of corrupt conduct is that it must be conduct which 'could' constitute or involve a criminal offence, a disciplinary offence or reasonable grounds for dismissing or terminating the services of a public official. Thus, for example, where an alleged criminal offence is involved, a determination that a person has engaged in corrupt conduct, is necessarily based upon a finding, the conduct of the person could constitute a criminal offence. In the public perception, the conditional nature of the premise upon which it is based could easily be obscured by the unconditional form of such a conclusion.'* [Emphasis in original].

4.2.3 Submissions to the review have criticised the definition of corrupt conduct in a number of other respects. In general terms, these submissions have been to the effect that the definition of corrupt conduct is complex, convoluted, and extremely broad.

4.2.4 A very few submissions have suggested ways in which the definition might be improved.

4.2.5 Since 1992, the Law Society has suggested that the definition should read: *'Corrupt conduct is conduct by any person (whether or not a public official) that adversely affects the exercise of official functions by any public officer, any group or body of public officials of any public authority and involves a criminal offence.'*

4.2.6 This proposal has a number of defects which, in fact, illustrate the difficulties which arise when change to the existing position is considered:

- While one appreciates that the existing definition is broad (intentionally so), this proposed definition is much too narrow. It is premised on there

<sup>62</sup> See the *Report on Review of ICAC Act* (May 1993) at chapter 1.

<sup>63</sup> See the Parliamentary Committee's *Review of the ICAC Stage II Jurisdictional Issues*.

<sup>64</sup> (1992) 28 NSWLR 125 at 129.



being an actual adverse effect on official functions and would thus exclude conduct, for example, where there was an unsuccessful attempt to corrupt a public official. An example would be the situation where, say, a public official was offered a bribe but reported the matter to ICAC. There would be no adverse effect on public administration and, so, that clear attempt at corruption would not come within this definition, even taking account of section 9(2) of the Act. A definition which excludes such matters is not in the public interest.

- Equally, the limiting of the definition by inclusion of the ‘criminal offence’ as an essential element is too narrow because it excludes the conduct now mentioned in section 9(1)(b) – (d), e.g. a disciplinary offence (section 9(1)(b)). Once again an example can be given - assume a public official released information to a company tendering for a public contract because of a personal relationship with an employee of the company. Probably no criminal offence is involved but clearly most people would regard such conduct as corrupt. It would not, however, fall within the Law Society’s proposed definition. There are also difficulties with the word ‘involves’ – it is very unclear in meaning.

4.2.7 For these reasons, I do not support the Law Society’s suggested changes.

4.2.8 The Ombudsman has expressed concern that the broad definition of corrupt conduct in the Act leads to significant overlap between his jurisdiction and that of ICAC. In his submission to the review, the Ombudsman states:

*‘This overlap can lead to significant problems including duplication or matters falling between the cracks, confusion on the part of public officials and the public, and different approaches to similar issues.....’*

4.2.9 I accept that the broad definition of corrupt conduct results in overlap between the jurisdiction of ICAC and the Ombudsman and that the Ombudsman’s concerns are raised despite efforts that have been made by ICAC and the Ombudsman to put in place effective liaison and protocols to minimise duplication and confusion. I am reluctant, however, to amend the definition of corrupt conduct so as to restrict the investigative jurisdiction of ICAC. To do so may lead to an unacceptable risk that ICAC would be prevented from investigating conduct that it clearly should.

4.2.10 A number of recommendations that I make elsewhere in this report will facilitate the demarcation between the jurisdiction of ICAC and the Ombudsman, without going so far as to remove entirely ICAC’s capacity to investigate. For example, recommendation R2.2 proposes that, in exercising its functions, ICAC is to direct its attention, so far as practicable, towards corruption that is serious or systemic and have regard to the responsibility that public authorities and public officials have, with the assistance of ICAC, to prevent and deal effectively with corruption.

4.2.11 I have also given careful consideration to the Ombudsman’s suggestion that the definition of corrupt conduct should *‘emphasise a threshold test requiring*

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*improper motives/an intention to do wrong/a guilty state of mind, equivalent to mens rea in the criminal context.'*

- 4.2.12 I strongly disagree with this suggestion. The proposed 'threshold test' is vague and uncertain. Concepts such as 'an intention to do wrong' are obviously inappropriate as a criterion for defining the existence of corrupt conduct. Also, this suggested change is unnecessary because concepts of criminal responsibility or 'mens rea' are already involved in determination of the existence of corrupt conduct because of the listing of criminal offences in section 8(2) and because of the limitations set out in section 9(1).
- 4.2.13 To the extent that the Ombudsman's proposed 'threshold test' is directed towards the recent expansion of the jurisdiction of ICAC to investigate the conduct of a local government authority that is alleged to be a substantial breach of a code of conduct (which is, as I understand it, the Ombudsman's primary concern) it may have more relevance, particularly where the code is expressed in broad, aspirational terms. The model code of conduct that local government authorities are required to adopt is intended to cover aspects of good administration (such as giving reasons for decisions, taking into account the views of others in making decisions), the breach of which are squarely within the jurisdiction of the Ombudsman to investigate.
- 4.2.14 Nonetheless I am not satisfied that this of itself justifies change to the definition of corrupt conduct for two reasons. First, overlaps in jurisdiction between ICAC and the Ombudsman can be dealt with by administrative means. The Act facilitates the development of co-operative arrangements and I have suggested elsewhere amendments to ICAC to encourage ICAC to focus on serious corruption. Second, section 8 of the Act limits ICAC jurisdiction to conduct that is partial, dishonest, a breach of public trust, involves the misuse of official information or adversely affects the exercise of official functions. A substantial breach of the code of conduct will not amount to corrupt conduct unless it also falls within these categories.
- 4.2.15 Moreover, in considering whether conduct falls within section 8, ICAC gives consideration to the state of mind of the person alleged to be involved in corrupt conduct. For example, in its recent investigation report into the conduct of the Honourable Peter Breen, MLC, it was noted that:

*'In considering section 8 the Commission considers whether there was an actual or imputed appreciation that what was being done was, in the context in which it was done, carried out for a reason that is unacceptable. This does not, however, mean that simply because a person does not at the relevant time believe that his or her conduct is corrupt, the Commission is precluded from making an adverse finding. Apart from dishonest conduct, conduct beyond negligence but not amounting to dishonesty in the accepted meaning of the term, may be conduct within that section 8(1) of ICAC Act if, for example, it*

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*amounts to a reckless disregard of indicators of dishonest or partial behaviour of others.*<sup>65</sup>

- 4.2.16 As a practical matter, the Ombudsman’s proposal adds little and is, therefore, I think unnecessary.
- 4.2.17 Specific criticisms of the definition of corruption have been made by Mr Ian Latham, a councillor of Canterbury Council in an address to ICAC on 23 November 2004. Mr Latham’s criticism is this:
- ‘If it [i.e. the definition of corrupt conduct] means any conduct that involves the partial exercise of a councillor’s functions; then it is hard to see why almost all action by a councillor is not corrupt.’*
- 4.2.18 Mr Latham’s concern is misplaced. While section 8 includes among the types of action which constitutes corrupt conduct ‘conduct of a public official that constitutes or involves the ... partial exercise of any of his or her official functions’ (section 8(1)(b)), that definition is limited by section 9(1) which requires, in addition, that the conduct must involve a criminal, disciplinary offence, grounds for dismissal or a substantial breach of an applicable code of conduct.
- 4.2.19 Conduct of a councillor which is merely partial is not within the meaning of corrupt conduct as the Act defines it. No change is necessary in this respect.
- 4.2.20 Should the definition of ‘corrupt conduct’ be amended to deal with the Chief Justice’s criticisms of the word ‘could’ in *Greiner v ICAC*. In my view, the definition should not be changed – the function of the word ‘could’ where used in sections 8 and 9 is to trigger ICAC’s power to commence and conduct an investigation into the question whether corrupt conduct might have occurred. See section 10(2) and 13. If the word were not used, it would mean that ICAC had to be affirmatively satisfied that there was corrupt conduct or a criminal offence before it could begin an investigation to determine that very matter. That would be an absurd result.
- 4.2.21 Criticism of the definition of ‘corrupt conduct’ insofar as it includes the word ‘could’ is misplaced to the extent that it is a pre-condition for exercise of the power to conduct an investigation.
- 4.2.22 The criticism has more force in relation to the definition of ‘corrupt conduct’ when used in section 13(3) and (5), the sections which empower ICAC to make findings that particular persons have engaged in corrupt conduct. Obviously, it would be inappropriate to base such a finding on the mere possibility of the existence of such conduct or of the commission of a criminal offence. I do not believe ICAC has ever done so. Nevertheless, consideration should be given to amending the Act to limit the powers to make findings of corrupt conduct to circumstances where ICAC is satisfied of the existence of

<sup>65</sup> *Report on investigation into the conduct of the Hon Peter Breen MLC* ICAC Report December 2004 Appendix 2.

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conduct which had adversely affected, or would (if engaged in) adversely affect official functions or, similarly, was or would be a criminal offence etc.

- 4.2.23 I have given consideration to the criticism which has been repeatedly made of the Act's definition of 'corrupt conduct' – that is, that it is overly broad or overly general. This is a criticism which has been made since the introduction of the original legislation in 1988.
- 4.2.24 There is no doubt that the definition is broad and general. It was intended to be, so as to ensure that all conduct commonly regarded as corrupt would be caught.
- 4.2.25 I do not agree, however, that the definition is *overly* broad or has operated, or been applied, unfairly. Specifically, with one exception, no one has drawn my attention to any case, investigation or report of ICAC where the conduct (if it occurred) was not clearly within what members of our community would readily agree was corrupt.
- 4.2.26 The exception to which I refer was *Greiner v ICAC* itself to which a number of persons who made submissions to me pointed as an example of conduct which would not commonly be regarded as corrupt but which was found to be within the definition. While it is certainly true that Commissioner Temby did find the conduct in question to be corrupt, that finding was set aside by the Court of Appeal in *Greiner v ICAC* supra.
- 4.2.27 I do not regard this one example as establishing that the current definition results in any serious or substantial injustice. I do not consider it should be amended, to limit its breadth or the generality of the definition.
- 4.2.28 I am strengthened in this conclusion by considering alternative approaches to drafting the definition. The only alternative I can see to something pretty much like the current drafting which involves lists types of conduct by reference to its effect or potential effect (section 9(1)(a)) or by description of its nature by (section 9(1)(b)–(d)) or both (section 9(2)) would be to avoid definition altogether and use an undefined term such as 'official corruption'. That would create far more difficulties than it would eliminate.
- 4.2.29 Whilst the definition of corrupt conduct is broad, general and complex, I do not consider that it is desirable to make substantive changes that will alter ICAC's investigatory jurisdiction.

### **4.3 Corruption of public officials under section 8(2)**

- 4.3.1 Under section 8(1) of the Act corrupt conduct is defined as:
- conduct that adversely affects (or could adversely affect) the honest or impartial exercise of official functions by a public official;
  - conduct of a public official that involves the dishonest or partial exercise of official functions;
  - conduct of a public official that involves a breach of trust;

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- conduct of a public official that involves the misuse of information acquired in the course of official functions;  
provided that the conduct could involve any of the following matters listed in section 9 of the Act:
  - a criminal offence;
  - a disciplinary offence;
  - reasonable grounds for dismissal;
  - in relation to Members of Parliament, a substantial breach of their code of conduct.

- 4.3.2 Under section 8(2), corrupt conduct also includes conduct of any person that adversely affects (or could adversely affect) the exercise of official functions by any public official and which could involve bribery, blackmail, illegal drug dealings and an assortment of other criminal offences. This conduct only amounts to corrupt conduct if it could involve any of the matters listed in section 9 as referred to above.
- 4.3.3 Section 8(2) corrupt conduct can be distinguished from section 8(1) conduct as it requires no wrongdoing on behalf of the public official. The conduct is corrupt because of its potential to adversely affect official functions, not because of any wrongdoing by the official. An example of section 8(2) corruption might be fraudulent action by person A that caused a public official to unknowingly hand over money to which person A was not entitled. This amounts to corruption because it undermines the integrity of public administration by the wrongful payment of public monies.
- 4.3.4 There are two problems with this aspect of the definition. It is a different category of corruption as it *requires* no wrongdoing on behalf of a public official. Further, it is circular and otiose to apply section 9 to section 8(2) corrupt conduct, given the lengthy list of criminal conduct included in the latter section.
- 4.3.5 For these reasons, consideration should be given to re-drafting section 8 to distinguish more clearly between corrupt conduct *by* public officials and corruption *of* public administration, the latter being conduct that does not require any wrongdoing on the part of a public official. This could be achieved by section 8(2) corruption being classified as indirect corruption, placed in a separate section, and no longer being subject to the operation of section 9. Alternatively, it could be placed in a separate section, the list of items of criminal conduct deleted but remain subject to section 9.

**Recommendation R4.1:** That, subject to recommendation R4.2 below, no substantial amendments to the definition of corrupt conduct in sections 7-9 of the Act be made, except to redraft the provisions to more clearly distinguish between corruption by public officials and corruption that adversely affects the performance of public official functions, without involving official wrongdoing.

## 4.4 Aspects of the definition concerning Ministers of the Crown and Members of Parliament

- 4.4.1 There are several aspects of the definition of corrupt conduct that uniquely apply to Members of Parliament and Ministers of the Crown.
- 4.4.2 Issues have arisen as to the meaning and effect of sub-sections 9(4) and (5) of the Act. Those sub-sections are apparently intended to limit, or perhaps, vary, the circumstances in which ICAC can make findings of corruption in relation to the conduct of Ministers or Members of Parliament.
- 4.4.3 The two sub-sections are as follows:
- (4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.
  - (5) Without otherwise limiting the matters that it can under section 74A (1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct could also constitute a breach of a law (apart from this Act) and the Commission identifies that law in the report.
- 4.4.4 It will be seen that sub-section 9(4) operates by way of creating an exception from the operation of sub-sections 9(1)-(3) or perhaps more accurately, nullifying their operation in particular circumstances, that is, when conduct of a Minister or Member of Parliament is involved and where that conduct would cause a reasonable person to believe that the conduct would bring the integrity of the relevant office into serious disrepute.
- 4.4.5 If those matters are established and, of course, the conduct falls within the section 8 definition, then the exclusion created by sub-section 9(1) from section 8 is inapplicable. Thus, in such circumstances, the fact that a criminal offence (s9(1)(a)) or a substantial breach of an applicable code of conduct (s9(1)(a)) is not involved does not preclude a finding of corrupt conduct (sub-sections 9(1)(b) and (c) are *ex facie* irrelevant to conduct of Ministers and Members of Parliament).
- 4.4.6 Because the opening words of sub-section 9(4) make it subject to sub-section 9(5), the latter sub-section creates a further qualification in relation to conduct of Ministers and Members of Parliament. It operates by restricting ICAC's power to include a finding of corrupt conduct in a report under section 74 on the part of a Minister or Member so that ICAC can only make such a finding if it is satisfied that the conduct constitutes a breach of a law (other than the ICAC Act itself) and ICAC identifies the law in the report.
- 4.4.7 There are difficulties with these provisions. They are poorly drafted and clumsy because they involve an exception (section 9(5) which applies to

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sections in a different Part (Part 8) of the Act) to an exception (section 9(4)) to an exception (section 9(1)) to the main definition of corrupt conduct (section 8(1)). Further, section 9(4) appears to deprive section 9(1)(d) of any operation at all.

- 4.4.8 The intended meaning of the words ‘a law’ as used in the phrase ‘could constitute a breach of a law’ in sub-section 9(5) is also unclear. The words have been the subject of differing interpretations.<sup>66</sup>
- 4.4.9 On the one hand, is the possibility that the words refer to both statutory and the common (or unwritten) law. The other possible interpretation (which appears the more likely to me) is that ‘a law’ means a statute or a provision thereof.
- 4.4.10 If this interpretation is correct,<sup>67</sup> as I think it is, sub-sections 9(4) and (5) have the undesirable consequence of excluding common law criminal offences from ICAC’s jurisdiction. It can hardly be supposed that this was Parliament’s intention in enacting the provisions and there was nothing in the Parliamentary debates to suggest that it was.
- 4.4.11 ICAC has submitted to me that the Act should be amended to include expressly non-statutory and civil law.
- 4.4.12 Finally, the purpose of the provisions is unclear and serious questions arise as to whether they are necessary or should simply be removed from the Act.
- 4.4.13 No light is shed on these matters by the Second Reading Speech which led to their introduction into the Act in 1994. During the Parliamentary debates the independent Member for Manly, Dr MacDonald, suggested that the provisions would be required to cover the conduct of Members of Parliament and Ministers in the period prior to the adoption of a code of conduct and to cover behaviour that may not be covered by the code of conduct,<sup>68</sup> although he did not discuss their intended meaning.
- 4.4.14 It may be that in inserting these two sub-sections, Parliament collectively had in mind the type of situation which came before ICAC (and the Court of Appeal) is the *Greiner* matter to which I have already referred. There Mr Greiner had made an appointment of a member of his party to a significant public service position. The detail of this controversy is set out in section 5.7 below. Such appointments are often the subject of political controversy and

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<sup>66</sup> See ICAC’s report on *Investigation into circumstances surrounding the payment of a Parliamentary pension to Mr PM Smiles* (February 1995) by the then ICAC Commissioner the Honourable Barry O’Keefe, AM QC and ICAC’s report on *Investigation into conduct of the Honourable J Richard Face* (June 2004) by Assistant Commissioner Peter Johnson SC.

<sup>67</sup> There may be different interpretations as to what these provisions mean, as to which see ICAC’s report on *Investigation into conduct of the Honourable J Richard Face* (June 2004) by Assistant Commissioner Peter Johnson SC. In this report, the Assistant Commissioner found that sub-sections 9(4) and 9(5) operated to extend ICAC’s jurisdiction and therefore did not exclude common law criminal offences.

<sup>68</sup> See the speech of Dr MacDonald during the Parliamentary debate on the Bill, *Hansard* Legislative Assembly at page 4724.

indeed, political and public opprobrium. But, no breach of any legal obligation imposed on Mr Greiner was involved and, indeed, Mr Greiner had insisted that no law be broken. Parliament may have perceived, when considering these amendments, that it was at least arguable that such a political appointment would bring the office of any Minister responsible for it into disrepute, but that that matter (if it were the case) should not be sufficient of itself to base a finding of corrupt conduct. There is considerable force in that view – such decisions are political and Parliament may well have thought they should be dealt with as part of the political process rather than by the corruption watchdog. It may be that the additional requirements that this conduct breach a law and ICAC identify that law were added for this reason.

- 4.4.15 If only the basis for a finding of corrupt conduct set out in section 9(1)(d) (breach of an applicable code of conduct) and not the basis set out in section 9(1)(a) (criminal offence) were considered, one can see why Parliament may have thought Ministers and Members should only be liable to a finding of corrupt conduct if the section 9(4) and (5) criteria were satisfied. A code of conduct is likely to be expressed in general terms and cover conduct from the most trivial misconduct to the most serious. Parliament may, understandably, have thought that a finding of corrupt conduct should not result merely from a breach of a code of conduct (after satisfaction of the section 8 criteria). That does not explain, however, why a criminal offence (section 9(1)(a)) was not thought sufficient for Ministers and Members. One would have thought it should be.
- 4.4.16 These are important provisions because they control the circumstances in which Ministers and Members may be made the subject of findings of corrupt conduct. I do not regard the present position as satisfactory – it is critical that matters such as this be dealt with as clearly as possible.
- 4.4.17 The possible approaches to clarifying the circumstances in which findings of corrupt conduct can be made against Ministers and Members appear to be these:
- Such a finding could be made if ICAC were satisfied that either a criminal offence or a substantial breach of an applicable code of conduct were involved. These are the matters now mentioned in sub-sections 9(1)(a) and (d).
  - Such a finding could be made if ICAC were satisfied that the test now stated in section 9(4) (or one along similar lines) were satisfied, this is, reasonable satisfaction that the conduct would bring the Minister in question's office or Parliament into serious disrepute.
  - Alternatively, the position could be left as it is but section 9(1)(d), which has no apparent function be repealed.
- 4.4.18 It would also be possible to retain a qualification along the lines of that now appearing in section 9(5) that the conduct could constitute a breach of a law (subject to clarification of the meaning of that term).
- 4.4.19 These are, in the end, matters entirely for Parliament to decide. There is no answer which is necessarily right. On the one hand, it might be thought



sufficient for a finding of corrupt conduct that the Minister or Member involved has committed either a criminal offence or a substantial breach of a code of conduct. These are the criteria now stated in section 9(1)(a) and (d). They have the benefit of a greater degree of objective certainty than does the test now set out in section 9(4). On the other hand, there are factors that I mention in paragraphs 4.13 and 4.14 above.

- 4.4.20 If Parliament thought ‘criminal offence’ and ‘substantial breach of a code of conduct’ were sufficient, that view could be implemented simply by deleting sub-sections 9(4) and (5) which would re-apply section 9(1)(a) and (d) to Minister’s and Members’ conduct.
- 4.4.21 Alternatively, if sub-sections 9(4) and 9(5) are retained, section 9(1)(d) concerning applicable codes of conduct should be repealed.
- 4.4.22 As stated, these are matters uniquely for Parliament. In the circumstances, I propose merely to recommend that consideration be given to amending section 9 so as to clarify the circumstances in which the definition of corrupt conduct applies to Ministers and Members of Parliament and in which findings of corrupt conduct may be made against them. Further, at a minimum, if no other amendment is made, sub-sections 9(4) and (5) should be amended to clarify the meaning of the words ‘a law’ by limiting it to criminal offences (to cover common law criminal offences) and statutory law (by which I mean provisions of or made under an Act of Parliament).

**Recommendation R4.2:** That consideration be given to amending section 9 so as to clarify the circumstances in which the definition of corrupt conduct applies to Ministers and Members of Parliament and in which findings of corrupt conduct may be made, and, if sub-sections 9(4) and (5) are not repealed, sub-section 9(5) be amended to clarify the meaning of the words ‘a law’ by limiting it to criminal law and statutory law.

## 4.5 Findings

- 4.5.1 The principal functions of ICAC include the power to make findings and form opinions on the basis of the results of its investigations.<sup>69</sup> In particular, ICAC may:
- Make findings of fact
  - Make findings of corrupt conduct
  - Express opinions that consideration should or should not be given to the prosecution or the taking of other action against particular persons.<sup>70</sup>
- 4.5.2 The power to make findings of corrupt conduct has been the subject of comment and controversy since ICAC’s inception. When introducing the legislation, The Honourable Nick Greiner stated, in response to allegations

<sup>69</sup> Section 13(3) of the Act.

<sup>70</sup> Section 13(5) of the Act.

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that the legislation represented an unjustified interference in the rights of individuals:

*'...the commission will be required to make definite findings about persons directly and substantially involved. The commission will not be able to simply allow such persons' reputations to be impugned publicly by allegations without coming to some definite conclusion....'*<sup>71</sup>

4.5.3 Section 74(5), as originally enacted, provided as follows:

- (5) A report may include a statement of the Commission's findings as to whether there is or was any evidence or sufficient evidence warranting consideration of—
- (a) the prosecution of a specified person for a specified offence; or
  - (b) the taking of action against a specified person for a specified disciplinary offence; or
  - (c) the taking of action against a specified public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.

4.5.4 In 1990, the High Court declared that ICAC was precluded from expressing any finding, other than under section 74(5).<sup>72</sup> This prevented ICAC from making findings that corrupt conduct had occurred.

4.5.5 In making this declaration the High Court concluded:

*'The Commission is primarily an investigative body whose investigations are intended to facilitate the actions of others in combating corrupt conduct. It is not a law enforcement agency and it exercises no judicial or quasi-judicial functions. Its investigative powers carry with them no implication, having regard to the manner in which it is required to carry out its functions, that it should be able to make findings against individuals of corrupt or criminal behaviour....Were the functions of the Commission to extend to the making of findings, which are bound to become public, that an individual was or may have been guilty of corrupt or criminal conduct, there would plainly be a risk of damage to that person's reputation and of prejudice in any criminal proceedings which may follow.'*<sup>73</sup>

4.5.6 Later that year, the Government introduced amendments to the Act to authorise ICAC to make findings of corrupt conduct. These amendments remain in force. The relevant provisions are extracted below.

### 13 Principal functions

- .....
- (3) The principal functions of the Commission also include:
- (a) the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with

<sup>71</sup> ICAC Bill 1988, Second Reading Speech, *Hansard* Legislative Assembly at page 675.

<sup>72</sup> *Balog v ICAC* (1990) 169 CLR 625.

<sup>73</sup> *Balog v ICAC* (1990) 169 CLR 625.

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- which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and
- (b) the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.
- (4) The Commission is not to make a finding, form an opinion or formulate a recommendation which section 74B (Report not to include findings etc of guilt or recommending prosecution) prevents the Commission from including in a report, but this section is the only restriction imposed by this Act on the Commission's powers under subsection (3).
- (5) The following are examples of the findings and opinions permissible under subsection (3) but do not limit the Commission's power to make findings and form opinions:
- (a) findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct,
  - (b) opinions as to whether consideration should or should not be given to the prosecution or the taking of other action against particular persons,
  - (c) findings of fact.

### **74A Content of reports to Parliament**

- (1) The Commission is authorised to include in a report under section 74:
- (a) statements as to any of its findings, opinions and recommendations, and
  - (b) statements as to the Commission's reasons for any of its findings, opinions and recommendations.
- (2) The report must include, in respect of each 'affected' person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:
- (a) the prosecution of the person for a specified criminal offence,
  - (b) the taking of action against the person for a specified disciplinary offence,
  - (c) the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official.
- (3) An 'affected' person is a person described as such in the reference made by both Houses of Parliament or against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation concerned.
- (4) Subsection (2) does not limit the kinds of statement that a report can contain concerning any such 'affected' person and does not prevent a report from containing a statement described in that subsection in respect of any other person.

### **74B Report not to include findings etc of guilt or recommending prosecution**

- (1) The Commission is not authorised to include in a report under section 74 a statement as to:
- (a) a finding or opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence), or

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- (b) a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence).
- (2) A finding or opinion that a person has engaged, is engaging or is about to engage:
  - (a) in corrupt conduct (whether or not specified corrupt conduct), or
  - (b) in specified conduct (being conduct that constitutes or involves or could constitute or involve corrupt conduct),
    - is not a finding or opinion that the person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence.
- (3) In this section and section 74A, **criminal offence** and **disciplinary offence** have the same meanings as in section 9.

4.5.7 The Parliamentary Committee and the Law Society have submitted to the review that ICAC should not have the power to make findings of corrupt conduct, primarily because of the damage to a person's reputation that is occasioned by such a finding.

4.5.8 There will be cases where it is clear that a person has engaged in corrupt conduct, even though there may be insufficient admissible evidence to warrant a criminal prosecution. It does not follow that Parliament, and the people of New South Wales, should not be told the true position as to corrupt conduct and those involved. To maintain integrity in public administration, Parliament is entitled to know the findings of ICAC.

4.5.9 ICAC's findings, although not affecting legal rights and obligations, invariably have a significant impact on employment and reputation. Nonetheless, I am not persuaded that ICAC should be prevented from making findings of corrupt conduct. Publishing findings of corrupt conduct is integral to ICAC's function of exposing and preventing corrupt conduct. It also permits ICAC to vindicate the reputations of people, where that is appropriate, who have been damaged by allegations of corruption that have not been substantiated.

4.5.10 This does not mean that ICAC should consider that it is compelled to make a finding whenever corrupt conduct has been technically established. There may be many reasons why it would be inappropriate to do so, for example, triviality. ICAC has held that it may, in an appropriate matter, decline to make a finding of corrupt conduct, even though the factual findings would permit such a finding to be made.<sup>74</sup>

4.5.11 ICAC does not see the need for the Act to be amended to state that it has this discretion, given that it appears to be generally accepted that this is the position. In my view it would be beneficial for the Act to state explicitly that ICAC has the discretion to refrain from making a finding as the availability of

<sup>74</sup> See, for example, ICAC's *Report on the Public Employment Office Evaluation of the position of Director-General, Department of Community Services* (Assistant Commissioner Peter Hall, QC, 1996).

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this discretion reduces the risk of injustice that may arise from a finding of corrupt conduct.

4.5.12 As discussed in section 4.2 above, I have not been persuaded that the definition of corrupt conduct should be amended, however, I am concerned about the impact of the conditional phrasing of the definition of corrupt conduct on the power of ICAC to make findings of corrupt conduct. Obviously, it would be inappropriate to base such a finding on the mere possibility of the existence of such conduct or of the commission of a criminal offence. I do not believe ICAC has ever done so. Nevertheless, consideration should be given to amending the Act to limit the powers to make findings of corrupt conduct to circumstances where ICAC is satisfied of the existence of conduct which had adversely affected, or would (if engaged in) adversely affect official functions or, similarly, was or would be a criminal offence, disciplinary offence, reasonable grounds for dismissal, or a substantial breach of an applicable code of conduct.

**Recommendation R4.3:** That the power of ICAC to make findings of corrupt conduct be retained, but the Act amended to clarify that:

- ICAC may only make findings of corrupt conduct where satisfied of the existence of conduct which had adversely affected, or would (if engaged in) adversely affect official functions or, similarly, was or would be a criminal offence, disciplinary offence, reasonable grounds for dismissal, or a substantial breach of an applicable code of conduct; and
- ICAC has a discretion to decline to make a finding of corrupt conduct even where the relevant conduct technically amounts to corruption.

# CHAPTER 5 - JURISDICTION

## 5.1 Public agencies and public officials

5.1.1 ICAC's success in securing the integrity of public administration depends upon its capacity to investigate the conduct of all public authorities and public officials.

5.1.2 In establishing ICAC, the then Premier, The Honourable Nick Greiner, made it clear that the Government intended ICAC to have extensive jurisdiction across the entire ambit of the public sector:

*'The term public official has been very widely defined to include members of Parliament, the Governor, judges, Ministers, all holders of public offices, and all employees of department and authorities. Local government members and employees are also included. In short, the definition in the legislation has been framed to include everyone who is conceivably in a position of public trust. There are no exceptions and no exemptions.'*<sup>75</sup>

5.1.3 The Act defines a 'public official' as:

'an individual having public official functions or acting in a public official capacity, and includes any of the following:

- (a) the Governor (whether or not acting with the advice of the Executive Council),
- (b) a person appointed to an office by the Governor,
- (c) a Minister of the Crown, a member of the Executive Council or a Parliamentary Secretary,
- (d) a member of the Legislative Council or of the Legislative Assembly,
- (e) a person employed by the President of the Legislative Council or the Speaker of the Legislative Assembly or both,
- (f) a judge, a magistrate or the holder of any other judicial office (whether exercising judicial, ministerial or other functions),
- (g) an officer or temporary employee of the Public Service or a Teaching Service,
- (h) an individual who constitutes or is a member of a public authority,
- (i) a person in the service of the Crown or of a public authority,

<sup>75</sup> Second Reading Speech for ICAC Bill 1988, Premier Greiner, Legislative Assembly *Hansard* 26 May 1988 at page 674.

- (j) an individual entitled to be reimbursed expenses, from a fund of which an account mentioned in paragraph (d) of the definition of **public authority** is kept, of attending meetings or carrying out the business of any body constituted by an Act,
- (k) a member of the Police Force,
- (k1) an accredited certifier within the meaning of the *Environmental Planning and Assessment Act 1979*,
- (l) the holder of an office declared by the regulations to be an office within this definition,
- (m) an employee of or any person otherwise engaged by or acting for or on behalf of, or in the place of, or as deputy or delegate of, a public authority or any person or body described in any of the foregoing paragraphs.<sup>76</sup>

5.1.4 The Act defines a ‘public authority’ as:

including:

- (a) a Government Department, Administrative Office or Teaching Service,
- (b) a statutory body representing the Crown,
- (c) a declared authority under the *Public Service Act 1979*,
- (d) a person or body in relation to whom or to whose functions an account is kept of administration or working expenses, where the account:
  - (i) is part of the accounts prepared under the [Public Finance and Audit Act 1983](#),  
or
  - (ii) is required by or under any Act to be audited by the Auditor -General, or
  - (iii) is an account with respect to which the Auditor -General has powers under any law, or
  - (iv) is an account with respect to which the Auditor -General may exercise powers under a law relating to the audit of accounts if requested to do so by a Minister of the Crown,
- (e) a local government authority,
- (f) the Police Force,
- (g) a body, or the holder of an office, declared by the regulations to be a body or office within this definition.<sup>77</sup>

5.1.5 Statutory health corporations and affiliated health organisations under the *Health Services Act 1997* have been prescribed as public authorities for the purposes of the Act.<sup>78</sup>

5.1.6 No public authority or public official has suggested to me that they should be entirely outside the jurisdiction of ICAC.<sup>79</sup> Nor has anybody suggested to me that the definitions of ‘public authority’ or ‘public official’ require amendment.

<sup>76</sup> Section 3 of the Act.

<sup>77</sup> Section 3 of the Act.

<sup>78</sup> See *ICAC Regulation 2000* reg 18.

5.1.7 I am generally satisfied that ICAC has jurisdiction over the broad range of persons and bodies that exercise public official functions, except for police officers who are covered by the Police Integrity Commission.<sup>80</sup>

## 5.2 Boards appointed by the Governor

5.2.1 The jurisdiction of ICAC over boards appointed by the Governor was considered by the Parliamentary Committee in its November 2001 report, *Review of ICAC Stage II Jurisdictional Issues*.

5.2.2 In that report, the Parliamentary Committee recommended that:

*‘Ministers should ensure that all boards falling within their administration operate under an enforceable code of conduct and that procedures are in place to deal with breaches of the code and that, where the misconduct involves corrupt conduct, ICAC would be able to investigate.’<sup>81</sup>*

5.2.3 In its submission to this review, the Parliamentary Committee reiterated its concern about ICAC’s jurisdiction over boards to the following effect:

*‘In its November 2001 report ICAC Committee recommended that ICAC’s jurisdiction should be extended to include boards appointed by the Governor. There are in excess of 600 such organisations in New South Wales, and the Commission has previously expressed concern that it has no jurisdiction over them. The Government has not so far acted on this recommendation.’*

5.2.4 The reference to ICAC’s concern that it has no jurisdiction over boards appointed by the Governor appears to be based upon evidence given by a former ICAC Commissioner, the Honourable Barry O’Keefe, to the Parliamentary Committee in 1997, to the following effect:

*‘Persons who are appointed by His Excellency the Governor to various boards do not fall within the ambit of our jurisdiction because they fall outside the ambit of the definition of ‘public official’.<sup>82</sup>*

5.2.5 ICAC advises that it no longer adheres to this view. In its supplementary submission to this review, ICAC stated that boards appointed by the Governor *‘are likely to be already subject to the jurisdiction of ICAC where the conduct constitutes or involves a criminal offence within section 9(1)(a)’*.

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<sup>79</sup> As to changes to ICAC’s jurisdiction in relation to Local Government and Members of Parliament, see sections 5.6 and 5.7; as to police see 5.8.

<sup>80</sup> As to which see XXXX.

<sup>81</sup> *Review of ICAC Stage II Jurisdictional Issues* at page 68.

<sup>82</sup> *Review of ICAC Stage II Jurisdictional Issues* at page 33.



- 5.2.6 I agree with ICAC's more recently expressed view that boards appointed by the Governor are within ICAC's jurisdiction in relation to corrupt conduct that involves a criminal offence. The definition of 'public official' in section 3 of the Act includes a person appointed to an office by the Governor. 'Office' is not defined in the Act. By virtue of section 21 of the *Interpretation Act 1987*, the term 'office' in any Act includes position. On this basis, it seems clear that members of boards appointed by the Governor would fall within the definition of public official in the Act and hence be subject to the jurisdiction of ICAC in relation to corrupt conduct that involves a criminal offence.
- 5.2.7 The jurisdiction of ICAC to investigate allegations of corrupt conduct by boards that do not involve a criminal offence, will depend on whether the board is subject to a disciplinary instrument and the specific legislative provisions governing dismissal of board members.
- 5.2.8 ICAC expressed support for amendments to the Act:  
*'that involved clarifying its jurisdiction over such boards to include other conduct provided for in section 9(1) that does not involve or constitute a criminal offence but may be sufficient to amount to reasonable grounds for dispensing with the services of a person, or dismissal.'*
- 5.2.9 ICAC has not, however, been able to provide any examples of allegations of corrupt conduct in relation to boards appointed by the Governor that it has been unable to investigate for want of jurisdiction.
- 5.2.10 I do not think that it is necessary or advisable to amend the Act to make it mandatory for boards to adopt a disciplinary instrument or to specify what might amount to reasonable grounds for dismissing a member of a board. The diversity in the composition, function and powers of boards appointed by the Governor militates against such an approach.
- 5.2.11 I see no reason to alter ICAC's jurisdiction in relation to board members, particularly when there do not appear to have been any complaints about the conduct of any such board which ICAC has been prevented from investigating.
- 5.2.12 Boards have been encouraged to follow ethical standards in the exercise of their functions. In December 2001, the Premier issued *Conduct Guidelines for Members of Boards and Committees*.<sup>83</sup> The guidelines define the standards of behaviour expected of board and committee members. The guidelines stipulate that *'All boards should have a code of conduct defining the standards of behaviour expected of their organisation.'*<sup>84</sup>
- 5.2.13 It might also be noted that some of the 600 or so boards identified by the Parliamentary Committee on the basis of the NSW Audit Office's 1998 report *On board: guide to better practice for public sector governing and advisory boards*, are appointed by Ministers, not the Governor. Boards appointed by a

<sup>83</sup> Premier's Memorandum 2001-17.

<sup>84</sup> At page 2 of the guidelines.

Minister will be ‘public authorities’ and hence subject to the jurisdiction of ICAC where an account is kept of administration or working expenses and the account is prepared under the *Public Finance and Audit Act 1983* or otherwise subject to the powers of the Auditor-General.<sup>85</sup> This is generally the case where the board has a governance, as opposed to purely advisory role.

### 5.3 Government businesses

5.3.1 Some Government agencies are not dependent on the budget for funding. Revenue is derived from external user charges and this revenue permits the agency to be largely self-supporting.

5.3.2 Government businesses include:

- Public trading enterprises
- Public financial enterprises
- State owned corporations
- General government non budget dependent businesses.<sup>86</sup>

5.3.3 ICAC has jurisdiction over any person or body in relation to whom or to whose functions an account is kept of administration or working expenses, where the account:

- Is part of the accounts prepared under the *Public Finance and Audit Act 1983*
- Is required by or under any Act to be audited by the Auditor-General
- Is an account with respect to which the Auditor-General has powers under any law
- Is an account with respect to which the Auditor-General may exercise powers under a law relating to the audit of accounts if requested to do so by a Minister.<sup>87</sup>

5.3.4 This definition captures Government businesses. In addition, Government service providers that have been corporatised (such as rail, water and electricity generation services) under the *State Owned Corporations Act 1989* are expressly declared to be public authorities (and its directors, officers and employees as public officials) under section 36 of the *State Owned Corporations Act 1989*.

5.3.5 The only variation to ICAC’s jurisdiction is that ICAC is not permitted to exercise its statutory power to enter premises of a public authority or public official in relation to Company State Owned Corporations is that.<sup>88</sup> There are no Company State Owned Corporations at this stage.

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<sup>85</sup> See definition of ‘public authority’ in section 3 of the Act.

<sup>86</sup> See the Government’s *Commercial Policy Framework* [www.treasury.nsw.gov.au](http://www.treasury.nsw.gov.au) under ‘glossary of terms’.

<sup>87</sup> See the definition of ‘public authority’ in section 3 of the Act.

<sup>88</sup> *State Owned Corporations Act 1989* section 36.

- 5.3.6 I have not received any submissions suggesting that ICAC’s jurisdiction over Government businesses is inadequate or inappropriate and I make no recommendations for change in this regard.

## 5.4 Outsourced Government functions

- 5.4.1 Where Government functions are outsourced to a private individual or private organisation, the potential for corruption may be enhanced, especially where there is reduced accountability for the provision of those services. This risk, combined with the current trend for contracting and tendering out Government services, and privatising or corporatising Government services, makes it vital that ICAC continue to have jurisdiction over those services where there remains a nexus between the conduct being investigated and public official functions.
- 5.4.2 Care must be taken to ensure that ICAC does not exercise its jurisdiction over conduct in the private sector where such conduct has no nexus with the exercise of public official functions.
- 5.4.3 Outsourced Government functions would generally fall within ICAC’s jurisdiction where there is a nexus with public official functions. The definition of ‘public official’ in section 3 of the Act includes an individual having public official functions or acting in a public official capacity and includes *‘an employee of or any person otherwise engaged by or acting for or on behalf of, or in place of, or as deputy or delegate of, a public authority or any person or body described in any of the foregoing paragraphs.’*
- 5.4.4 The issue of outsourced Government functions has been considered in two ICAC investigation reports, both of which found that ICAC had jurisdiction to investigate outsourced Government functions.
- 5.4.5 In its November 2000 report on motor vehicle re-birthing ICAC found that it had jurisdiction over the conduct of Authorised Unregistered Vehicle Inspection Station inspectors licensed by the Roads and Traffic Authority (RTA) to examine and record motor vehicle identifiers.
- 5.4.6 During the investigation, the RTA submitted that these inspectors were not public officials within the meaning of the Act as they merely provided expert advice to the RTA concerning the physical suitability of a motor vehicle for the establishment of registration. Although the RTA accepted that it relied on inspectors in the discharge of its public function, it claimed that the inspection and report function of the examiners was not, in itself, the exercise of any relevant public function.
- 5.4.7 ICAC took the view that identity checks carried out by the inspectors were undertaken on behalf of the RTA and the supervision of inspectors by the RTA indicated the connection between them. It was clear, in particular, that the RTA would not be able to perform its public official function of registering vehicles without the inspection process undertaken by the

inspectors. In the event their activities standing alone could not be characterised as ‘public official functions’ within the meaning of the Act then they would be persons ‘engaged by or acting for or on behalf of, or in the place or as ... delegate of ...’ the RTA within the definition in section 3 of the Act.

- 5.4.8 ICAC also recently examined the role of WorkCover and outsourced accredited assessors responsible for assessing the competency of operators of certain heavy plant and equipment (*Report on Investigation into Safety Certification and Training in the NSW Construction Industry – June 2004*). Although not directly employed by WorkCover, these assessors were fulfilling WorkCover responsibilities and accordingly ICAC found they were exercising ‘public official functions’ within the meaning of section 3(1) of the Act and undertook assessments on behalf of WorkCover within the meaning of section 3(1)(m) of the Act. ICAC was also satisfied that WorkCover accredited trainers were ‘public officials’ as they exercise public official functions and do work on behalf of WorkCover.
- 5.4.9 In a number of cases, legislation has been enacted in order to specifically confer jurisdiction on certain contracted services. For example, the *Environmental Planning and Assessment Act 1979* amended the definition of ‘public official’ in the Act to include accredited certifiers undertaking building inspections. Legislation was also enacted so that Junee Correctional Centre would fall within the Commission’s jurisdiction.
- 5.4.10 No submissions have been made to me that ICAC’s jurisdiction over outsourced Government functions is inadequate or inappropriate, although ICAC has asked me to recommend amending the Act to make it clear that functions or services for which a public service agency is responsible and which are contracted-out to a private sector individual or organisation nevertheless attract the jurisdiction of ICAC in relation to the performance of those services or functions by the private individual or organisation.
- 5.4.11 I am of the view that the provisions of the Act are adequate to enable ICAC to investigate outsourced Government functions. Past investigations by ICAC have confirmed this to be the case. In the event that the Government takes steps to outsource a Government function in such a way so as to put the jurisdiction of ICAC in doubt, it would obviously be appropriate for particular amendments to be made to remove this doubt. As noted above, amendments were made to this effect in relation to the Junee Correctional Centre and accredited building inspectors. I do not make any recommendations for amendments to the Act concerning the jurisdiction of ICAC over outsourced Government functions.

## 5.5 Private citizens

- 5.5.1 Although the primary objective of ICAC is to promote the integrity of public administration, it also has jurisdiction over private citizens. The definition of

corrupt conduct includes certain criminal conduct by *any person* that adversely affects or could adversely affect the exercise of official functions by a public official or public authority.<sup>89</sup> Many of ICAC’s powers may be exercised over non-public officials. For example, ICAC has the power to require *any person* to produce documents in accordance with a statutory notice issued under section 22 of the Act. The privilege against self-incrimination may be abrogated in relation to any person summonsed to appear before a hearing of ICAC to give evidence and produce documents under section 35 of the Act.

- 5.5.2 ICAC’s powers over non-public officials are not as extensive as those over public officials. For example, ICAC has no statutory power to enter private premises without a warrant and no power to compel non-public officials to prepare a statement of information under section 21.
- 5.5.3 ICAC’s jurisdiction over non-public officials is not limited to those who seek to adversely affect the honest or impartial exercise of official functions by a public authority or public official. It extends to certain criminal conduct that merely affects the exercise of official functions.
- 5.5.4 ICAC thus has jurisdiction over those who seek to corrupt public officials or public authorities, as well as those who seek to corrupt public administration (without any wrongdoing on the behalf of a particular person or entity). An example of the latter may be the perpetration of an undetected fraud that caused an officer to innocently record the incorrect owner of a vehicle.
- 5.5.5 ICAC believes that it is important for it to have jurisdiction over those who adversely affect public officials and administration. Nobody has submitted that it should not have this jurisdiction. Clearly it should.

**Recommendation R5.1:** That there be no change to the jurisdiction of ICAC over:

- public authorities
- public officials
- boards appointed by the Governor
- Government businesses
- outsourced Government functions
- private citizens.

## 5.6 Local Government

### *Introduction*

- 5.6.1 ICAC has jurisdiction over local government authorities, including the councillors elected to govern the council, and the staff employed to administer the council. The definition of ‘public authority’ in section 3 of the Act includes a ‘local government authority’. ‘Local government authority’ is defined in section 3 of the Act as meaning a council or county council within

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<sup>89</sup> See s8(1)(a) and s8(2) of the Act.

the meaning of the *Local Government Act 1993* or any person or body exercising all or any of the functions of such a council or county council.

- 5.6.2 Local Government is a significant aspect of ICAC's jurisdiction. Approximately one-third of the complaints received by ICAC concern local councils.<sup>90</sup> As well as conducting regular investigations into the activities of councillors and council staff,<sup>91</sup> ICAC has formulated a Local Government Strategy to provide corruption prevention advice to councillors and council staff.
- 5.6.3 During the course of the review, Parliament passed the *Local Government Amendment (Discipline) Act 2004*.<sup>92</sup> This Act establishes a disciplinary mechanism for councillors. It also requires councils to adopt and apply a comprehensive code of conduct. I have some concerns about the way in which these amendments will operate in so far as they relate to the jurisdiction of ICAC over local government authorities. These concerns are discussed further below.

### ***Disciplinary proceedings for councillors***

- 5.6.4 I am concerned about the manner in which the *Local Government Amendment (Discipline) Act 2004* involves ICAC in the disciplinary process for councillors. New section 440H of the *Local Government Act 1993* authorises ICAC to make a report to the Director-General of the Department of Local Government to initiate the process for suspension of a councillor from civic office. In this report, ICAC may state that it is satisfied that grounds exist that warrant a councillor's suspension. Section 440H of the *Local Government Act 1993* is reproduced below:

#### **440H How is the process for suspension of a councillor for misbehaviour initiated?**

- (1) The process for the suspension of a councillor from civic office is initiated by:
- (a) a request made by the council by resolution communicated to the Director-General, in which the council states its belief that grounds may exist that warrant the councillor's suspension, or
  - (b) a request made by the Director-General to the council for a report from the council in relation to the councillor's alleged misbehaviour, or
  - (c) a report made by the Independent Commission Against Corruption or the Ombudsman, in which the Commission or the Ombudsman states that the Commission or Ombudsman is satisfied that grounds exist that warrant the councillor's suspension.

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<sup>90</sup> ICAC Annual Report 2003-04 page 39.

<sup>91</sup> See, for example, *Report into corrupt conduct associated with development proposals at Rockdale City Council* (July 2002) and *Report on investigation into Mr Glen Oakley's use of false academic qualifications* (December 2003).

<sup>92</sup> The Act was assented to on 28 September 2004 and commenced on 1 January 2005.

- (2) The council must make a report to the Director -General requested under subsection (1) (b) before the date specified in the Director -General's request or any later date allowed by the Director-General.
- (3) This section authorises such requests and reports to be made, and a reference in this section to a report made by the Independent Commission Against Corruption or the Ombudsman is a reference to a report made to the Director-General under the authority of this subsection or under any other provisions of this or any other Act.
- (4) Nothing in this section affects any function under any other provisions of this or any other Act that authorises the making of a report or recommendation concerning suspension of a councillor from civic office.

- 5.6.5 The grounds for suspension of a councillor are set out in section 440I of the *Local Government Act 1993*. They include serious acts of misbehaviour (for example, by breaching the code of conduct). The Director-General, by order in writing, may suspend a councillor for up to one month if ICAC states in a report that it is satisfied that grounds exist that warrant suspension.<sup>93</sup> The Director-General is not required to conduct his or her own investigation into the matter,<sup>94</sup> but must give reasons for deciding to suspend or not suspend a councillor.<sup>95</sup> Instead of suspending a councillor, the Director-General may, by presentation of a report, refer the matter to the Pecuniary Interest and Disciplinary Tribunal. The report may contain or be accompanied by such material as the Director-General thinks fit.<sup>96</sup>
- 5.6.6 The *Local Government Act 1993* does not confer any investigative powers on ICAC. Presumably, ICAC would rely on its powers under its own legislation in order to obtain information upon which it could form an opinion that grounds exist for suspension of a councillor. This would, quite properly, limit the jurisdiction of ICAC to acts of misbehaviour that amounted to corrupt conduct under its Act. Of concern, however, is the potential for discordance between the findings that ICAC may make in a report made under its Act and a report made under the *Local Government Act 1993*. Putting it bluntly, there is a clear inconsistency between the two.
- 5.6.7 Section 440H(3) of the *Local Government Act 1993* authorises ICAC to make a report in which ICAC states that it is satisfied that grounds exist that warrant a councillor's suspension. Section 440H(4) provides that nothing in section 440H affects any function under any provision of any other Act that authorises the making of a report or recommendation concerning suspension of a councillor from civic office.
- 5.6.8 However, under the ICAC Act, ICAC is not permitted to make a finding, form an opinion or formulate a recommendation which section 74B prevents ICAC from including in a report.<sup>97</sup> Section 74B of the ICAC Act provides that an investigation report may not include findings or opinions of guilt or

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<sup>93</sup> *Local Government Act 1993* s440K.

<sup>94</sup> *Local Government Act 1993* s440J.

<sup>95</sup> *Local Government Act 1993* s440Q.

<sup>96</sup> *Local Government Act 1993* s440N.

<sup>97</sup> Section 13(4) of the Act.

recommendations for prosecution for criminal or disciplinary offences. It is extracted below.

**74B Report not to include findings etc of guilt or recommending prosecution**

- (1) The Commission is not authorised to include in a report under section 74 a statement as to:
  - (a) a finding or opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence), or
  - (b) a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence).
- (2) A finding or opinion that a person has engaged, is engaging or is about to engage:
  - (a) in corrupt conduct (whether or not specified corrupt conduct), or
  - (b) in specified conduct (being conduct that constitutes or involves or could constitute or involve corrupt conduct),

is not a finding or opinion that the person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence.

5.6.9 Disciplinary offence includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.<sup>98</sup> This would appear to include suspension of a councillor under the *Local Government Act 1993*.

5.6.10 It is difficult to reconcile section 440H(3) with section 440H(4), in light of the restrictions contained in section 74B of the Act. On one view, ICAC might be prevented from forming an opinion that there are grounds to warrant suspension of the councillor from office under ICAC Act, while forming that same opinion under the *Local Government Act 1993*. This is clearly undesirable given that the same investigation would be conducted in relation to both reports. Alternatively, section 13(4) of ICAC Act may operate to prevent ICAC from stating in a report under section 440H of the *Local Government Act 1993* that it is satisfied that there are grounds to warrant suspension of the councillor from office.

5.6.11 The High Court, in its consideration of the capacity of ICAC to make findings in 1990 (prior to amendments to the Act), noted that, in the event that there is doubt as to the power of ICAC to make findings, the narrower construction should be preferred on the basis that, where there are two alternative constructions of legislation that are open, that which is consonant with the common law is to be preferred.<sup>99</sup>

5.6.12 ICAC is authorised by section 74C(2) of the Act to include in an investigation report a recommendation that consideration be given to the suspension of a

<sup>98</sup> Section 74B(3) and section 9 of the Act.

<sup>99</sup> See *Balog v ICAC* [1990] HCAC 28.



councillor from civic office with a view to his or her dismissal for serious corrupt conduct. No equivalent authorisation for recommendations that consideration be given to the suspension of a councillor from civic office on the grounds referred to in section 440I was included in the *Local Government Amendment (Discipline) Act 2004*.

- 5.6.13 In my view it would be preferable for ICAC Act to be amended to specifically authorise ICAC to recommend that consideration be given to the suspension of a councillor from civic office on the grounds referred to in section 440I was included in the Act. Section 440H(3) should also be amended to follow this wording.
- 5.6.14 ICAC has not hitherto had a direct role in the initiation of disciplinary proceedings. Whilst I have some reservations about the extension of the functions of ICAC in this regard, the recent passage of the legislation through Parliament has dissuaded me from making any recommendations for change in relation to the jurisdiction of ICAC over local government, except to the extent I consider necessary to minimise the prospect of successful legal challenges to the exercise of ICAC’s jurisdiction.

**Recommendation R5.2:** That ICAC’s jurisdiction over Local Government be amended to:

- Clarify that ICAC may make a recommendation that consideration be given to the suspension of a councillor from civic office on the grounds set out in section 440I of the *Local Government Act 1993*.
- Replace the power that ICAC has under the *Local Government Act 1993* to present a report stating that ‘*grounds exist that warrant a councillor’s suspension*’ with a power to recommend that consideration be given to the suspension of a councillor from civic office on the grounds set out in section 440I of the *Local Government Act 1993*.

### **Code of conduct**

5.6.15 The *Local Government Amendment (Discipline) Act 2004* inserts a new section 440 in the *Local Government Act 1993* which permits a model code of conduct applicable to councillors, members of staff of councils and delegates of councils to be prescribed by the regulations. A council must adopt a code of conduct that incorporates the provisions of the model code of conduct.

5.6.16 The *Local Government Amendment (Discipline) Act 2004* inserts section 9(6) in ICAC Act as follows:

A reference to a disciplinary offence in this section and sections 74A and 74B includes a reference to a substantial breach of an applicable requirement of a code of conduct required to be complied with under section 440 (5) of the [Local Government Act 1993](#), but does not include a reference to any other breach of such a requirement.

- 5.6.17 This provision follows the existing provisions that apply to codes of conduct for Members of Parliament prescribed under the Act. ICAC has previously argued that it was necessary to extend ICAC's jurisdiction over local councillors in this manner because, in the absence of disciplinary process for local councillors, ICAC has no jurisdiction to investigate allegations of corruption that fall short of criminal behaviour. The amendment was supported by the Parliamentary Committee in its November 2001 *Report on Review of ICAC Stage II: Jurisdictional Issues*. In its submission that that review, ICAC identified non-pecuniary conflicts of interest and improper influence in employment decisions as matters of concern.
- 5.6.18 The *Local Government Amendment (Discipline) Act 2004* extends ICAC's jurisdiction over Local Government in relation to both the code of conduct and the disciplinary process for councillors. The purpose in establishing both these mechanisms is unclear and appears to involve an unnecessary level of duplication. As I understand it, ICAC made the recommendation that an enforceable code of conduct apply to councillors because of the absence of a disciplinary process.
- 5.6.19 The need for this provision appears to have significantly diminished with the enactment of a procedure for suspending councillors for disruptive behaviour or misbehaviour, particularly given that the definition of misbehaviour incorporates breach of a code of conduct. It would seem to me that breach of a code of conduct that is of sufficiently serious nature as to warrant the councillor's suspension would undoubtedly be captured by the definition of disciplinary offence in section 9(3), without the requirement to add section 9(6). If anything, section 9(6) operates to restrict the jurisdiction of ICAC, for example, by preventing ICAC from investigating numerous breaches, which of themselves would not warrant ICAC's attention, but by sheer number suggest that serious corrupt conduct may be occurring.
- 5.6.20 The Ombudsman has also expressed concern about the expansion of ICAC's jurisdiction to investigate substantial breaches of the code of conduct applying to local government authorities. The Ombudsman is concerned that this amendment reflects significant overlap with his jurisdiction and that this creates the potential for duplication of effort and public confusion.
- 5.6.21 Despite my reservations about the need or benefit for ICAC to have jurisdiction over local government authorities with respect to the disciplinary process and the code of conduct, I do not propose to make any further recommendations concerning these provisions. This is in part due to the recent passage of the legislation through Parliament and my hesitation at recommending restrictions on ICAC's jurisdiction over local government authorities when this is clearly an area where there are many corruption risks. The operation of these provisions may be an area that the Parliamentary Committee might care to monitor in the near future.

## 5.7 Members of Parliament

### **Summary**

- 5.7.1 ICAC's ability and willingness to investigate all public officials, including Ministers and Members of Parliament, contribute to its high standing within the community. Indeed, there would be little public confidence in ICAC if it could not expose corruption in high office.
- 5.7.2 As there are no disciplinary offences that apply to Members of Parliament, each House of the Parliament has adopted a code of conduct to apply ICAC's jurisdiction to non-criminal conduct of its Members.
- 5.7.3 The role of ICAC, as part of the Executive, in enforcing the ethical standards that apply to Parliamentarians sits uncomfortably with the principle of Parliamentary sovereignty upon which the Westminster system of Parliamentary democracy that applies in New South Wales is based. Nonetheless, I do not recommend that ICAC's jurisdiction to enforce Parliamentary codes of conduct be removed. No such amendments to ICAC's jurisdiction have been put forward in submissions before me<sup>100</sup> and I must take into account that it was Parliament's decision to amend the Act to give ICAC jurisdiction to enforce its codes of conduct. It would be open to Parliament to reclaim responsibility to enforce its ethical standards, should it wish to do so.
- 5.7.4 A substantial amount of the criticism about ICAC has emanated from, or concerned, Members of Parliament. It was submitted to me that the Act may operate unfairly in relation to Members of Parliament for two reasons. First, the decision to refer a complaint to ICAC about a Parliamentarian may in some cases be made on political grounds. Second, unlike other public officials, there is no person or body responsible for investigating minor complaints about Parliamentarians. These factors may result in Parliamentarians being subjected to high profile ICAC investigations for relatively minor matters.
- 5.7.5 I have been requested by several individual Members of Parliament to examine proposals to partially replace ICAC's jurisdiction over Members of Parliament with a Parliamentary investigator.
- 5.7.6 In my view the establishment of a Parliamentary investigator to examine minor allegations involving Parliamentarians is worth considering. It would be consistent with the principle that ICAC's investigations should be directed towards serious and systemic corruption.
- 5.7.7 The proposal would place Members of Parliament in a position similar to that which exists for other public officials whereby ICAC may refer allegations of corruption to another person body for investigation or other action under Part 5 of the Act.
- 5.7.8 The proposal should not adversely impact on ICAC's ability to promote the honesty and integrity of public administration, as long as ICAC retains the

<sup>100</sup> Although some concerns have been expressed to me about the appropriateness and effectiveness of this approach. These concerns are discussed further below.

capacity to investigate Parliamentarians if the Parliamentary investigator fails to do so, or if that investigation proves inadequate.

- 5.7.9 ICAC has expressed support for this recommendation and has suggested that it should also apply where ICAC cannot investigate a serious allegation because of Parliamentary privilege. I agree with this suggestion.
- 5.7.10 The Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics has suggested that the Legislative Assembly could consider options for investigating matters which involve Parliamentary privilege on a case by case basis. That Committee does not support the appointment of an external third party or commissioner to investigate matters involving members of the Legislative Assembly.
- 5.7.11 I agree that the Parliamentary investigator need not be an external third party. A Parliamentary Committee might be established on an ongoing or ad hoc basis to investigate complaints concerning Members of Parliament. I have amended my recommendation accordingly.

### **Background**

- 5.7.12 In establishing ICAC the then Premier, the Honourable Nick Greiner, made two things clear:
- ICAC would have jurisdiction to investigate and expose corruption involving all public officials, including Ministers of the Crown and Members of Parliament; and
  - Conduct would be corrupt only where it offended known wrongs.
- 5.7.13 In his Second Reading Speech for the ICAC Bill, Mr Greiner stated:
- ‘The independent commission is not intended to be a tribunal of morals. It is intended to enforce only those standards established or recognised by law. Accordingly, its jurisdiction extends to corrupt conduct which may constitute a criminal offence, a disciplinary offence or grounds for dismissal. The commission’s jurisdiction will cover all public officials. The term public official has been very widely defined to include Members of Parliament, the Governor, judges, Ministers, all holders of public offices, and all employees of departments and authorities.’<sup>101</sup>*
- 5.7.14 Since its inception, ICAC has conducted a number of high profile investigations into Ministers of the Crown and Members of Parliament, several of which have resulted in findings of corrupt conduct and the resignation of the affected Member.

### **The ‘Metherell affair’**

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<sup>101</sup> Second Reading Speech *Hansard* Legislative Assembly at page 676.

- 5.7.15 Most notably, in 1992 ICAC conducted an investigation into the resignation of Dr Terry Metherell from the NSW Parliament, and his subsequent appointment to a senior public service position. His resignation impacted upon the balance of power in the Legislative Assembly in such a way as to create political advantage for the then Government.
- 5.7.16 This matter was referred by both Houses of Parliament to ICAC under section 73 of the Act.<sup>102</sup> Accordingly, ICAC was required to fully investigate the matter<sup>103</sup> and to prepare a report to Parliament on its investigation.<sup>104</sup>
- 5.7.17 In its investigation of the ‘Metherell affair’, ICAC found that the then Premier<sup>105</sup> had engaged in corrupt conduct. The findings against the Honourable Nick Greiner were made on the basis that his conduct involved the partial exercise of official functions, a breach of public trust, and could involve reasonable grounds for dismissing him from his office as Premier.
- 5.7.18 ICAC’s findings were declared a nullity by the Court of Appeal (although by this time the Premier had resigned from Parliament). The Court held that the test of whether conduct that falls within section 8 of the Act could constitute reasonable grounds for dismissal of a public official is objective. The Court noted that there was no evidence that such grounds would cover a case (such as that involving Mr Greiner) where ICAC was satisfied that:
- ‘there was no criminal offence, where what was done was believed to be in all respects lawful and as to which it could not be concluded that it would be seen by a notional jury as contrary to known and recognised standards of honesty and integrity.’<sup>106</sup>*
- 5.7.19 The effect of this decision was that ICAC’s jurisdiction to investigate allegations of corruption involving Ministers or Members of Parliament was largely restricted to circumstances where the alleged conduct could constitute or involve a criminal offence. The other bases for corrupt conduct, namely, disciplinary offences and reasonable grounds for dismissal could have very little practical operation in relation to Ministers and Members of Parliament.
- 5.7.20 It was said by many that the Act required amendment so that Members of Parliament would not be less amenable to ICAC’s jurisdiction than ordinary public officials, although one of the Act’s key architects, former senior public servant Mr Gary Sturgess, declared that as ICAC’s jurisdiction only applies to known wrongs, it was never intended for ICAC to be able to investigate Members of Parliament and Ministers for non-criminal conduct. He stated:

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<sup>102</sup> There have been no subsequent references to ICAC from both Houses of Parliament under section 73 of the Act, although the Legislative Assembly has requested ICAC to report on what measures might be taken in respect of regulating or limiting the employment of Members of Parliament to provide advice on public affairs, see ICAC’s *Report to the Speaker of the Legislative Assembly on possible regulation or limitation on secondary employment of Members in the field of ‘public affairs’* (September 2003).

<sup>103</sup> Section 73(2) of the Act.

<sup>104</sup> Section 74 of the Act.

<sup>105</sup> Findings were also made against the then Minister for Environment., Mr Tim Moore.

<sup>106</sup> *Greiner v ICAC* (1992) 28 NSWLR 125 at 148 per Gleeson CJ.

*'The policy of the legislation was to punish for known offences, criminal or disciplinary. Since there are no disciplinary offences for politicians, the Act was quite deliberate in leaving this range of matters outside the jurisdiction of ICAC.'*<sup>107</sup>

5.7.21 Consequent upon the Court of Appeal's declaration that its finding was a nullity, ICAC issued a second report in relation to the Metherell affair to correct the record and identify some important issues for consideration. In this report the then ICAC Commissioner, Mr Ian Temby, QC noted that there were sound constitutional reasons for ICAC having a more limited role in relation to Judges and Members of Parliament. He stated:

*'There are sound reasons in principle why Judges and Members of Parliament should be treated slightly differently in a procedural sense. It is important to the functioning of a liberal democratic society that the rule of law prevail, and that is predicated upon an independent judiciary. One of the hallmarks is that Judges cannot be removed from office by the Executive. This can only happen through the Parliament, which is the ultimate democratic institution. So far as Members of Parliament are concerned, they again must be free from Executive control, and the notion of sovereignty of Parliament requires that that institution have control of its own Members. It may be the Commission should be entitled to investigate everybody in the public sector, from the Governor down, but with respect to those who hold constitutional offices the Commission should not have power beyond reporting its findings and recommendations to the Parliament. That should not include recommendations for removal from office, if only because the Parliament should not be told what to do by the Commission which is a body of the Parliament's own creation.'*<sup>108</sup>

### **Codes of Conduct**

5.7.22 Mr Temby's suggestion was not taken up. Instead, the Parliamentary Committee embarked upon a comprehensive review of the Act, which included consideration of the definition of corrupt conduct and its application to Members of Parliament.<sup>109</sup>

5.7.23 The Parliamentary Committee, in accordance with a resolution of both Houses of Parliament in December 1991, also pursued its consideration of a code of conduct for Members of Parliament,<sup>110</sup> although these matters were ultimately

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<sup>107</sup> Sturgess, G "The NSW Independent Commission Against Corruption" in Weller, P (ed) *Royal Commissions and the Making of Public Policy* (MacMillan 1994) at page 124.

<sup>108</sup> ICAC Second Report on investigation into the Metherell resignation and appointment (September 1992) at page 18.

<sup>109</sup> See chapters 1 and 4 of the *Report on Review of the ICAC Act* (May 1993).

<sup>110</sup> See the Parliamentary Committee's Discussion Paper entitled *Report on Inquiry into Pecuniary Interest Provisions for Members of Parliament and Senior Executives and A Code of Conduct for Members of Parliament* (1994) and ICAC's *Report on Investigation concerning Neal and Mochalski* (April 1991).

separately considered by each House's ethics committee established under Part 7A of the Act.

- 5.7.24 In its 1993 *Report on Review of the ICAC Act*, the Parliamentary Committee endorsed the view that ICAC must be able to investigate all public officials and that the 'great and powerful' should not be beyond the reach of ICAC. The Parliamentary Committee recommended that section 9 be repealed and that ICAC's investigatory jurisdiction should be determined by reference to section 8 which should remain largely unchanged.
- 5.7.25 This proposal would expand the jurisdiction of ICAC in respect of all public officials. It was not adopted. Instead, in 1994 the Government introduced the Independent Commission Against Corruption (Amendment) Bill to expand the jurisdiction of ICAC in relation to Ministers and Members of Parliament. It achieved this by permitting ICAC to investigate corrupt conduct where that conduct could constitute or involve a substantial breach of an applicable code of conduct. The code of conduct in relation to each House was to be developed and adopted by resolution of the House concerned. The code of conduct in relation to Ministers was to be adopted by regulation.
- 5.7.26 The Independent Commission Against Corruption (Amendment) Bill also included a provision to permit ICAC to make a finding of corrupt conduct in relation to a Minister or Member of Parliament where the conduct would cause a reasonable person to believe that it would bring the integrity of the office concerned into serious disrepute and the conduct could also constitute a breach of the law. This provision is discussed further at section 4.4 of this report.
- 5.7.27 At the same time, Part 7A was inserted into the Act to provide for each House to have an ethics committee to prepare a draft code for consideration by the House and to provide advice and educative work on ethical standards apply to Members.
- 5.7.28 The proposed amendments were highly controversial, with many Members raising concerns about the introduction of a code of conduct during the Parliamentary debates. The then Opposition opposed the Bill and moved amendments (which were defeated) to restrict the findings that ICAC might make in relation to Members of Parliament to findings of fact. These amendments were intended to reflect Mr Temby's views, extracted above.
- 5.7.29 The reason Parliament decided to pursue reforms for a code of conduct, rather than those suggested by the Parliamentary Committee, Mr Temby or others is not altogether clear. From the Parliamentary debates it appears that the three independents who held the balance of power in the Lower House at this time were instrumental in securing the amendments. These independents expressed particular concern to restore public confidence in Parliamentarians and ensure that Members of Parliament were subject to the same level of scrutiny by ICAC as other public officials.<sup>111</sup>

<sup>111</sup> See the speeches of Dr MacDonald, Ms Moore and Mr Hatton during the Parliamentary debate on the Bill, *Hansard* Legislative Assembly at page 4724ff.

- 5.7.30 Draft codes were eventually released for comment (after several statutory amendments to extend the timeframe) by the Legislative Assembly Standing Ethics Committee and the Legislative Council Standing Committee on Privileges and Ethics in mid-1996. Delays were encountered in adopting the draft codes as the Houses could not agree on a uniform code.
- 5.7.31 To progress the matter, the Premier released a draft code of conduct for Members of the New South Wales Parliament in March 1998. The Legislative Assembly voted on 5 May 1998 to adopt the code. The Legislative Council agreed to its adoption on 1 July 1998. Consequently, ICAC may investigate an allegation of corrupt conduct where that conduct amounts to a substantial breach of the Member's code of conduct (and the conduct also falls within section 8 of the Act).<sup>112</sup>
- 5.7.32 The code that applies to the Members of each House covers such matters as disclosure of conflicts of interest, bribery, gifts, use of public resources and use of confidential information. It is reproduced in Appendix G of this report.<sup>113</sup>
- 5.7.33 In late 1998 each House also agreed to the appointment of a Parliamentary Ethics Adviser. This position is currently held by Mr Ian Dickson. By resolution of each House, Mr Dickson has been appointed to assist and advise Members of Parliament to resolve ethical issues and problems, including conflicts of interest and the use of entitlements.<sup>114</sup> The Parliamentary Ethics Adviser does not investigate matters. He provides advice to Members of Parliament upon request.
- 5.7.34 ICAC's role in enforcing the ethical standards that apply to Parliamentarians as prescribed by section 9(1)(d) of the Act continues to attract controversy. The former ICAC Commissioner, Mr Ian Temby, QC has recently reiterated his concerns about ICAC categorising the conduct of constitutional office holders as corrupt and the adoption of codes of conduct. In discussing the Metherell affair in a recent speech to Government lawyers, Mr Temby stated:

*'The Commission made a supplementary report to Parliament, strongly recommending that in the case of constitutional officeholders – including Judges, members of Parliament and people such as the Ombudsman – the final decision as to continuation in office or otherwise should be left to the Parliament, and the Commission should be required to find facts but not categorise conduct as being corrupt or otherwise. It is a matter of great regret that this recommendation was not followed. Over a long period leading up to and following my departure from office Parliament played around with the*

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<sup>112</sup> Section 9(1)(d) of the Act. No Ministerial code of conduct has been prescribed for the purposes of the Act at this stage.

<sup>113</sup> The Code of Conduct for each House may be viewed on the Parliament's website: [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au)

<sup>114</sup> See, for example, resolution of the Legislative Council on 23 September 2004 reported in *Hansard* of that date at page 5.



*issue, and in the end opted for a Code of Conduct which has proved less than useful in practice.*<sup>115</sup>

- 5.7.35 The role of ICAC, as part of the Executive, in enforcing the ethical standards that apply to Parliamentarians sits uncomfortably with the principle of Parliamentary sovereignty upon which the Westminster system of Parliamentary democracy that applies in New South Wales is based. This discomfort is heightened by the fact that a finding of corrupt conduct by ICAC in relation to a Member of Parliament will invariably lead to the resignation or expulsion of the Member from Parliament. Fundamentally, this impinges on the sovereignty of Parliament to rule its own affairs.
- 5.7.36 It is not just in New South Wales that tensions between the sovereignty and accountability of Parliament has led to supplementation of traditional forms of Parliamentary accountability such as the ballot-box, Ministerial responsibility, and self-regulation. Usually these other forms of control operate supplement, rather than replace, a self-regulatory regime.
- 5.7.37 For example, the arrangements that apply to the House of Commons in the United Kingdom largely preserve Parliament's control over its affairs, but also contain an independent element in the form of a Parliamentary Commissioner for Standards.<sup>116</sup> The House has adopted a code of conduct, a register of Members' interests, an independent Parliamentary Commissioner for Standards (who is appointed pursuant to resolution of the House but acts independently in discharging his monitoring, advisory and investigative roles) and a Committee on Standards and Privileges. The Parliamentary Commissioner for Standards reports to the Committee on complaints against Members.
- 5.7.38 Many provincial Canadian legislatures have established statutory Parliamentary Ethics Commissioners who generally perform an advisory and investigative role in relation to the Executive and Parliament.<sup>117</sup>
- 5.7.39 The decision of the New South Wales Parliament to permit enforcement of ethical standards of Parliament by ICAC (an organ of the Executive) represents a greater loss of sovereignty than is usually tolerated by Parliaments.<sup>118</sup>

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<sup>115</sup> Speech by Ian Temby, QC Government Lawyers CLE Conference 7 September 2004 *The Role of the ICAC*.

<sup>116</sup> Select Committee on Parliamentary Commissioner for Standards *Annual Report 2003-04* Appendix 4.

<sup>117</sup> Oonagh Gay *The Regulation of Standards – A Comparative Perspective* May 2002 Wicks Committee on Standards in Public Life.

<sup>118</sup> The manner in which ethical standards in legislatures of the Commonwealth are regulated has been considered in detail by ICAC and elsewhere. See for example ICAC's report on *Regulation of secondary employment for Members of the NSW Legislative Assembly* and Oonagh Gay, *The Regulation of Standards – A Comparative Perspective* May 2002 Wicks Committee on Standards in Public Life.

- 5.7.40 Concern about the erosion of Parliamentary sovereignty may be minimised were it to be demonstrated that it has led to significant improvements in the accountability of Members of Parliament.
- 5.7.41 ICAC has conducted a number of investigations into Members of Parliament since the codes of conduct were adopted.<sup>119</sup> In its investigation into the Honourable Malcolm Jones, MLC and its investigation into the Honourable J Richard Face ICAC<sup>120</sup> found corrupt conduct on the basis of a substantial breach of clause 4 of the code of conduct concerning use of public resources. In each instance, however, ICAC was satisfied that the relevant conduct could constitute or involve a criminal offence. The provisions concerning the code of conduct did not lead to a finding of corrupt conduct that would not have been made in any event.
- 5.7.42 The extent to which ICAC's jurisdiction is effectively extended by section 9(1)(d) concerning codes of conduct is limited by the operation of Parliamentary privilege.<sup>121</sup> Parliamentary privilege may restrict investigations into substantial breaches of the code of conduct, particularly in relation to clause 2 of the code concerning bribery and clause 5 of the code concerning use of confidential information.
- 5.7.43 In a comparative study of the regulation of ethical standards in legislatures throughout the Commonwealth it has been observed that the '*rigorous enforcement regime*' that exists in New South Wales has not '*prevented the spread of public cynicism about standards of conduct in public life*',<sup>122</sup> and that greater levels of scrutiny can actually contribute to the growth in decline in confidence in politicians among the general public:
- 'More and more guidelines, scrutineers, checks and balances are established. These mechanisms mean that each subsequent ministerial error is magnified in significance. Media and parliamentary opponents are more ruthless in their attacks on MPs mistakes because, they argue, ministers had clear guidelines and institutional support. Encouraged by increasingly hysterical attacks of rival political parties, channelled through the media, the electorate may then express greater outrage at the ballot box.'*<sup>123</sup>
- 5.7.44 ICAC's role in enforcing Parliamentary ethical standards may also be assessed by reference to the implementation of its corruption prevention recommendation. In this regard, ICAC's own assessment of the extent to which Parliament has adopted its recommendations for systemic improvements is mixed. In its recent *Report on Investigation into the conduct of the Honourable Peter Breen, MLC*, ICAC observed at chapter 5:

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<sup>119</sup> See most recently Report on Investigation into the conduct of the Honourable Peter Breen, MLC (December 2004), Report on Investigation into the conduct of the Honourable J Richard Face (June 2004), and Report on Investigation into the conduct of the Honourable Malcolm Jones, MLC (July 2003).

<sup>120</sup> ICAC did not make a finding of corrupt conduct in relation to the Honourable Peter Breen, MLC.

<sup>121</sup> Parliamentary privilege is expressly preserved by section 122 of the Act.

<sup>122</sup> Oongah Gay.

<sup>123</sup> Fleming and Holland '*Advancing Ministerial Ethics*' *Motivating Ministers to Morality* Ashgate 2001.

*'Since 1998, when the Commission reported on its investigation into allegations of misuse of parliamentary travel entitlements, the Commission has recommended improvements to the entitlements systems following each investigation. In the intervening period Parliament has implemented, or begun to implement, many of those recommendations. However, many of the issues identified in that report are still relevant and demonstrate the pressing need for further action.'*

5.7.45 Despite my reservations about the appropriateness and effectiveness of ICAC enforcing the ethical standards applicable to Members of Parliament, I do not recommend that ICAC's jurisdiction to enforce Parliamentary codes of conduct be removed. No such amendments to ICAC's jurisdiction have been put forward in submissions before me and I must take into account that it was Parliament's decision to amend the Act to give ICAC jurisdiction to enforce its codes of conduct. It would be open to Parliament to reclaim responsibility to enforce its ethical standards, should it wish to do so. I see no reason why section 9(1)(d) of the Act should not continue to apply to Members of Parliament, unless and until such time as Parliament decides otherwise.

### ***Parliamentary ethics committees***

5.7.46 Part 7A of the Act concerns the establishment and functions of Upper and Lower House committees to deal with codes of conduct and ethical standards. Part 7A designates a Legislative Council committee and a Legislative Assembly Committee to:

- Prepare draft codes of conduct for consideration of the Members of the applicable House
- Provide education relating to ethical standards applying to Members of the applicable House
- Provide advice in relation to ethical standards, upon request.

5.7.47 The Standing Committee on the Parliamentary Privilege and Ethics (the Committee) has been designated as the Legislative Assembly committee for the purposes of Part 7A of the Act.

5.7.48 This Chair of this Committee, John Price, MP, has written to the review advising that the Committee is *'strongly of the view that its functions should be conferred by resolution of the House, rather than statute.'*

5.7.49 The Committee is of the view that Part 7A is redundant and should be repealed. It is noted that each House has prepared and adopted a code of conduct for the purposes of section 9 of the Act. This enables ICAC to investigate a substantial breach of the code of conduct.

- 5.7.50 As adoption of the code of conduct takes place by resolution of the House,<sup>124</sup> it is not necessary to include the functions of each designated committee in the Act in order to secure ICAC's jurisdiction in relation to the codes of conduct. If the functions of each designated committee are removed from the Act, it might be desirable to retain in the Act the obligation for each House to review the code of conduct every four years (with the manner and form of this review to be determined by resolution of the House).
- 5.7.51 In a bicameral Parliamentary system I see some force in the proposition that a Committee comprised of Members of one House should be governed by resolution of that House, not by an Act of Parliament, although I acknowledge the inclusion of the functions of each Committee in legislation facilitates consistency in the procedures to be applied to the consideration of Parliamentary ethical standards. This appears to be uniquely a matter for Parliament to resolve and I am not prepared to make any recommendation on it.

### ***Parliamentary investigator***

- 5.7.52 A substantial amount of the criticism about ICAC has emanated from, or concerned, Members of Parliament. It was submitted to me that the Act may operate unfairly in relation to Members of Parliament for two reasons. First, the decision to refer a complaint to ICAC about a Parliamentarian may in some cases be made on political grounds. Second, there is no person or body responsible for investigating minor complaints about Parliamentarians. These factors may result in Parliamentarians being subjected to high profile ICAC investigations for relatively minor matters.
- 5.7.53 I would not support any amendments to the Act to restrict the circumstances in which a complaint may be made to ICAC about alleged corruption by a Member of Parliament. Accordingly, there is probably little that can be done by way of legislative amendment to the Act to prevent the making of complaints on political grounds.
- 5.7.54 I have been requested by several individual Members of Parliament to examine proposals to partially replace ICAC's jurisdiction over Members of Parliament with a Parliamentary investigator.
- 5.7.55 In my view the establishment of a Parliamentary investigator to examine minor allegations involving Parliamentarians is worth considering. It would be consistent with the principle that ICAC's investigations should be directed towards serious and systemic corruption.
- 5.7.56 The proposed Parliamentary investigator would not put Members of Parliament on a different footing to other public officials. Indeed, the purpose of the proposal is quite the reverse.

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<sup>124</sup> Section 9(3) of the Act.

- 5.7.57 Under Part 5 of the Act, ICAC may refer an allegation of corruption for investigation or other action to any person or body considered by ICAC to be appropriate in the circumstances.<sup>125</sup> ICAC regularly uses this power to refer minor matters to public officials and public authorities for investigation.<sup>126</sup> ICAC can require the person or body to whom the allegation has been referred to report back to ICAC on the outcome of the investigation and ICAC can take further action if not satisfied as to the action that has been taken.<sup>127</sup> There is, however, no person or body to whom ICAC can refer minor allegations in relation to Members of Parliament. This recommendation is designed to redress this imbalance.
- 5.7.58 The proposal should not adversely impact on ICAC's ability to promote the honesty and integrity of public administration, as long as ICAC retains the capacity to investigate Parliamentarians if the Parliamentary investigator fails to do so, or if that investigation proves inadequate.
- 5.7.59 ICAC has expressed support for this recommendation and has suggested that it should also apply where ICAC cannot investigate a serious allegation because of Parliamentary privilege.<sup>128</sup> I agree with this suggestion.
- 5.7.60 The Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics has suggested that the Legislative Assembly could consider options for investigating matters which involve Parliamentary privilege on a case by case basis. That Committee does not support the appointment of an external third party or commissioner to investigate matters involving members of the Legislative Assembly.
- 5.7.61 I agree that the Parliamentary investigator need not be an external third party. A Parliamentary Committee might be established on an ongoing or ad hoc basis to investigate complaints concerning Members of Parliament. I have amended my recommendation accordingly.
- 5.7.62 If Parliament were to consider establishing an officer charged with conducting investigations into minor allegations involving Members of Parliament, I am not convinced that coercive powers would be required in every case. Internal investigations conducted by public authorities into the conduct of its employees do not, as a rule, require coercive powers. The use of coercive powers should be restricted to the most serious allegations – ones that ICAC is well set up to investigate.
- 5.7.63 The Honourable Peter Breen, MLC has requested that I support his draft Parliamentary Commissioner for Standards Bill. This Bill provides for the appointment of an officer of the Parliament to advise Members of Parliament

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<sup>125</sup> Section 53 of the Act.

<sup>126</sup> In 2003-2004 ICAC referred 37 matters for investigation under Part 5 of the Act: *ICAC Annual Report 2003-2004*.

<sup>127</sup> Sections 54 and 55 of the Act.

<sup>128</sup> The issues concerning ICAC's investigations and Parliamentary privilege are discussed further at section 6.2 of this report.

on ethical issues and to investigate allegations of misuse of Members entitlements and allowances. The jurisdiction of ICAC to investigate these matters is ousted. Unlike ICAC, the Parliamentary Commissioner would be empowered to investigate a matter protected by Parliamentary privilege, where a House of Parliament has waived privilege and the Member is prepared to give evidence to the Parliamentary Commissioner. Otherwise, the Parliamentary Commissioner has much the same powers as ICAC, including to receive complaints from the public, conduct hearings, compel oral and documentary evidence and override common law privileges.

5.7.64 I do not think there is real benefit to be gained from splitting the jurisdiction of ICAC between two separate bodies, each with similar powers. Although ICAC is appointed by the Executive and the proposed Parliamentary Commissioner by the Parliament, the high degree of autonomy granted to the ICAC Commissioner by Parliament (including a Committee veto over appointment and a role for Parliament in the removal of the Commissioner and oversight of ICAC) makes the distinction of little practical value.

5.7.65 It has been suggested to me that there may be scope for the Parliamentary Ethics Adviser to take on an investigative role in relation to allegations of corrupt conduct. I do not entirely rule this out, although I note that an investigative role may adversely impact on the willingness of Members to seek ethical advice from the Parliamentary Ethics Adviser and it may be preferable for there to be some separation between the investigative and advisory roles.

5.7.66 In her submission to the review, the Honourable Jenny Gardiner, MLC expressed support for the proposed Parliamentary investigator, stating:

*‘Consideration of such an appointment is indeed worthwhile, provided, as recommended, serious and/or systemic corruption allegations and matters remained the preserve of ICAC.*

*The establishment of a Parliamentary Commissioner for Standards, working with strengthened Ethics Committees in each House of the Parliament of New South Wales, along the lines of the arrangements that have applied to Members of the House of Commons in the British Parliament since 1995, would probably be an improvement on existing arrangements relating to the NSW Parliamentary Codes of Conduct. Such model might take into account more recent developments in the Parliament of Canada (which are being taken into account in the current review of the Westminster Code of Conduct).’*

5.7.67 I do not form any final conclusions as to the precise form that a Parliamentary investigator should take, or whether it would be preferable to establish a Parliamentary investigator or Parliamentary Committee. These are matters for Parliament itself to determine, bearing in mind the fundamental principle of Parliamentary sovereignty over its own affairs.

**Recommendation R5.3:** That consideration be given to the establishment of a Parliamentary investigator or Parliamentary Committee to investigate:

- (a) minor matters involving Members of Parliament so as to permit ICAC to focus on serious and systemic allegations of corruption; or
- (b) allegations of corruption that ICAC is unable to investigate because of Parliamentary privilege as preserved by section 122 of the Act.

## 5.8 Police

- 5.8.1 The Police Integrity Commission has primary responsibility for the detection, investigation and prevention of police corruption. ICAC cannot investigate or otherwise deal with a matter involving the conduct of police officers if the matter does not also involve the conduct of public officials who are not police officers.<sup>129</sup>
- 5.8.2 ICAC retains its educative and advisory roles in relation to police.<sup>130</sup> The Police Integrity Commission is an independent body with similar powers and functions to that of ICAC, with the exception that the Police Integrity Commission is solely concerned with police corruption and other serious police misconduct, whereas ICAC jurisdiction covers the entire public sector. ICAC continues to have jurisdiction to investigate matters involving the conduct of unsworn or civilian employees of NSW Police.
- 5.8.3 ICAC has submitted that ICAC’s jurisdiction over unsworn police officers and the conduct of anti-corruption education for police should be transferred to the PIC or NSW Police.
- 5.8.4 ICAC advises that its corruption prevention and education functions are based on information and intelligence drawn from a range of sources, including complaints, reporting data, information acquired during investigations and enquiries, research activity and other intelligence.
- 5.8.5 ICAC is concerned that it is not in the best position to conduct effective prevention and education work in relation to NSW Police because it does not have access to all the sources of information due to the fact that its investigation function in relation to police have been transferred to the PIC. The contrary view was expressed by the Wood Royal Commission in the following terms:

*‘the dual role of investigation and education/prevention can involve a conflict of interest. The finding of corruption by ICAC could be suggestive of a failure of its corruption prevention and education strategies, thereby creating an incentive to ignore or trivialise, that form of conduct. Further, the tension*

<sup>129</sup> see Section 129 of the Police Integrity Commission Act 1996

<sup>130</sup> see Section 132 of the Police Integrity Commission Act 1996

*competition of resources exists wherever the same agency has discrete functions carried out by separate departments or units*.<sup>131</sup>

- 5.8.6 The PIC was established in accordance with the recommendations of the Wood Royal Commission which was established in response to ICAC's failure to uncover police corruption and organised criminal activities. The Wood Royal Commission was convinced that the PIC should not have a specific educative or corruption prevention role, as that may divert it from its primary task of active corruption investigations.<sup>132</sup>
- 5.8.7 The Wood Royal Commission recognised that education and corruption prevention strategies are of critical importance to the effective reduction of police misconduct and corruption. It envisaged that these functions, as well as research and policy development, would rest primarily with the NSW Police Service. It envisaged the role of ICAC being restricted to dealing with systems and corruption prevention issues such as tender and procurement issues about which it had specific expertise.
- 5.8.8 ICAC's jurisdiction in this regard is governed by the *Police Integrity Commission Act 1996*. I note that that Act has recently been reviewed and there were no recommendations for reform pursued by the Government.
- 5.8.9 Even if these matters were within my Terms of Reference, I would not support removing or preventing ICAC from exercising its educative and advisory roles in a manner that may involve NSW Police. As identified by the Wood Royal Commission, there may be particular areas, such as procurement or tendering, over which ICAC has specific expertise and which may be of benefit to NSW Police.
- 5.8.10 Anti-corruption education and prevention in relation to police is unlikely to be entirely effective if it is left to ICAC alone, as ICAC has limited sources of information and intelligence in relation to police. It is important for those bodies that do have access to this information, such as the PIC, the NSW Police and the Ombudsman, to ensure that it is used for anti-corruption education and prevention purposes where appropriate.
- 5.8.11 Effective anti-corruption education and prevention work requires good relationships between all these bodies, including ICAC. The ICAC Act requires ICAC to work in co-operation with such other persons and bodies as ICAC thinks appropriate in the exercise of its corruption prevention and advisory functions. I do not consider that any amendments to the Act are required to permit or foster the development of co-operative relationships in this regard.
- 5.8.12 The *Police Integrity Commission Act 1996* prevents ICAC from investigating the conduct of police officers unless the matter also involves the conduct of

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<sup>131</sup> Wood Royal Commission Interim Report, page 67

<sup>132</sup> Wood Royal Commission Interim Report, page 108



public officials who are not police officers.<sup>133</sup> A police officer is defined as a member of NSW Police holding a position which is designated under the *Police Act 1990* as a position to be held by a police officer.<sup>134</sup> In effect, this means that ICAC retains jurisdiction to investigate ‘unsworn’ or civilian officers who are employed by NSW Police.

5.8.13 ICAC has argued strongly that its jurisdiction to investigate unsworn employees of the NSW Police should be transferred to the Police Integrity Commission. ICAC notes that in most instances unsworn NSW Police employees are supervised and controlled by sworn officers and that accordingly the governance and accountability systems would be determined by sworn officers of NSW Police. On its face, ICAC’s position appears to have considerable logic.

5.8.14 Nonetheless, I do not propose to make any recommendations for change to ICAC’s jurisdiction concerning police. First, ICAC’s educative and advisory role over sworn NSW Police officers, and investigative, educative and advisory role over unsworn NSW Police officers, as referred to in the *Police Integrity Commission Act 1996*, is facilitative.<sup>135</sup> Second, given the current provisions in the *Police Integrity Commission Act 1996*, any changes to entirely remove ICAC’s jurisdiction would need to be made to the *Police Integrity Commission Act 1996* and as such are outside my terms of reference.

<sup>133</sup> *Police Integrity Commission Act 1996* s129.

<sup>134</sup> *Police Integrity Commission Act 1996* s4.

<sup>135</sup> See Part 12 of the Act.

# CHAPTER 6 - POWERS

## 6.1 Introduction

- 6.1.1 In order to carry out its function of investigating corrupt conduct, Parliament has invested ICAC with statutory powers. The primary purpose of these statutory powers is to enable ICAC to compulsorily obtain information, documents, and other things that may be relevant to an investigation.
- 6.1.2 ICAC may obtain information, documents or other things, by:
- Written notice
  - Summons
  - Arrest warrant
  - Search of public premises without warrant
  - Search warrant
  - Listening device warrant
  - Telephone intercept warrant
  - Controlled operation
  - Assumed identity.
- 6.1.3 The use of written notices, summons, arrest warrants, powers of entry and search warrants are governed by the Act. Listening devices, telephone intercepts, controlled operations and the use of assumed identities are regulated under other legislation.<sup>136</sup>
- 6.1.4 There are safeguards governing the exercise of these powers. The safeguards differ according to the nature of the power and the use to which the information obtained may be put. The powers of ICAC may, in many cases, be exercised despite common law privileges, rights and immunities such as public interest immunity and legal professional privilege. The privilege against self-incrimination may be abrogated, although where the person objects, the information may not be used in civil, disciplinary or criminal proceedings.<sup>137</sup>
- 6.1.5 The powers held by ICAC, whilst formidable, and greater in many respects than those possessed by police,<sup>138</sup> are not unique. Similar bodies throughout Australia have been granted comparable powers. See, for example, the Police Integrity Commission, NSW Crime Commission, Special Commissions of Inquiry, Royal Commissions, the Crime and Misconduct Commission (QLD), the Corruption and Crime Commission (WA), and the Australian Crime Commission.
- 6.1.6 It is pertinent to note that ICAC's investigations are primarily directed towards public officials. Although coercive powers may, in certain circumstances,

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<sup>136</sup> *Listening Devices Act 1984, Law Enforcement (Assumed Identities) Act 1998, Law Enforcement (Controlled Operations) Act 1997, and Telecommunications (Interception) Act 1979 (Cth).*

<sup>137</sup> Section 37 of the Act.

<sup>138</sup> However, officers of ICAC have fewer powers than the police in some areas. These are discussed further below.

apply to private individuals they are directed towards securing the accountability of the public sector.

## 6.2 Submissions proposing diminution of ICAC's powers

6.2.1 There were very few submissions to the review that proposed that ICAC's coercive powers should be diminished. The Council for Civil Liberties did not make a submission to the review, despite being invited to do so. The proposals made to the review for restricting ICAC's coercive powers are discussed below. This is followed by an examination of the proposals received from ICAC for expansion of their powers.

### ***Repeal of ICAC's power to issue its own search warrant***

6.2.2 In its submission, the Law Society expressed concern about the '*far reaching powers*' of ICAC. In particular, the Law Society advocated the repeal of section 40(2) of the Act which empowers The ICAC Commissioner to issue a search warrant in his or her own favour.

6.2.3 While the Act provides that that search warrants should, so far as practicable, be issued by authorised justices, The ICAC Commissioner may issue a search warrant authorising the search of any premises '*if the Commissioner thinks fit in the circumstances and if satisfied that there are reasonable grounds for doing so*'.<sup>139</sup>

6.2.4 I am advised by ICAC that this power has never been used.

6.2.5 The abolition of this power was considered by the Parliamentary Committee in its 1993 review of the Act. The Parliamentary Committee accepted that the power should be retained on the basis that '*in extraordinary circumstances the power for the Commissioner to issue his own search warrant could be an important investigative tool*'.<sup>140</sup> In doing so, the Parliamentary Committee endorsed ICAC's policy that search warrants ordinarily should be sought from authorised justices.

6.2.6 The policy of ICAC to approach an authorised justice for the issue of a search warrant is a sound one. ICAC has demonstrated its strict adherence to this policy for over fifteen years.

6.2.7 I acknowledge the argument of the Law Society that the lack of use of the power demonstrates that it could be repealed without adverse consequences. However, it is possible to foresee an extraordinary case where the power may be required, for example, where an authorised justice is not available and an

<sup>139</sup> Section 40(2), (3) of the Act.

<sup>140</sup> See Chapter 5 of the *Review of ICAC Act*.

investigation into serious allegations of corrupt conduct is likely to be irretrievably prejudiced without the warrant. The power should be retained for this purpose.

### ***Exercise of certain powers on the authority of three Judges***

- 6.2.8 Mr John Marsden, Solicitor and former President of the Council for Civil Liberties, in his submission, criticised ICAC's '*ability and authority to breach civil liberties and human rights issues by its almost Royal Commission like powers, given to it permanently under its original legislation...They are too great a power to hand to one individual.*'
- 6.2.9 Mr Marsden proposed that:  
*'ICAC should never have the right to breach an individual's civil liberties through:*  
a) *telephone taps*  
b) *taking away their right to silence*  
c) *search warrants*  
*without a decision made by three Judges, carried by the majority of those three Judges.'*
- 6.2.10 I do not support this proposal. It would improperly fetter the capacity of ICAC to investigate allegations of corrupt quickly and effectively. It would place ICAC at a distinct disadvantage compared to other investigative agencies, such as the Police Integrity Commission, the NSW Crime Commission and NSW Police.
- 6.2.11 In addition, the entitlement to apply for a telephone intercept warrant is regulated by federal legislation, not ICAC Act. ICAC, like other investigative agencies that are authorised to apply for telephone intercept warrants under the *Telecommunications (Interception) Act 1979* (Cth), must make its application to a member of the Administrative Appeals Tribunal.
- 6.2.12 I do not recommend any change to the procedures by which ICAC seeks authorisation to exercise its coercive powers.

### ***Parliamentary privilege***

- 6.2.13 The issue of Parliamentary privilege has been raised in submissions to the review in the context of ICAC's current investigation into the conduct of The Honourable Peter Breen, MLC. As part of this investigation, ICAC executed a search warrant on the Parliamentary offices of The Honourable Peter Breen.
- 6.2.14 Mr Marsden criticised ICAC for breaching Parliamentary privilege in executing this search warrant. Mr Marsden submitted that ICAC's actions were an example of '*the excesses of ICAC in this area*'. The Honourable Peter

Breen in his submission also criticised the actions of ICAC in executing the search warrant.

- 6.2.15 Parliamentary privilege is expressly preserved under the Act. Section 122 of the Act provides that *'Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings in Parliament.'*
- 6.2.16 Unlike the position in other States and the Commonwealth, there is in New South Wales no general legislative provision that defines the privileges of Parliament.
- 6.2.17 Article 9 of the Bill of Rights<sup>141</sup> 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.'*
- 6.2.18 The Bill of Rights is one of the Acts declared to apply to New South Wales pursuant to section 6 of the *Imperial Acts Application Act 1969*. The precise ambit of Article 9 as it applies to New South Wales has not been judicially determined. However, the High Court has accepted that the evident intention behind these provisions is that the constitutional norms prescribed by the Bill of Rights should apply in New South Wales.<sup>142</sup>
- 6.2.19 It follows that the privilege declared by Article 9 may not be breached by anything done by ICAC in the exercise of its functions.
- 6.2.20 In order for materials to be protected by Article 9 they must fall within the scope of 'proceedings in Parliament'. This clearly includes debates in Parliament, tabling of documents in Parliament, and proceedings of Parliamentary committees. It is less clear whether the correspondence or records of Members of Parliament are proceedings in Parliament.<sup>143</sup>
- 6.2.21 Possible breach of Parliamentary privilege by ICAC in executing the search warrant on the Parliamentary offices of The Honourable Peter Breen was first raised by the President of the Legislative Council, The Honourable Meredith Burgmann, MLC. Following the execution of the search warrant, the President wrote to ICAC objecting to the seizure of a computer and hard disk drive.<sup>144</sup> On 15 October 2003, on the motion of The Honourable Peter Breen, the Legislative Council resolved that the Standing Committee on Parliamentary Privilege and Ethics (the Privileges Committee) inquire into and report on whether the execution of the search warrant breached the immunities of the Legislative Council and what procedures should be adopted to determine whether any documents seized by ICAC were protected by Parliamentary privilege.

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<sup>141</sup> 1 Wm & Mary Sess 2 c 2.

<sup>142</sup> *Egan v Willis* (1998) 195 CLR 424 at 444-5.

<sup>143</sup> See the discussion in Campbell E *Parliamentary Privilege* Federation Press, 2003.

<sup>144</sup> Letter to ICAC dated 9 October 2003 reproduced as Appendix 2 to Report 25 *Parliamentary privilege and seizure of documents by ICAC*.

- 6.2.22 The Privileges Committee prepared two reports on the seizure of documents by ICAC from the Parliamentary offices of The Honourable Peter Breen, MLC.<sup>145</sup> The Privileges Committee found that the seizure of at least one document by ICAC in execution of the search warrant involved a breach of the immunities of the Legislative Council.<sup>146</sup> This finding was accepted and adopted by the Legislative Council on 4 December 2003. The Legislative Council subsequently adopted a procedure for the resolution of the disputed claim of privilege that recognised the Legislative Council as the appropriate forum for resolution of the issue.<sup>147</sup>
- 6.2.23 ICAC acknowledges, in its submission to the review, that Parliamentary privilege limits the exercise of its powers. However, in the execution of the search warrant over the Parliamentary offices of The Honourable Peter Breen it came into conflict with the Parliament as to the extent to which the privilege applies. There were two main areas of dispute between ICAC and Parliament, first, as to the kind of documents within the scope of ‘proceedings in Parliament’, and second, as to whether documents may be seized without questioning or impeaching proceedings in Parliament.
- 6.2.24 ICAC argued that the disputed documents fell outside the scope of ‘proceedings in Parliament’ as they were created for purposes connected with litigation. The Privileges Committee accepted that the documents were created for purposes connected with litigation. However, it adopted a broad definition of ‘proceedings in Parliament’, whereby documents could fall within ‘proceedings in Parliament’ if:
- the documents were brought into existence for the purposes of or incidental to the transacting of business in a House or Committee;
  - the documents were subsequently used for the purposes of or incidental to the transacting of business in a House or Committee; or
  - the documents were retained for the purposes of or incidental to the transacting of business in a House or Committee.<sup>148</sup>
- 6.2.25 The Privileges Committee concluded that some of the disputed documents fell within the scope of proceedings in Parliament because they were retained for purposes incidental to the transacting of business in the House.
- 6.2.26 ICAC also argued, apparently based on legal advice from the Solicitor-General, that the mere execution of a search warrant on a Parliamentary office, even over material that may relate to ‘a proceeding of Parliament’, does not give rise to a breach of Parliamentary privilege, unless and until ICAC impeaches or calls into question material that relates to a proceeding in Parliament.
- 6.2.27 The Privileges Committee accepted, based on advice from Mr Walker, SC and the Clerk of the Senate, Mr Harry Evans, that Article 9 prevents the seizure of

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<sup>145</sup> See *Parliamentary privilege and seizure of documents by ICAC* (Report 25 December 2003) and *Parliamentary privilege and seizure of documents by ICAC No 2* (Report 28 March 2004).

<sup>146</sup> Report 25 3 December 2003 *Parliamentary Privilege and seizure of documents by ICAC*.

<sup>147</sup> Report 28 Appendix 1 page 13.

<sup>148</sup> Report 28 at page 8.

documents under a search warrant where, as a natural consequence of the seizure, an impeaching or questioning of Parliamentary proceedings necessarily results.

- 6.2.28 Accordingly, the Parliamentary Committee rejected the argument of ICAC, as do I, that documents covered by Parliamentary privilege may be seized in execution of a search warrant without impeaching or questioning Parliamentary proceedings. However, ICAC's conduct in seizing the documents was not wilful and the stance that it took was arguable.
- 6.2.29 The Honourable Peter Breen submitted that ICAC, as an agent of the Executive arm of Government, ought to comply with any determination by the Parliament with regard to Parliamentary privilege. It is not in dispute that ICAC did so in this case.
- 6.2.30 A question could arise as to the role of the Courts in the event that ICAC does not accept the authority of Parliament as to Parliamentary privilege. Although it is the constitutional function of the Courts to interpret statutory provisions, the Courts have demonstrated a marked reluctance to rule on Parliamentary privilege, unless the issue is raised in a case that is otherwise properly before the Courts.<sup>149</sup> Where a known privilege is claimed, it appears that it is for the Parliament to determine the privilege, not the Courts:

*'It is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.'*<sup>150</sup>

- 6.2.31 In Queensland, the *Crime and Misconduct Act 2001* expressly provides that the Supreme Court may determine a claim of Parliamentary privilege arising in a misconduct investigation conducted by the Crime and Misconduct Commission.<sup>151</sup>
- 6.2.32 While it would be open for the New South Wales Parliament to amend the Act to take a similar approach in relation to investigations conducted by ICAC, it would amount to a significant departure from the limited role taken by the Courts in the past in deciding Parliamentary privilege. This limited role is consistent with Parliamentary democracy and I do not recommend any alteration to it.
- 6.2.33 The remaining question is how and when a claim of Parliamentary privilege is to be made. If it is right, as I think it is, that privilege (where it exists) is breached by ICAC at the point of seizure, the Parliament should be afforded an adequate opportunity to claim privilege at the time of execution of the search warrant.

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<sup>149</sup> *Crane v Gerthing* (2000) 169 ALR 727.

<sup>150</sup> *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162; cited with approval in *Egan v Willis* (1998) 195 CLR 424 at 446.

<sup>151</sup> See *Crime and Misconduct Act 2001* section 196.

- 6.2.34 The Privileges Committee recommended that the Legislative Council refer to it, for inquiry and report, the development of protocols for the execution of search warrants on Members' offices. This has not yet occurred, although the Privileges Committee did develop a protocol, followed by ICAC, for the resolution of the disputed claim of privilege in the Breen matter.
- 6.2.35 The development of protocols as recommended by the Privileges Committee would greatly assist ICAC to execute search warrants at Parliament House in a proper manner that takes into account the express preservation of Parliamentary privilege under section 122 of the Act.
- 6.2.36 ICAC has indicated its support for the development of protocols to govern the execution of search warrants at Parliament House. Whilst such protocols could be included in the Act, this is not necessary for the protocols to govern the execution of search warrants over Parliamentary offices.
- 6.2.37 As the content of the protocols is a matter for the Parliament and I have not been asked by the Parliament or any Parliamentarians to consider the issue, I do not propose to make any recommendations on the appropriate content of the protocols.
- 5.7.68 ICAC's September 2003 *Report on the Regulation of Secondary Employment of Members of the Assembly* contained a recommendation concerning the enforcement and investigation of breaches of the code of conduct where Parliamentary privilege protects the conduct from investigation by ICAC.
- 5.7.69 At recommendation 13 of this report ICAC suggested two options for consideration by the Legislative Assembly. These were to amend the Act to allow Parliament to waive privilege for specific matters referred to ICAC by resolution of the House or to appoint an officer of the Parliament on a case-by-case basis to investigate particular matters. ICAC suggested a number of provisions to safeguard the independence of the investigating official. In its submission to this review, ICAC made it clear that it preferred the latter option.
- 5.7.70 At section 5.7 of this report I propose the establishment of a Parliamentary investigator or Parliamentary Committee to investigate minor allegations of corruption involving Members of Parliament. ICAC has suggested to me that the Parliamentary investigator could also investigate serious allegations of corruption that ICAC could not investigate because of Parliamentary privilege. I agree with this suggestion.

### **6.3 Submissions proposing an expansion of ICAC's powers**

- 6.3.1 ICAC, in its submission to my inquiry, has requested certain amendments to the Act relating to its powers. Some of these proposals were considered by the



Parliamentary Committee in 2000.<sup>152</sup> Each proposed amendment requested by ICAC is dealt with below. ICAC made the only submission proposing amendments to the Act to support an expansion of ICAC's coercive powers.

### ***Police powers of arrest, search and seizure etc***

- 6.3.2 In its original submission to the review, ICAC sought the conferral of certain police powers on officers of ICAC who had previously served five years as a member of a police force. ICAC sought the police powers to stop, search, seize, detain, arrest, and convey firearms and narcotics for testing, analytical and evidentiary purposes.
- 6.3.3 Civilian officers of ICAC cannot currently exercise the functions of a police constable. Police officers seconded to ICAC can exercise police powers.<sup>153</sup> ICAC advised that when it was first established it employed a significant number of seconded NSW police officers. It now only has two seconded NSW police officers in its employ.
- 6.3.4 ICAC advised that the lack of police powers:  
*'can impede the proper planning of operations where police powers are needed. It inhibits full operational flexibility by requiring planning of operations to be dependent on the availability of seconded police officers or the availability of NSW police officers to undertake joint operations.'*
- 6.3.5 ICAC was not able to provide any instance where the integrity of an investigation was compromised by the absence of police powers. Rather, ICAC emphasised that the lack of police powers made it more difficult for ICAC to conduct its investigations.
- 6.3.6 ICAC made a similar request for the conferral of police powers on civilian officers to the Parliamentary Committee in 2000. This request was rejected by the Parliamentary Committee. In doing so, it noted that:  
*'vesting non-police officers with police powers is a significant step. The anecdotal evidence provided by the Commission of the impact on ICAC operations has failed to persuade the Committee that conferring police powers on ICAC investigators is an appropriate response at this stage.'*<sup>154</sup>
- 6.3.7 ICAC has likewise failed to persuade me of the need to confer police powers on civilian officers. Police powers involve the lawful coercion of private citizens. The precise scope of their powers and immunities are ill-defined. It is unlikely to be in the public interest to confer police powers on non-police officers unless there is good reason for doing so. It is my view that arrests and

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<sup>152</sup> In 2000, ICAC wrote to the Parliamentary Committee seeking its support for a number of proposed amendments to the Act concerning ICAC's powers: see Parliamentary Committee Report on *Consideration of Proposed Powers* 19 October 2000.

<sup>153</sup> Section 101B and section 105 of the Act.

<sup>154</sup> See page 13 of the report.

searches of individuals not undertaken pursuant to the citizen's power of arrest, should be carried out with police involvement.

- 6.3.8 The Act requires ICAC to exercise its investigative functions, so far as practicable, in co-operation with law enforcement agencies.<sup>155</sup> Where an investigation may necessitate the exercise of police powers, it is proper for the investigation to be conducted in co-operation with the police.
- 6.3.9 In my draft report I recommended against the conferral of police powers on civilian officers of ICAC. In its comments on my draft recommendations, ICAC indicated that it supported this recommendation. The current Commissioner of ICAC, the Honourable Jerrold Cripps, QC, has confirmed to me that ICAC does not at this stage seek to pursue amendments to the Act to confer police powers on its civilian officers.

**Recommendation R6.1:** That the police powers to stop, search, seize, detain, arrest, and convey firearms and narcotics for testing, analytical and evidentiary purposes not be conferred upon civilian officers of ICAC.

### ***Urgent listening device warrants***

- 6.3.10 ICAC has requested that its officers be given the power to make a telephone application for an urgent listening device warrant under section 18 of the *Listening Devices Act 1984*.
- 6.3.11 ICAC advises in its submission that:  
*'In two current operations the Commission was unable to obtain an urgent listening device warrant and thereby lost a valuable opportunity to obtain evidence of corrupt conduct.'*
- 6.3.12 The power to make an application for a listening device warrant is conferred on ICAC by section 19(2) of the Act. However, the power to obtain an urgent listening device warrant by telephone is restricted to police officers.<sup>156</sup> ICAC officers who are not seconded police officers therefore cannot make such an application.
- 6.3.13 The power to seek an urgent listening device warrant is similar to the power already held by ICAC to seek an urgent telephone intercept warrant under the *Telecommunications (Interception) Act 1974* (Cth). No submissions to the review have made any specific complaint about the exercise of this power by ICAC.
- 6.3.14 The extension of the power to obtain a listening device warrant by telephone to ICAC officers was supported by the Parliamentary Committee in its 2000 report,<sup>157</sup> on the proviso that an Inspector of ICAC was established to

<sup>155</sup> Section 16 of the Act.

<sup>156</sup> See section 18 of the *Listening Devices Act 1984*.

<sup>157</sup> *Report on Consideration of Proposed Powers* 19 October 2000.

oversight the exercise of ICAC’s coercive powers.<sup>158</sup> I concur with the Parliamentary Committee’s recommendation.

- 6.3.15 ICAC has suggested that this recommendation need not be conditional on the establishment of an Inspector of ICAC as the warrant can only be granted where a Judge is satisfied of the urgency, the warrant can only be in force for a period of up to twenty-four hours and the reporting requirements under the *Listening Devices Act 1984* apply equally to urgent warrants.
- 6.3.16 While I acknowledge that these matters are correct, I am reluctant to support increasing ICAC’s powers in the absence of any external oversight of the exercise of these powers. Police officers, who are currently the only persons who can apply under the *Listening Devices Act 1984* for an urgent listening device warrant by telephone, are subject to oversight in the exercise of their powers by the Ombudsman and the Police Integrity Commission.
- 6.3.17 The power to obtain an urgent listening device warrant by telephone should only be exercised by senior ICAC investigators. The Act confers special powers on A ‘senior Commission investigator’ is defined in the Act as ‘*an officer of the Commission who is designated by the Commissioner as a senior investigator and who is issued by the Commissioner with means of identification as such a senior Commission investigator.*’<sup>159</sup> The power to search certain persons during the execution of a search warrant is conferred only on police officers or senior Commissioner investigators.<sup>160</sup>

**Recommendation R6.2:** That, upon the establishment of the Inspector of ICAC, senior ICAC investigators be permitted to apply for urgent listening device warrants by telephone.

### ***Disposal of property***

- 6.3.18 ICAC has sought an amendment to the Act to permit it to dispose of unclaimed property in accordance with the directions of a Court.
- 6.3.19 During its investigations, ICAC may come into possession of monies and items of property from a number of sources, one of which is the execution of search warrants. I have been advised by ICAC that there have been a number of instances where ICAC has obtained monies or property during the course of an investigation, but has been unable to locate any rightful owner to whom the property should be returned at the conclusion of the investigation.
- 6.3.20 Section 47(2)(b) of the Act provides that ICAC may deliver the property to the Attorney General or the Director of Public Prosecutions with a recommendation as to what action should be taken in relation to it. However, this provision only applies to things seized pursuant to a search warrant, and it

<sup>158</sup> As to the Inspector see chapter 7.

<sup>159</sup> Section 41(3) of the Act.

<sup>160</sup> Section 41(2) of the Act.

appears to be directed towards items that might be used in a prosecution, rather than all unclaimed monies and property.

- 6.3.21 There are a number of other statutory provisions governing the disposal of unclaimed monies and property. However these provisions do not apply to ICAC.
- 6.3.22 Under Part 6 of the *Criminal Procedure Act 1986*, any person may make an application to the Court for return of property in police custody in connection with an offence. Following determination of the proceedings to which the property relates, unclaimed money may be transferred to the Treasury Consolidated Fund and other unclaimed property may be sold at public auction.<sup>161</sup> A person lawfully entitled to the property may recover the money or proceeds of sale from the Treasurer.<sup>162</sup> These provisions only apply to property held by police in connection with an offence.
- 6.3.23 Upon the commencement of the *Law Enforcement (Powers and Responsibilities) Act 2002* Part 6 of the *Criminal Procedure Act 1986* will be repealed and replaced. The provisions under the *Law Enforcement (Powers and Responsibilities) Act 2002* are in similar terms to Part 6. However, they will extend the jurisdiction of the Court to make directions for the disposal of 'property that is lawfully in the custody of a police officer or member of NSW Police other than in connection with an offence'.<sup>163</sup>
- 6.3.24 Section 7(3) of the *Search Warrants Act 1985* permits a Court to make directions concerning the disposal of items seized pursuant to a search warrant. However, this provision does not apply to search warrants issued under ICAC Act.
- 6.3.25 The Police Integrity Commission (Amendment) Bill 2004 contains a provision to permit the Police Integrity Commission to apply to a Local Court for directions as to the disposal of documents or things obtained pursuant to a search warrant where there is no person entitled to possession of the document or things. This provision has been introduced to permit the destruction of inadmissible or illegal material (such as drugs and child pornography) dating back to the Wood Royal Commission.<sup>164</sup> This provision is insufficient for ICAC's purposes as it only applies to documents or things obtained pursuant to a search warrant.
- 6.3.26 The Parliamentary Committee noted in its 2000 report<sup>165</sup> that ICAC 'needs a practical means of dealing with seized money.' It recommended that the provisions of Part 6 of the *Criminal Procedure Act 1986* be amended to apply to property in the custody of ICAC connected with an offence. This recommendation has not been implemented.

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<sup>161</sup> Section 320 of the *Criminal Procedure Act 1986*.

<sup>162</sup> Section 321 of the *Criminal Procedure Act 1986*.

<sup>163</sup> Section 216.

<sup>164</sup> Minister's Second Reading Speech *Hansard* Legislative Assembly, 16 September 2004.

<sup>165</sup> *Consideration of Proposed Powers* 19 October 2000.

- 6.3.27 A potential problem with this recommendation is its restriction to property in the custody of ICAC in connection with an offence. Property may lawfully come into the custody of ICAC for the purpose of an investigation into allegations of corrupt conduct. Corrupt conduct may involve an offence, but this is not necessarily so.<sup>166</sup>
- 6.3.28 Clearly, ICAC needs a means by which it can deal with unclaimed monies and other property. ICAC should be given the power to apply to a Court for a direction as to the disposal of property, where:
- The property is lawfully in the custody of ICAC in connection with an investigation.
  - The property is not required for the purpose of an investigation or other proceedings (such as a criminal prosecution or disciplinary proceedings).
  - There is no person who appears to be lawfully entitled to the property.
- 6.3.29 The provisions of Part 6 of the *Criminal Procedure Act 1986* (or the *Law Enforcement (Powers and Responsibilities) Act 2002* when commenced) should be adapted for the purpose of these applications.

**Recommendation R6.3:** That ICAC be given the power to apply to a Court for a direction as to the disposal of property, where:

- The property is lawfully in the custody of ICAC in connection with an investigation.
- The property is not required for the purpose of an investigation or other proceedings (such as a criminal prosecution or disciplinary proceedings).
- There is no person who appears to be lawfully entitled to the property.

**Recommendation R6.4:** That the provisions of Part 6 of the *Criminal Procedure Act 1986* (or, if commenced, Part 17 Division 2 of the *Law Enforcement (Powers and Responsibilities) Act 2002*) be adapted, so far as practicable, to apply to the disposal of property on application by ICAC to the Court.

### ***Statements of information from non-public officials***

- 6.3.30 ICAC seeks to extend the application of its power to issue a written notice requesting information from a public official to include non-public officials.
- 6.3.31 Under section 21 of the Act, ICAC has the power, by notice in writing, to require a ‘statement of information’ from a public authority or public official.<sup>167</sup> ICAC has a similar power to require the production of documents or other things, although this power is broader as the written notice may be issued to any person.<sup>168</sup> It is an offence to fail to comply with a written notice issued by ICAC.<sup>169</sup>

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<sup>166</sup> See section 9 of the Act.  
<sup>167</sup> Section 21 of the Act.  
<sup>168</sup> Section 22 of the Act.  
<sup>169</sup> See sections 82 and 83 of the Act.

- 6.3.32 ICAC advises that it often uses the power to require a ‘statement of information’ to obtain details of a person’s financial situation so that ICAC can prepare a financial profile, without requiring the person to produce original documentation such as bank statements.
- 6.3.33 ICAC has requested that this power be extended to persons who are not public officials. ICAC argues that this amendment would benefit non-public officials as it would:
- Avoid the need for non-public officials to produce original documentation.
  - Reduce the need for non-public officials to be called as witnesses to give evidence.
- 6.3.34 I have not been persuaded that these reasons justify extending the compulsive powers held by ICAC over non-public officials. If a non-public official would prefer to provide a ‘statement of information’ than to be called as a witness or produce original documentation, presumably he or she would voluntarily comply with a request from ICAC. There is no need for a statutory expansion in powers in order to benefit non-public officials.
- 6.3.35 The Parliamentary Committee also rejected a similar request from ICAC in 2000.<sup>170</sup>

**Recommendation R6.5:** That the power to issue a statutory notice under section 21 of the Act for the production of a statement of information to ICAC not be extended to non-public officials.

### ***Statutory power to enter premises***

- 6.3.36 ICAC has requested amendments to the way in which certain privileges apply to the exercise of its statutory power of entry under section 23 of the Act.
- 6.3.37 Under section 23 of the Act, ICAC has the power to enter and inspect premises used or occupied by a public authority or public official and take copies of any document found at the premises. No prior notice or warrant is required.
- 6.3.38 This power can be exercised quickly without the need to obtain authorisation or for there to be a threshold belief or suspicion about the existence of documents on the premises to be searched. Certain privileges restrict the exercise of this power by ICAC. Section 25 of the Act provides:

(1) This section applies to the powers of entry, inspection and copying conferred by section 23.

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<sup>170</sup> See *Consideration of Proposed Powers* 19 October 2000.

- (2) The powers shall not be exercised if it appears to the Commissioner or authorised officer that any person has a ground of privilege whereby, in proceedings in a court of law, the person might resist inspection of the premises or production of the document or other thing and it does not appear to the Commissioner or authorised officer that the person consents to the inspection or production.
- (3) The powers may however be exercised despite:
- (a) any rule of law which, in proceedings in a court of law, might justify an objection to an inspection of the premises or to production of the document or other thing on grounds of public interest, or
  - (b) any privilege of a public authority or public official in that capacity which the authority or official could have claimed in a court of law, or
  - (c) any duty of secrecy or other restriction on disclosure applying to a public authority or public official.

6.3.39 The privileges protected by section 25(2) are not enumerated. In enacting this provision it appears that the legislature intended to protect privilege (other than those expressly referred to in section 25(3)) whenever it may apply, without defining when the privileges would apply. Section 25(2) may preserve legal professional privilege (subject to section 25(3)(b)) and the privilege against self-incrimination.

6.3.40 ICAC is of the view that *'the uncertainty of meaning created by the language of section 25 may operate to severely restrict the usefulness of a section 23 inspection.'*

6.3.41 ICAC suggests that the Act should be amended so that it is not required to cease exercising its statutory power of entry whenever a privilege may apply. To balance the rights of individuals, ICAC suggests that any documents that it inspects or copies under a section 23 inspection could be subject to a use-immunity similar to that provided in section 26 of the Act.

6.3.42 Section 26 of the Act provides that a person may voluntarily produce a statement, document or thing requested by ICAC in a statutory notice issued by ICAC and section 21 or section 22 of the Act, and, as long as the person 'objects' to production it cannot be used in any proceedings against the person, except for an offence against the Act. It may be used for the purpose of the investigation. This is known as a use-immunity. The Act does not extend the use-immunity available for documents produced under statutory notices to documents obtained under the section 23 inspection.

6.3.43 The extent to which the privilege against self-incrimination might prevent ICAC from inspecting or copying documents under its statutory power of entry has not been judicially determined. It is clear to me, however, that section 25(2) does not prevent ICAC from obtaining any incriminating documents or things pursuant to the exercise of the statutory power of entry.

6.3.44 I am not persuaded that the privileges preserved by section 25(2) should be removed, nor that a use-immunity should be extended to a section 23 inspection. The use-immunity could potentially apply to more documents than

that which the privilege against self-incrimination applies. If the use immunity were extended to section 23 inspections, practical problems would arise as to its application, for example, how and when an objection could be made. ICAC may not know in advance the nature of the documents provided (thus giving a person a broader use-immunity than may be desirable).

- 6.3.45 ICAC has other means by which it might obtain incriminating documents. It could obtain a search warrant, in which case the use-immunity would not apply to things seized. Alternatively, a notice to produce or summons could be issued for the production of the incriminating documents. The use-immunity would then apply. If it is not practical to issue a notice or seek a search warrant, ICAC could advise the affected person that it proposes to recommend to the Attorney General that a person be granted an indemnity from prosecution or an undertaking that certain documents will not be used in evidence against the person. ICAC has the power to make such a recommendation under section 49 of the Act.

**Recommendation R6.6:** That the privileges preserved by section 25(2) in relation to the exercise of ICAC's power of entry under section 23 remain and that the use immunity under section 26 of the Act that applies to statements, documents or things obtained under objection (following a notice issued under section 21 or section 22) not be extended to documents or things obtained pursuant to the statutory power of entry.

## 6.4 Coercive Powers - Conclusion

- 6.4.1 The potential for misuse of the coercive powers granted to ICAC under the Act was a major focus of the Parliamentary debates on the establishment of ICAC.<sup>171</sup> In 1993, the Parliamentary Committee concluded that:

*'It is generally accepted that the grave concerns about ICAC's possible misuse of its coercive powers have proved to be groundless.'*<sup>172</sup>

- 6.4.2 Little appears to have occurred in the eleven years that have elapsed that would warrant a revision of the Parliamentary Committee's conclusion. Relatively few submissions to the review complained about misuse of investigative powers by ICAC. I am satisfied that ICAC's powers are appropriate to meet its objectives.

<sup>171</sup> See, for example, *Hansard* Legislative Assembly 31 May 1988 at page 822.

<sup>172</sup> *Review of ICAC Act*, Parliamentary Committee, May 1993 at paragraph 5.1.3.



- 6.4.3 However, should there have been undetected misuses of power in the past, the establishment of an Inspectorate as proposed in chapter 7, should significantly reduce the possibility of such misuse not being detected in the future.

## 6.5 Hearings

### *Introduction*

6.5.1 For the purposes of an investigation, ICAC may hold hearings.<sup>173</sup> The provisions governing ICAC hearings are found in Part 4 Division 3 of the Act.

6.5.2 When the Act was first introduced, there was a general presumption that hearings would be held in public. Section 31 originally provided:

- (1) A hearing shall be held in public, unless the Commission directs that the hearing be held in private.
- (2) If the Commission directs that a hearing be held in private, the Commission may give directions as to the persons who may be present at the hearing.
- (3) At a hearing that is held in public, the Commission may direct that the hearing or a part of the hearing be held in private and give directions as to the persons who may be present
- (4) The Commission shall not give a direction under this direction under this section that a hearing or part of a hearing be held in private unless it is satisfied that it is desirable to do so in the public interest for reasons connected with the subject-matter of the investigation or the nature of the evidence to be given.

6.5.3 In 1991, the Act was amended to give effect to the recommendations of the Parliamentary Committee that ICAC be given greater discretion to determine whether to hold a hearing in public or private.<sup>174</sup> Section 31 of the Act now provides that a hearing may be held in public or private, as decided by ICAC. In making this decision, ICAC is required to have regard to the public interest. The current section 31 is reproduced below:

- (1) A hearing may be held in public or in private, or partly in public and partly in private, as decided by the Commission.
- (2) Without limiting the above, the Commission may decide to hear closing submission in private. This extends to a closing submission by a person appearing before the Commissioner by a legal practitioner representing such a person, as well as to a closing submission by a legal practitioner assisting the Commission as counsel.
- (3) In reaching these decisions, the Commission is obliged to have regard to any matters which it considers to be related to the public interest.
- (4) The Commission may give directions as to the persons who may be present at a hearing when it is being held in private. A person must not be present at a hearing in contravention of any such directions.

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<sup>173</sup> Section 30(1) of the Act.

<sup>174</sup> These recommendations followed the *Inquiry into Commission Procedures and Rights of Witnesses* conducted by the Parliamentary Committee in 1990. See the discussion in Chapter 3 of the Parliamentary Committee's *Review of ICAC Stage III The Conduct of ICAC Hearings* June 2002.

- 6.5.4 These amendments empowered ICAC to hold ‘private’ hearings more readily. These hearings might be hearings held in the presence of affected persons, to the exclusion of the public (in the manner of a ‘closed’ Court where hearings are held in camera). More frequently, these private hearings consist of little more than a private interview between the presiding Commission, Counsel assisting, the person interviewed and his or her legal practitioner.
- 6.5.5 In 2002, the conduct of ICAC hearings was again examined by the Parliamentary Committee in its *Review of ICAC Stage III The Conduct of ICAC Hearings*.<sup>175</sup>
- 6.5.6 In this report, the Parliamentary Committee noted the relative decline in the use of public hearings following the 1991 amendments to the Act. As an example, the number of public hearings days fell from 193 in 1992 to 45 in 2002.
- 6.5.7 The Parliamentary Committee’s analysis also demonstrated that the total number of hearing days is declining. This may reflect the increased importance ICAC is placing on obtaining evidence from other means, for example, covert surveillance, induced statements, rather than coerced evidence.

### ***Role of hearings***

- 6.5.8 Section 30 of the Act states that ICAC may hold hearings for the purposes of an investigation. The significance of holding a hearing is threefold. ICAC may override the privilege against self-incrimination at a hearing. It may conduct the hearing in public and it must prepare a report to Parliament in relation to matters as to which it has conducted a public hearing.<sup>176</sup>
- 6.5.9 In its submission to the Parliamentary Committee’s inquiry in 2002 ICAC ‘argued that it no longer regards public hearings as the primary or ‘most effective’ investigative tool available to it, as the Commission previously stated in the 1990 Annual Report. Rather ICAC indicated that it now regards public hearings as only one of the investigative tools available in the investigative repertoire of the Commission.’<sup>177</sup>
- 6.5.10 ICAC acknowledged in its submission to this review that ‘The role and significance of public hearings has evolved over the history of the Commission....Much of the initial controversy about the Commission’s hearing functions has subsided over time, in the face of familiarity and evolving practice. The lack of public controversy regarding Commission hearings may also reflect the reduced reliance that the Commission now places on public hearings as an investigative tool.’

<sup>175</sup> Report No 8/52<sup>nd</sup> Parliament.

<sup>176</sup> Section 74 of the Act.

<sup>177</sup> Report No 8/52<sup>nd</sup> Parliament at page 42-3.

- 6.5.11 Despite ICAC's view that the controversy about its hearing functions has subsided over time, it was a matter raised in several submissions to this review.
- 6.5.12 The Parliamentary Committee stated that *'all initial investigations by the commission should be in private so that avenues of inquiry that proved baseless but which could damage reputations would be examined and discarded without unjustly damaging the reputation of individuals.'*
- 6.5.13 ICAC appears to agree with this view. In its supplementary submission, ICAC asserts that *'the contention that the Commission uses public hearings at the initial stages of an investigation of an allegation or complaint is an erroneous one. Very few matters investigated by the Commission utilise the power to conduct public hearings as part of the initial investigation. In those matters where they are held, they are conducted as the final stage of an investigation and concentrate on specific issues that have been refined during preceding investigative stages.'*
- 6.5.14 In the course of my enquiries, a number of submissions have been made concerning the nature of the investigative function to be undertaken by ICAC and to what I describe as the adverse effects of its investigative function becoming judicialised by the presence of lawyers and the way in which the investigation proceeds in public.
- 6.5.15 ICAC is an administrative body charged with the duty (amongst others) of investigating allegations of corrupt conduct and making findings as to the truth of the allegations. It is not a court of law. Nor is it an administrative body established to act as a court of law (as is not infrequently the case with administrative tribunals).
- 6.5.16 ICAC is authorised to investigate in public. When it does so, what takes place is referred to as a 'public hearing'. In the context of ICAC legislation, a 'public hearing' is simply part of the investigating process.
- 6.5.17 It should not be understood as an aspect of the criminal justice system in which courts of law determine the guilt or non-guilt of a person charged with a criminal offence by what takes place at the public hearing (ie the trial) in the context of legally admissible evidence, the presumption of innocence, the criminal standard and onus of proof etc.
- 5.8.15 My inquiries have led me to the conclusion that successive Commissioners have well recognised the inquisitorial nature of the 'public hearings'. That is to say, they have led me to the view that the 'public hearings' are not conducted as though they were criminal trials although the contrary appears to be the perception of some. Hearings are conducted for the purpose of an investigation. They do not perform a similar function to hearings conducted by a Court of law. It is important, I believe, that the legislation accurately reflects what ICAC actually does and is intended to do. The use of the word 'hearing' is liable to confuse.

6.5.18 In my opinion, the terms of the Act and the way in which ICAC discharges its investigative function should make it clear that what is being undertaken by ICAC is an administrative investigative function and not a judicial or quasi-judicial activity.

### ***Private hearings***

6.5.19 Most people associate the term ‘private hearing’ with judicial proceedings held in camera with relevant affected parties present, but not the general public. ‘Private hearings’ as referred to in the Act are nothing of the sort. They are, in effect, compulsory interviews conducted as part of the investigative function of ICAC.

6.5.20 In its written submission to the Parliamentary Committee’s *Stage III Review The Conduct of ICAC Hearings*, the NSW Bar Association argued for reform of ICAC hearings process to be accompanied by the drawing of a legislative distinction between a compulsory private interview conducted with section 38 protection outside of the hearings process, and an otherwise public hearing that is closed to the public for a particular purpose. The NSW Bar Association argued that the ability of ICAC to conduct compulsory interviews without first conducting a formal hearing would greatly enhance the investigative capacity of ICAC.

6.5.21 The NSW Bar Association has not made a submission to this review, although it has confirmed that it adheres to the views expressed in its submission to the Parliamentary Committee in 2002.

6.5.22 I am of the view that the Act should be amended to expressly permit ICAC to conduct compulsory examinations. These examinations would be conducted in private and be accompanied by the same powers and protections that currently apply to so called private hearings.

6.5.23 ICAC would be able to compel answers to questions and the production of documents. Evidence obtained compulsorily and under objection would not be available for use in criminal or disciplinary proceedings. The private examination would be on oath, conducted by ICAC Commission or an Assistant Commissioner. The person to be interviewed would be able to obtain legal advice and representation.

6.5.24 ICAC’s power to obtain voluntary (or induced) statements would not be affected by these provisions.

**Recommendation R6.7:** That the Act be amended to rename ICAC’s power to conduct private hearings as a power to conduct compulsory examinations. Compulsory examinations would be conducted for the purposes of an investigation, where ICAC is satisfied that it would be in the public interest to do so. Compulsory examinations would be conducted in private and on oath by The ICAC Commissioner or an Assistant Commissioner and carry the protections for affected persons that currently apply to private hearings.

### ***Public hearings***

- 6.5.25 I do not agree, as some have argued, that public hearings are unnecessary or that the power to hold them should be removed. Quite the contrary, in my opinion, public investigations are indispensable to the proper functioning of ICAC. This is not only for the purpose of exposing reasons why findings are made, but also to vindicate the reputations of people, if that is appropriate, who have been damaged by allegations of corruption that have not been substantiated. Moreover, if issues of credibility arise, it is, generally speaking, preferable that those issues are publicly determined.
- 6.5.26 Rather than the power to hold a public hearing, it may be more accurate to empower ICAC to hold a ‘public inquiry’. At one level this is merely a change of nomenclature to reflect more accurately the role and nature of ICAC’s hearing function.
- 6.5.27 It is hoped, however, that the change will achieve more than that. The change in nomenclature emphasises the inquisitorial nature of the investigation. It may, over time, encourage those involved in such inquiries, such as counsel assisting and other legal practitioners, to discard inappropriate adversarial tactics and techniques.
- 6.5.28 The hearing is the culmination of the investigation. The presiding Commissioner is the chief investigator. The point being to determine whether corrupt conduct has occurred and, if so, what needs to be done about it, not whether ICAC can prove beyond reasonable doubt that a person is guilty of a corruption offence.
- 6.5.29 If it is accepted that ICAC’s powers to conduct public and private hearings should be replaced with the power to conduct public inquiries and private examinations, consideration needs to be given to the circumstances in which these powers may be exercised.
- 6.5.30 Consistent with the provisions applying to private hearings, ICAC might be empowered to hold a private examination for the purposes of an investigations and when it is in the public interest to do so.
- 6.5.31 I have given careful consideration to whether the Act should define the circumstances in which a public inquiry might be held. Undoubtedly, this is one of the most controversial decisions that ICAC may make. Once ICAC holds its investigation in public, it must prepare a report to Parliament on the matter.<sup>178</sup>
- 6.5.32 Once the power to conduct a private interview is separated from the power to hold a public inquiry, it may be appropriate for the Act to provide guidance on

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<sup>178</sup> See section 74 of the Act.

when a public inquiry may be held. This will avoid creating a return to the presumption that all investigations should be conducted in public.

- 6.5.33 I do not recommend that an exhaustive list of considerations be included in the Act on the basis that this would be an unnecessary fetter on ICAC's discretion. Such a prescriptive list may prove inadequate and may invite litigation (which would be undesirable given the purpose and role of hearings).
- 6.5.34 In my view, public inquiries should only be held for the purpose of an investigation where ICAC is satisfied that it would be in the public interest to do so, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements. This is in general agreement with what I understand to be ICAC's current practice in holding public hearings, and reflects similar provisions that apply to the Corruption and Crime Commission in Western Australia.
- 6.5.35 ICAC supports these proposals but:
- suggests that all hearings be referred to as examinations; and
  - opposes any prescription of the factors to be taken into account when determining whether hearings should be held in public.
- 6.5.36 ICAC is concerned that use of the term 'public inquiry' may *'unnecessarily add to the erroneous perception that the Commission uses its public hearing function to effectively conduct its investigations and inquiries in a public manner without undertaking the necessary preparatory investigative work that in fact underlies those public hearings.'*
- 6.5.37 I believe that the term 'public inquiry' more strongly connotes the inquisitorial process in which ICAC is engaged than the term 'public examination'. Public inquiry is a term that is increasingly used to describe the kind of investigation engaged in by ICAC, for example, in relation to inquiries held under the *Environmental Planning and Assessment Act 1979* and inquiries held under section 740 of the *Local Government Act 1993*.
- 6.5.38 Nonetheless, the important point is to move away from the term 'hearing' which carries the erroneous connotation that ICAC investigation is akin to the hearing process undertaken by a Court of law. While I prefer the term 'public inquiry' to that of 'public examination', either would be an improvement to the use of the term 'hearing'.
- 6.5.39 The Police Integrity Commission, which has a similar power to hold hearings to that of ICAC, does not share this view. The Commissioner of the Police Integrity Commission has submitted that:
- 'It is possible that the suggested terms might be misunderstood to indicate an isolated enquiry or interview as compared to a process of information gathering for the purpose of furthering an investigation. This is a misconception the Commission is at pains to avoid when it uses its hearing powers.'*

6.5.40 I do not agree that the suggested terms are likely to have this effect. This misconception, should it arise, is more likely to be a consequence of holding an investigation partly in private and partly in public. It can be redressed by clear statements during the public part of the investigation.

**Recommendation R6.8:** That the Act be amended to rename ICAC’s power to conduct public hearings as a power to hold public inquiries. Public inquiries would be held for the purpose of an investigation, where ICAC is satisfied that it would be in the public interest to do so, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements. The powers and privileges that currently apply to public hearings would apply to public inquiries. A public inquiry could be closed to the public for a particular purpose (for example, to hear closing submissions in private).

### ***Particulars***

6.5.41 A person appearing before ICAC at a public or private hearing is entitled to be informed of the general scope and purpose of the hearing.<sup>179</sup>

6.5.42 Some submissions to the review have complained that this provision is insufficient for the affected person to be advised adequately about the nature of the allegation that he or she may be facing.

6.5.43 Burwood Council has suggested that the Act should be amended to introduce a presumption that ICAC is to inform an affected person of the allegations against them at the commencement of the investigation of the allegations and provide the affected person an opportunity to respond to this information by way of submission. This requirement would be subject to certain exceptions, for example, if informing the affected person may jeopardise ICAC’s investigation.

6.5.44 Burwood Council is concerned that the current legislative scheme unduly compromises the affected person’s civil liberties and causes significant ‘*stress, disruption and loss of confidence*’.

6.5.45 Investigation by ICAC is unlikely to be a pleasant experience, and even more so when the affected person is uncertain as to the extent and nature of the investigation or whether and if so, what, allegations have been made against him or her.

6.5.46 Nonetheless the requirement to provide particulars to an affected person is not one that I support. It imports an adversarial framework that does not sit

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<sup>179</sup> Section 30(4) of the Act.



comfortably with ICAC's inquisitorial focus. It may generate an unacceptable risk of litigation, especially if ICAC routinely declines to proffer particulars on the basis that to do so would jeopardise an investigation. It may be impractical in many circumstances, for example, where a person is only prepared to make a statement to ICAC under protection of the use-immunity that applies to hearings, ICAC would not be in a position to know in advance the nature of the allegation.

- 6.5.47 As the rules of procedural fairness apply to ICAC, ICAC is required to. The common law requirements of procedural fairness (which oblige ICAC to put an allegation to an affected person before making a finding against him or her), in combination with the statutory obligation on ICAC to state the general nature and scope of the hearing, are in my view sufficient to ensure fairness to an affected person. I make no recommendation for change to the particulars that ICAC is required to provide to a person appearing before an ICAC hearing or otherwise subject to investigation by ICAC.

# CHAPTER 7 – ACCOUNTABILITY

## 7.1 Summary

- 7.1.1 The Parliamentary Committee reviewed the accountability of ICAC in 2000.<sup>180</sup> It concluded that the accountability regime that applies to ICAC is deficient because it fails to provide for accountability in the exercise of ICAC's compulsive powers. No person or body has responsibility for investigating complaints that ICAC or its officers have misused powers.
- 7.1.2 The Parliamentary Committee, in its 2000 report, recommended the establishment of an independent Inspector of ICAC, modelled on the Inspector of the Police Integrity Commission. After reviewing the Parliamentary Committee's report, and conducting my own inquiries, I support the establishment of an independent Inspector of ICAC.
- 7.1.3 ICAC acknowledges that there is a '*serious gap in its accountability*'<sup>181</sup> and supports the establishment of an Inspector. In doing so, it argues for the abolition of the Operations Review Committee, which is an advisory body established under the Act. Submissions to the review overwhelming support this approach.
- 7.1.4 I am of the view that the Inspector is a superior form of accountability to the Operations Review Committee because of its independence, proactive role in auditing and reviewing ICAC's powers and procedures, and its capacity to receive complaints from the public about misconduct by ICAC. Proper accountability does not require them both.
- 7.1.5 The Inspector would not perform the Operations Review Committee's function of reviewing all decisions of ICAC not to investigate, or to discontinue investigation of a complaint. However, a requirement for ICAC to provide reasons to complainants would provide a proper alternative safeguard.
- 7.1.6 Some submissions to the review have suggested that findings of ICAC should be subject to a full merits review. I have not been persuaded that this proposal should be accepted. To give effect to it, it would be necessary for another independent body of greater standing than ICAC to re-examine findings of fact made by ICAC. Were this right to be exercised routinely, it could prove to be a costly proposal of dubious benefit, given the capacity of the Supreme Court to review findings of ICAC on the administrative law grounds of illegality, irrationality, or procedural unfairness, and the ability of the proposed Inspector to investigate allegations of misconduct by ICAC.

## 7.2 Importance of accountability

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<sup>180</sup> ICAC: *Accounting for Extraordinary Powers* (May 2000) Report No 2/52<sup>nd</sup> Parliament.

<sup>181</sup> ICAC submission to the review.

- 7.2.1 Parliament has entrusted ICAC with extensive coercive powers. These powers are essential for ICAC to carry out its investigative functions effectively.<sup>182</sup> However, these powers have the potential to infringe the fundamental liberties, privileges and immunities of citizens. Whilst it is important that ICAC should be able to make use of these powers for the purposes of an investigation into alleged corrupt conduct, ICAC should not be able to exercise those powers unchecked. Many submissions to the review, including those from ICAC itself, have stressed the importance of ensuring that ICAC is accountable for the exercise of its coercive powers.
- 7.2.2 Parliament has vested in ICAC significant discretion in the exercise of its functions. Whilst this broad discretion enhances ICAC's capacity to investigate, expose, and prevent corrupt conduct, it is equally important that ICAC is not permitted to exercise this broad discretion with impropriety and the possibility that it might do so is minimised.
- 7.2.3 Due to the nature of ICAC's functions and jurisdiction, Parliament has given ICAC statutory independence from the Executive, and to a lesser extent, from Parliament itself. Unlike most other public authorities, ICAC is not subject to Ministerial direction and control. As a consequence, no Minister is responsible to Parliament for the exercise of ICAC's functions.
- 7.2.4 ICAC's status as an independent agency charged with the responsibility of improving the integrity of public administration makes it even more important for ICAC to follow good administrative practice and to be accountable for the discharge of its functions. External scrutiny enhances the public's confidence in ICAC and helps to ensure that ICAC is properly responsive to the public interest.

### 7.3 Current accountability mechanisms

#### *Introduction*

- 7.3.1 The accountability of ICAC was comprehensively examined by the Parliamentary Committee in 2000 in its report *ICAC: Accounting for Extraordinary Powers*.<sup>183</sup> I am advised that there has been no formal Government response to this report.
- 7.3.2 The Act provides for the following accountability mechanisms for ICAC:
- Parliamentary Committee
  - Operations Review Committee
  - Reports to Parliament
  - Public hearings.
- 7.3.3 There are also other forms of accountability imposed on ICAC by other Acts or the common law. These include:
- Ombudsman

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<sup>182</sup> As to the exercise of powers by ICAC see chapter 6.

<sup>183</sup> Report No 2/52<sup>nd</sup> Parliament May 2000.

- General public sector accountability
- Judicial review.

7.3.4 Each of these accountability mechanisms is discussed further below.

### **Ombudsman**

- 7.3.5 The Ombudsman's jurisdiction over ICAC is limited in its nature and scope. The Ombudsman can investigate certain complaints from public officials about ICAC. Where a public official makes a protected disclosure alleging corrupt conduct by ICAC or its officers, the Ombudsman may conduct an investigation into the allegation.<sup>184</sup> However, the Ombudsman has no power to investigate complaints about ICAC made by private citizens. The absence of a person or body with responsibility to receive and examine complaints about ICAC from private citizens is discussed further at section 7.4.
- 7.3.6 The Ombudsman also has a role in monitoring the compliance of ICAC with its statutory obligations concerning telephone intercepts and controlled operations. The Ombudsman has jurisdiction to monitor ICAC's compliance with the record-keeping requirements imposed by the Commonwealth's telephone intercept laws. The Ombudsman has no power to investigate ICAC's use of telephone intercepts.
- 7.3.7 Controlled operations are illegal activities undertaken by law enforcement agencies in accordance with the requirements imposed by the *Law Enforcement (Controlled Operations) Act 1997*. The Ombudsman can inspect ICAC's records relating to controlled operations.
- 7.3.8 In 2003-2004 the Ombudsman conducted three inspections of ICAC's records of telephone interceptions and controlled operations to ensure compliance with its statutory obligations. ICAC reports that '*apart from some minor procedural issues ICAC was found to have complied with the relevant legislation.*'<sup>185</sup> The Ombudsman, in his submission to the review, did not raise any concerns with this aspect of ICAC's accountability.

### **General public sector accountability**

- 7.3.9 Accountability mechanisms that apply throughout the public sector, such as freedom of information and privacy laws, apply (to a limited extent) to ICAC. ICAC's corruption prevention, complaint handling, investigative and reporting functions are exempt from the *Freedom of Information Act 1989*.<sup>186</sup> In effect this means that only the administrative functions of ICAC are subject to freedom of information laws.

<sup>184</sup>Section 13 of the *Protected Disclosures Act 1994*. A 'protected disclosure' refers to a complaint about corrupt conduct made voluntarily by a public official in accordance with the requirements of the *Protected Disclosures Act 1994*.

<sup>185</sup> ICAC *Annual Report 2003-2004* at page 55.

<sup>186</sup> See Schedule 2 of that Act.

- 7.3.10 ICAC is required to comply with the requirements of the *Privacy and Personal Information Protection Act 1998* governing collection, use and disclosure of personal information in relating to its administrative and educative functions. However, the remainder of its functions are exempt from the provisions of that Act.
- 7.3.11 Although ICAC is subject to laws governing access to information in a more limited manner than most public sector agencies, this aspect of ICAC's accountability has not arisen in submissions to the review and I do not propose to make any recommendations in relation to it.
- 7.3.12 As with other public sector agencies, ICAC must also comply with the financial accountability requirements imposed by the *Public Finance and Administration Act 1983*.

### **Judicial review**

- 7.3.13 Findings of corrupt conduct by ICAC may be reviewed by the Supreme Court on the administrative law grounds of illegality, irrationality or procedural unfairness.<sup>187</sup> ICAC is obliged to observe the requirements of procedural fairness in the conduct of hearings and when making decisions concerning the procedures to be followed at such hearings.<sup>188</sup>
- 7.3.14 The availability of judicial review, despite the fact that findings of ICAC do not affect legal rights and responsibilities, flows from the harm to the reputation of affected persons that may be occasioned by an adverse finding,<sup>189</sup> and the inherent and statutory jurisdiction of the Supreme Court to supervise the functioning of administrative tribunals to ensure that they carry out their functions and perform their duties in accordance with the law.<sup>190</sup>
- 7.3.15 As findings by ICAC have no legal effect or consequences, declaratory relief is the most likely remedy for legal or procedural error by ICAC. This may extend to a declaration that a finding by ICAC is a nullity.<sup>191</sup> It may also be possible to obtain an injunction to restrain ICAC from publishing a finding. This may arise, for example, where ICAC has not complied with the requirements of procedural fairness.
- 7.3.16 The Parliamentary Committee examined the availability of judicial review in its 1993 review of ICAC Act.<sup>192</sup> It concluded that *'the current extent and nature of judicial review of ICAC is appropriate...There is no need for the common law remedies which are available in the case of the legal or procedural error by ICAC to be entrenched in legislation.'*

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<sup>187</sup> See *Greiner v ICAC* (1992) 28 NSWLR 125; *ICAC v Chaffey* (1993) 30 NSWLR 21; and *Langton v ICAC* [1998] NSWSC 559.

<sup>188</sup> *ICAC v Chaffey* (1993) 30 NSWLR 21 at 27.

<sup>189</sup> See *Annetts v MCCann* (1990) 170 CLR 596; *Ainsworth v Criminal Justice Commission* (1992) 106 ALR 11.

<sup>190</sup> *Greiner v ICAC* (1992) 28 NSWLR 125 at 130.

<sup>191</sup> See *Greiner v ICAC* (1992) 28 NSWLR 125.

<sup>192</sup> *Report on Review of ICAC Act* May 1993 at Chapter 3.

7.3.17 In its submission to this review, the Parliamentary Committee expressed concern about ICAC's compliance with the requirements of procedural fairness. The Parliamentary Committee referred to:

*'[T]he apparent lack of any consistent practice by the Commission to give the parties to an inquiry an opportunity to respond to adverse findings or statements concerning them prior to the publication of a final report. The Committee considers that parties should be given this opportunity particularly as there is no mechanism for appeal.'*

7.3.18 ICAC strongly rejected the assertion that it does not afford procedural fairness to affected parties prior to publication of a final report. In its supplementary submission to the review ICAC stated:

*'The Commission's practice on this issue is clear and well established.*

*Where public hearings are conducted, at the conclusion of the taking of evidence, a timetable is laid down for Counsel Assisting to file and serve submissions setting out the evidence and any findings of fact and corrupt conduct that may be available against persons based on that evidence and other material. Those submissions are served on all persons who are the subject of those recommended findings together with any witnesses who gave evidence during the hearings. All these persons are then afforded an opportunity to make submissions in reply which the Commission takes into account before preparing its final report.*

*Where private hearings are conducted, the same procedure may also be applied or at least any persons the subject of adverse findings or comment provided with a draft of the Commission's findings and the material in support for consideration and reply before publication.*

*To make adverse findings against a person in a public report without affording an opportunity to that person to be made aware of that finding and the material in support and to reply to it before publication of the final report, would also be in breach of well established rules of procedural fairness and natural justice which are applicable to the conduct of the Commission public report process.*

*No proceedings of this kind have been commenced against the Commission for the past five years during which time it has published over 30 investigation reports making findings of corrupt conduct.'*

7.3.19 Other submissions to the review, for example, the submission from Burwood Council, argued that the Act should be amended to give express recognition to the application of the rules of procedural fairness to ICAC to ensure that *'no confusion arises as to whether such rules operate in the context of investigations by ICAC.'*

7.3.20 By force of the common law, ICAC is required to give an affected person an opportunity to respond to adverse findings prior to the publication of a final

report.<sup>193</sup> This is one of the most important aspects of procedural fairness as it applies to ICAC. Failure to comply with the requirements of procedural fairness is a ground upon which an affected person could seek judicial review.

7.3.21 I am satisfied that ICAC understands its obligation to comply with the requirements of procedural fairness. In the absence of specific examples of ICAC not affording a person affected by an inquiry an opportunity to respond to adverse findings or statements prior to publication of a report, it does not seem to me that legislative codification of ICAC's common law duty is warranted.

7.3.22 There is a danger that legislative codification of the application of the rules of procedural fairness to ICAC can generate rigidity, with a consequent loss of fairness to an affected person. By keeping ICAC's obligation to comply with procedural fairness at common law, the principles that must be applied by ICAC are clear, without circumscribing the circumstances in which they are to apply.

7.3.23 In my view, development of these rules as they apply to ICAC is better left to the Courts on a case by case basis. This will ensure that ICAC is required to afford procedural fairness while maintaining the flexibility of approach which the common law permits.

**Recommendation:** That there be no amendment of the Act to require ICAC to afford procedural fairness to a person before publishing an adverse finding or statement because such an obligation already exists under the common law, it appears that ICAC complies with this obligation and, if it were to fail to do so, the remedy of judicial review is available to require it to do so.

### ***Reports to Parliament***

7.3.24 The formal way in which ICAC communicates its findings is by tabling reports in Parliament. ICAC is required to table a report in Parliament whenever it conducts a public hearing.<sup>194</sup> This report must include a statement as to whether ICAC is of the opinion that consideration should be given to taking criminal proceedings, disciplinary action or proceedings for dismissal in relation to a person against whom substantial allegations have been made.<sup>195</sup> The report may include any findings made by ICAC, including findings of corrupt conduct, but it may not include a finding that a person is guilty of a criminal or disciplinary offence.<sup>196</sup>

7.3.25 ICAC may at any time make a special report to Parliament on any policy matter relating to its functions.<sup>197</sup>

<sup>193</sup> See *ICAC v Chaffey* (1993) 30 NSWLR 21.

<sup>194</sup> Section 74(3) of the Act, unless the hearing was conducted following a reference from both Houses of Parliament and Parliament directed otherwise.

<sup>195</sup> Section 74A of the Act.

<sup>196</sup> Section 74B of the Act.

<sup>197</sup> Section 75 of the Act.

7.3.26 ICAC is required to table an annual report of its operations.<sup>198</sup> The annual report is an important aspect of the accountability framework that applies to ICAC. Section 76 of the Act requires ICAC to include the following matters in its annual report:

- (a) a description of the matters that were referred to the Commission,
- (b) a description of the matters investigated by the Commission,
- (c) any recommendations for changes in the laws of the State, or for administrative action, that the Commission considers should be made as a result of the exercise of its functions,
- (d) the general nature and extent of any information furnished under this Act by the Commission during the year to a law enforcement agency,
- (e) the extent to which its investigations have resulted in prosecutions or disciplinary action in that year,
- (f) the number of search warrants issued by authorised justices and the Commissioner respectively under this Act in that year,
- (g) a description of its activities during that year in relation to its educating and advising functions.

7.3.27 I have given careful consideration to whether there should be any additional operational matters upon which ICAC should be required to report. One matter that has been brought to the attention of the review is the time taken by ICAC to complete its investigations. It has been said that ICAC is increasingly taking a longer period of time to conduct its investigations. Criticism has focussed on delay from the time that a complaint is lodged until the time that it is concluded, as well as delay from the conclusion of public hearings until the publication of the investigation report.

7.3.28 Long delays between notifying ICAC of an allegation of corrupt conduct and the resolution of that allegation can have a devastating impact on an individual's reputation. Even where the allegation is not in the public domain, long delays may adversely impact on the on-going operation of the agency, especially where the allegation concerns a high-ranking public official.

7.3.29 There is insufficient available information upon which I might be able to sensibly assess claims about this type of delay by ICAC. Timeliness can be affected by a number of factors, both internal and external to ICAC. If there were evidence, however, that timeframes were substantially increasing, this would be a matter of concern.

7.3.30 I do not think the solution is the imposition of rigid statutory timeframes which fail to take into account the particular circumstances of the case. The time taken by ICAC to deal with allegations of corrupt conduct is a proper matter for oversight by the Parliamentary Committee.

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<sup>198</sup> Section 76 of the Act.



7.3.31 This oversight could be facilitated by ICAC being required to report on the average time taken to investigate complaints and the actual time taken to investigate matters in which an investigation report is published.<sup>199</sup>

**Recommendation:** That section 76 of the Act be amended to require ICAC to include in its annual report to Parliament the average time taken to investigate complaints and the actual time taken to investigate matters in which an investigation report is published.

### ***Public hearings***

7.3.32 This section should be read subject to the views expressed in section 6.5 above as to the nature of such hearings and the appropriate nomenclature. As the term ‘hearing’ is now used in the Act, I will continue to use it in this section.

7.3.33 When the Act first commenced, there was a strong presumption that ICAC would hold its hearings in public. Section 31 of the Act originally provided that hearings were to be held in public, absent satisfaction that a private hearing was in the public interest for reasons connected with the subject matter of the investigation and the nature of the evidence to be given.

7.3.34 This provided a measure of accountability of ICAC by permitting the public to observe and be informed about its investigative activities. As with judgments delivered by the Courts, the holding of ICAC’s hearings in public may serve to enhance the public’s confidence in the findings of ICAC.

7.3.35 Since amendments to the Act made in 1991, ICAC has had a broad discretion to hold hearings in public or private. Section 31 currently provides that:

*‘A hearing may be held in public or in private, or partly in public and partly in private, as decided by the Commission....In reaching these decisions, the Commission is obliged to have regard to any matters which it considers to be related to the public interest.’<sup>200</sup>*

7.3.36 The number of public hearings days has been steadily declining since these amendments came into effect. The proper mix of public and private hearings is discussed in chapter 6. As I am not advocating a return to the presumption in favour of public hearings, it is pertinent to note here that the less investigations are undertaken in public, the greater the need for other accountability mechanisms, such as an Inspector of ICAC as discussed in section 7.4.

### ***Parliamentary Committee***

7.3.37 Monitoring of ICAC’s activities by Parliament is necessary because ICAC has been established as a body independent of the Executive. It is not subject to

<sup>199</sup> In my draft report I recommended that ICAC be required to include ‘*the time taken to deal with allegations of corrupt conduct in its annual report to Parliament.*’ By this recommendation I did not intend that ICAC would be required to report on each individual complaint in its annual report. I have amended my recommendation to make this clear.

<sup>200</sup> Section 31 of the Act.

Ministerial control or direction. As a consequence, no Minister is responsible to Parliament for the activities of ICAC.

7.3.38 The Act establishes a joint Parliamentary Committee made up of eleven members, three of which are members of, and appointed by, the Legislative Council, and eight of which are members of, and appointed by, the Legislative Assembly.<sup>201</sup>

7.3.39 The current members of the Parliamentary Committee are:

<b>Member</b>	<b>Party</b>	<b>House</b>
The Hon Kim YEADON MP (Chair)	ALP	Lower
The Hon Jenny GARDINER MLC	Nat	Upper
The Hon Peter PRIMROSE MLC	ALP	Upper
Mr John MILLS MP	ALP	Lower
Mr Barry O'FARRELL MP	Lib	Lower
Mr Paul PEARCE MP	ALP	Lower
The Hon John PRICE MP	ALP	Lower
Mr Anthony ROBERTS MP	Lib	Lower
Mr John TURNER MP	Nat	Lower
Mr John PRICE MP	ALP	Lower
Reverend The Hon Fred NILE MLC	CDP	Upper

7.3.40 The provisions governing the Parliamentary Committee are found in Part 7 of the Act. The Parliamentary Committee has described its role as *'to ensure ICAC generally is operating as intended by the Parliament.'*<sup>202</sup>

7.3.41 Section 64 of the Act sets the functions of the Parliamentary Committee:

- (1) The functions of the Joint Committee are as follows:
  - (a) to monitor and to review the exercise by the Commission of its functions,
  - (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
  - (c) to examine each annual and other report of the Commission and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
  - (d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission,
  - (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.
- (2) Nothing in this Part authorises the Joint Committee:
  - (a) to investigate a matter relating to particular conduct, or

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<sup>201</sup> See sections 63 and 65 of the Act.

<sup>202</sup> Parliamentary Committee Report No 2/52<sup>nd</sup> Parliament/ICAC: *Accounting for Extraordinary Powers* May 2000 at pages 18 and 53.

- (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or
- (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

7.3.42 The primary function of the Parliamentary Committee is to monitor and review the exercise of ICAC's functions.<sup>203</sup> The Parliamentary Committee is also empowered to veto the proposed appointment of a person as the ICAC Commissioner.<sup>204</sup>

7.3.43 The Parliamentary Committee has the power to send for persons, papers and records, but does not otherwise have the power to direct ICAC.<sup>205</sup> The Parliamentary Committee prepares reports on the functions of ICAC for consideration by Parliament.<sup>206</sup> The Parliamentary Committee holds regular public meetings with the ICAC Commissioner to ask questions on general matters relating to ICAC. The evidence obtained is reported to Parliament.

7.3.44 The Parliamentary Committee is not permitted to examine particular decisions made by ICAC.<sup>207</sup> Nor is it empowered to set the broad policies and priorities of ICAC.

7.3.45 The Parliamentary Committee has not sought removal of the restrictions on its jurisdiction contained in section 64(2) of the Act.<sup>208</sup> In its report on *ICAC: Accounting for Extraordinary Powers* the Parliamentary Committee stated:

*'It is the Committee's opinion that these statutory restrictions imposed upon the Committee under section 64(2) are appropriate. Committee Members have neither the qualifications nor the expertise to conduct investigations, nor does the Committee have the resources to serve as an appeal mechanism for individuals dissatisfied with the decisions and findings of the Commission.'*

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

7.3.46 For the reasons identified by the Parliamentary Committee, I do not recommend expanding the jurisdiction of the Parliamentary Committee. The overwhelming majority of submissions to the review supported the Parliamentary Committee's position on the limited scope of its jurisdiction.

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<sup>203</sup> Section 64(1)(a) of the Act.

<sup>204</sup> Section 64A of the Act.

<sup>205</sup> Section 69(1) of the Act.

<sup>206</sup> Section 64(1)(b) of the Act.

<sup>207</sup> Section 64(2) of the Act.

<sup>208</sup> In its comments on my draft report the Parliamentary Committee has suggested that consideration could be given to permitting it to examine particular matters in private. This suggestion is discussed at section XXXX.

Instead, many submissions identified the need to redress the gap in its jurisdiction by the establishment of an independent Inspector.<sup>209</sup>

7.3.47 The Whistleblowers Association suggested to the review that the Parliamentary Committee should be able to examine de-identified case studies to assist its monitoring and review of the exercise of ICAC's functions. It was said that this information may provide a useful basis upon which the Parliamentary Committee could assess the operation of ICAC, without investigating particular decisions of ICAC. The use of de-identified case studies in this way would not appear to infringe Part 7 and has been adopted from time to time by the Parliamentary Committee and ICAC.

### ***Operations Review Committee***

7.3.48 The Operations Review Committee is an advisory committee established under Part 6 of the Act. The Operations Review Committee consists of eight members, being the ICAC Commissioner; an Assistant ICAC Commissioner; the Commissioner of Police; a person appointed by the Governor on the recommendation of the Attorney General, with the concurrence of the Commissioner; and four persons appointed by the Governor on the recommendation of the Premier, with the concurrence of the Commissioner, to represent community views.<sup>210</sup>

7.3.49 The members of the Operations Review Committee are:

- Mr Jerrold Cripps, QC, ICAC Commissioner
- Mr John Pritchard, Deputy Commissioner
- Mr Ken Moroney, Commissioner of Police
- Mr Laurie Glanfield AM, Director-General of the Attorney-General's Department (Attorney General's nominee)
- Acting Professor Merrilyn Walton, Department of Medical Evaluation, Faculty of Medicine, The University of Sydney
- Reverend Harry Herbert, Executive Director, Uniting Care
- Dr Suzanne Jamieson, Department of Work and Organisational Studies, The University of Sydney
- Ms Jill Segal, former Chair, Banking and Financial Services Ombudsman.<sup>211</sup>

7.3.50 The functions of the Operations Review Committee are set out in section 59 of the Act:

(1) The functions of the Operations Review Committee are as follows:

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

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<sup>209</sup> See the discussion at section 7.3.

<sup>210</sup> Section 60 of the Act.

<sup>211</sup> This information is taken from ICAC's annual report 2003-2004.

(2) The Commissioner shall consult with the Committee on a regular basis, and at least once every 3 months.

- 7.3.51 Before deciding whether to discontinue or not to commence an investigation of a complaint, ICAC must consult with the Operations Review Committee in relation to the matter.<sup>212</sup>
- 7.3.52 ICAC is not obliged to seek the advice of the Operations Review Committee before discontinuing an investigation commenced on its own motion or reported from another agency. In practice, ICAC seeks the advice of the Operations Review Committee on these matters. ICAC has also broadened the role of the Operations Review Committee to advise whether ICAC should continue an investigation that is underway.<sup>213</sup>
- 7.3.53 The Operations Review Committee is able to bring to the attention of the Commissioner any matter relating to the operations of ICAC which the member considers important.<sup>214</sup>
- 7.3.54 ICAC advises that the Operations Review Committee originally met every month, however, since March 2002 it has met every two months. Committee members interviewed for the review advised that they are presented with lengthy material (approximately 700 pages) for each meeting and that proper preparation for meetings takes in excess of a day.
- 7.3.55 Both ICAC and the Parliamentary Committee have acknowledged the large amount of work that is required by members in preparation for meetings.
- 7.3.56 The capacity of the Operations Review Committee to effectively examine ICAC's assessment of complaints is being compromised by its rapidly increasing workload. The number of complaints received by ICAC has increased by over 50% in the last two years.<sup>215</sup>
- 7.3.57 The Operations Review Committee had input into eight percent or 149 of the 1,807 matters that it examined throughout the reporting year. According to ICAC's 2003-2004 annual report:

*'The Operations Review Committee met on six occasions and considered 1,807 matters relating to complaints and investigations. Of these, 300 matters were considered by way of a Schedule of Information. Of the remaining 1,507 matters, the Committee:*

- *accepted the recommendation made in relation to 1,177 matters (65 percent) without any alteration or comment*
- *accepted reports on the status of 181 matters (10 percent)*
- *made specific comment or alteration to the recommendation before accepting the report on 131 matters (7 percent)*

<sup>212</sup> Section 20(4) of the Act.

<sup>213</sup> ICAC Annual Report 2003-2004 page 52.

<sup>214</sup> ICAC Annual Report 2003-2004 page 52.

<sup>215</sup> In 2001-2002 ICAC received 1231 complaints involving an allegation of corrupt conduct (including protected disclosures and matters referred by agencies under section 11 of the Act). In 2003-2004 this number had grown to 1884. See ICAC Annual Report 2003-2004 page 20.

- *did not accept the recommendation and sought further information and required further reports to be prepared for 18 matters (1 percent).*

7.3.58 On the information available to me, the members of the Operations Review Committee take their responsibility seriously and demonstrate a willingness to raise matters with ICAC in the public interest. It also appears that ICAC is generally responsive to the advice provided by the Operations Review Committee.

7.3.59 Despite the skill and dedication of its members, the Operations Review Committee is a limited accountability mechanism. The ability of the Operations Review Committee to provide proper advice to ICAC is dependent completely on ICAC's willingness to provide it with full and frank information. The Operations Review Committee has no power to compel information from ICAC. Its ability to report on its proceedings is severely constrained as there is no reporting mechanism in the Act and its members are bound by the secrecy provisions in section 111 of the Act.

7.3.60 The lack of structural independence of the Operations Review Committee from ICAC was criticised by the Parliamentary Committee in 2000 in the following terms:

'This potential dependence stems from:

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

7.3.61 Although it has not been suggested to the review that any of these factors have led to improper behaviour by ICAC, the potential for reduced accountability, or at least the appearance of it, remains. To address these and other concerns I recommend the establishment of an Inspector and the abolition of the Operations Review Committee. These proposals are discussed in section 7.5.

## 7.4 Gaps in accountability

7.4.1 The accountability regime that applies to ICAC is deficient because it fails to provide for accountability for the exercise of ICAC's compulsive powers. No person or body has responsibility for investigating complaints that ICAC or its officers have misused powers. ICAC itself acknowledges that there is a need to enhance its accountability.

7.4.2 This need is not diminished by the relative paucity of complaints about the exercise of ICAC's compulsive powers. There may be good reasons why

persons investigated by ICAC would not complain to ICAC or this review about the exercise of powers by ICAC. These reasons might include fear of reprisals, reluctance to publicise their investigation by ICAC, and a belief that no action would be taken by ICAC.

- 7.4.3 In any event, the need for accountability does not depend upon proof of misuse of discretionary power. Accountability mechanisms serve to enhance public confidence in ICAC. Given the role of ICAC in securing the integrity of public administration, it is important that ICAC is itself accountable for the exercise of its official functions.

## 7.5 Additional accountability mechanisms

### *Inspector*

#### (a) GENERAL

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- 7.5.1 The Parliamentary Committee reviewed possible accountability mechanisms suitable for adaptation for ICAC in its 2000 report. Other independent standing commissions with jurisdiction to investigate allegations of corruption are subject to oversight in the exercise of their coercive powers. For example, the Police Integrity Commission is subject to oversight by an independent Inspector. The Queensland Crime and Misconduct Commission and the Western Australian Corruption and Crime Commission are subject to oversight by a Parliamentary Commissioner.
- 7.5.2 After reviewing the models used in other jurisdictions, the Parliamentary Committee concluded that the Act should be amended to provide for the establishment of an Inspector of ICAC. It proposed that the Inspector be modelled on the Inspector of the Police Integrity Commission.

#### (b) FEATURES OF THE INSPECTOR OF THE POLICE INTEGRITY COMMISSION

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- 7.5.3 The Inspector is appointed by the Governor with the advice of the Executive Council. The Parliamentary Committee is empowered to veto the proposed appointment. The Inspector must be a former judge or qualified for appointment as a judge. A person may not hold the office of Inspector for more than five years.
- 7.5.4 The Inspector is required to report annually to Parliament and may make special reports to Parliament. The Parliamentary Committee monitors and reviews the exercise of the Inspector's functions.
- 7.5.5 The Inspector of the Police Integrity Commission is part-time and supported by one member of staff. He may appoint additional staff on a temporary basis, should the need arise, for example, to assist in the conduct of an inquiry.
- 7.5.6 The Inspector's functions are to:

- Audit the operations of the Police Integrity Commission for the purpose of monitoring its compliance with laws.
- Deal with, by reports and recommendations, complaints about abuse of power, impropriety and other forms of misconduct on the part of the Police Integrity Commission or its officers.
- Assess the effectiveness and appropriateness of the procedures of the Police Integrity Commission relating to the legality or propriety of its activities.

7.5.7 The Inspector's functions may be exercised on his own motion, on complaint, at the request of the Minister, or on reference from an agency.

7.5.8 The Inspector has the powers, authorities, protections and immunities of a Royal Commissioner. According to the Inspector's annual report, no formal inquiries were held in the 2003-04 reporting year.

7.5.9 The key provisions of the *Police Integrity Commission Act 1966* relating to the Inspector of the Police Integrity Commission are set out below.

### **89 Principal functions of Inspector**

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

### **90 Powers of Inspector**

- (1) The Inspector:
  - (a) may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and
  - (b) is entitled to full access to the records of the Commission and to take or have copies made of any of them, and
  - (c) may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and
  - (d) may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other



things relating to the Commission's operations or any conduct of officers of the Commission, and

- (e) may investigate and assess complaints about the Commission or officers of the Commission, and
- (f) may refer matters relating to the Commission or officers of the Commission to other agencies for consideration or action, and
- (g) may recommend disciplinary action or criminal prosecution against officers of the Commission.

**91 Inquiries**

- (1) For the purposes of the Inspector's functions, the Inspector may make or hold inquiries.
- (2) For the purposes of any inquiry under this section, the Inspector has the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the [Royal Commissions Act 1923](#) and that Act (section 13 excepted) applies to any witness summoned by or appearing before the Inspector in the same way as it applies to a witness summoned by or appearing before a commissioner.
- (3) A witness summoned by or appearing before the Inspector is to be paid such amount as the Inspector determines, but not exceeding the amount that would be payable to such a witness if he or she were a Crown witness subpoenaed by the Crown to give evidence.

**101 Special reports**

The Inspector may, at any time, make a special report to the Presiding Officer of each House of Parliament on:

- (a) any matters affecting the Commission, including, for example, its operational effectiveness or needs,
- (b) any administrative or general policy matter relating to the functions of the Inspector.

**102 Annual reports**

The Inspector is required to prepare, within the period of 4 months after each 30 June, a report of the Inspector's operations during the year ended on that 30 June and furnish the report to the Presiding Officer of each House of Parliament.

**(c) STRENGTHS OF THE INSPECTOR MODEL**

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7.5.10 The Inspector is able to respond expeditiously to serious complaints of misconduct or abuse of power, without threatening the integrity of the investigation. The presence of an Inspector may encourage ICAC to consider how a well-respected, independent person might view steps that it has taken or might take.

7.5.11 The Parliamentary Committee concluded that the strengths of the Inspector model are:

- *‘the independence of the Inspector*
- *the security of confidential information*
- *its ability to access operational material without compromising investigations*
- *its proactive auditing powers*
- *its complaints handling role.’*

7.5.12 The Greens, in their submission to the review, stressed the importance of ensuring that *‘accountability mechanisms do not threaten the effectiveness or independence of ICAC’*.<sup>216</sup> The proposed Inspector would improve the effectiveness of ICAC, without compromising its independence.

7.5.13 ICAC, in its submission to the review, stated that *‘adoption of the Inspector model as outlined here would provide an enhanced degree of accountability for the conduct of the Commission’s operations and powers and fill a serious gap in accountability mechanisms that is a feature of the current regimes as provided for under the Act.’*

7.5.14 I support the establishment of an Inspectorate whose role, powers and procedures are modelled on the provisions apply to the Inspector of the Police Integrity Commission.

7.5.15 As with the Inspector of the Police Integrity Commission, the Inspector should be located in physically separate premises to ICAC, although there will be a need to ensure that the Inspector has access to the offices of ICAC. To maintain independence of this Inspector from ICAC, the financing of the Inspector should not fall within the operating expenses of ICAC.

7.5.16 In order to permit the proposed Inspector to access any records of ICAC containing material obtained by way of telephone intercepts, amendments will need to be made to the *Telecommunications (Interception) Act 1979*. The Commonwealth Government amended this legislation to permit the Inspector of the Police Integrity Commission to have access to telecommunications product. To ensure that the Inspector can access all records held by ICAC, a request for similar amendments will need to be made to the Commonwealth Government in relation to the proposed Inspector of ICAC.

(d) PARLIAMENTARY COMMISSIONER

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7.5.17 In Western Australia and Queensland, Parliamentary Commissioners are used to oversight their anti-corruption commissions, rather than an Inspector.<sup>217</sup> The features of the Parliamentary Commissioner model of accountability were examined comprehensively by the Parliamentary Committee in its 2000 report.<sup>218</sup>

<sup>216</sup> Submission from the Greens.

<sup>217</sup> The differences between these models are comprehensively explored in the Parliamentary Committee’s report.

<sup>218</sup> *ICAC: Accounting for Extraordinary Powers* (Report No 2/52<sup>nd</sup> Parliament May 2000 Ch 2.

7.5.18 The most significant difference between the Parliamentary Commissioners adopted in Western Australia and Queensland and the Inspector of the Police Integrity Commission is that the former are officers of the Parliament, whereas the latter has greater independence. The Parliamentary Commissioners operate on reference from the Parliamentary Committee. This reduces their proactive capacity and may give rise to a conflict of interest in light of ICAC's jurisdiction over Members of Parliament. For these reasons, I prefer the Inspector model to that of a Parliamentary Commissioner.

(e) ABOLITION OF THE OPERATIONS REVIEW COMMITTEE

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7.5.19 During the Parliamentary Committee's consideration of ICAC's accountability, the then ICAC Commissioner, Ms Irene Moss, AM expressed the view that:

*'...it is possible and perhaps even desirable, to have both an inspector model of accountability and an ORC'. (page 63)*

7.5.20 The Parliamentary Committee expressed doubt that the Operations Review Committee should continue as a statutory body if an Inspectorate were to be established. The Parliamentary Committee noted that it was *'keen to avoid duplication of effort, jurisdictional overlap and waste of resources, and intends reviewing the situation when the Inspector has been operational for 12 months'*.

7.5.21 Both the current ICAC Commissioner, the Honourable Jerrold Cripps, QC, and the former ICAC Commissioner, Ms Moss, in submissions to this inquiry expressed real doubts about the continued viability of the Operations Review Committee if an Inspector were to be established.

7.5.22 ICAC's current view is that *'there would not be any need for a body in addition to that of the Inspector to ensure accountability of the Commission in the exercise of its powers and functions.'*

7.5.23 I have given careful consideration to the proper role of the Operations Review Committee in the event that the Inspectorate is established. I agree that retention in its current form would result in duplication of effort, jurisdictional overlap and waste of resources. In my view, the Inspector is structurally a superior form of accountability than the Operations Review Committee. Proper accountability does not require them both.

7.5.24 In addition, the rapid rise in the number of complaints made to ICAC places real limits on the capacity of the Operations Review Committee to perform its functions effectively.

7.5.25 The Operations Review Committee scrutinises the decisions of ICAC not to investigate a complaint or to discontinue investigation of a complaint. Although the Operations Review Committee does not review complaints about ICAC, its existence may assure complainants that all of ICAC's decisions not to investigate a complaint have been independently assessed. The Inspector does not replace this role of the Operations Review Committee. Whilst the Inspector has the capacity to receive complaints about ICAC, he or she is not

given the function of reviewing every decision of ICAC not to investigate or discontinue a complaint.

- 7.5.26 The routine accountability function performed by the Operations Review Committee could be addressed by ensuring that ICAC complies with principles of good administrative practice in its complaints handling, such as the provision of reasons as discussed in section 7.6.
- 7.5.27 The Parliamentary Committee, in its comments on my draft recommendations expressed concern that replacing the Operations Review Committee with the Inspector would mean that there would be no oversight of the manner in which allegations of corrupt conduct were handled, particularly as the Parliamentary Committee is precluded by section 64(2) of the Act from doing so.
- 7.5.28 The Parliamentary Committee suggested that consideration might be given to:
- altering the Inspector's powers to permit the Inspector to audit operational files for the purpose of reviewing their accuracy and completeness and to determine whether ICAC has exercised its power in an appropriate manner; or
  - altering section 64(2) of the Act to permit it to examine particular matters in private on condition that the Parliamentary Committee would not report on them without ICAC's approval.
- 7.5.29 I do not share the Parliamentary Committee's concern that replacing the Operations Review Committee with the Inspector will mean that there will be no oversight of ICAC's complaints handling practices.
- 7.5.30 The proposed Inspector would be given the specific functions of auditing ICAC's operations, dealing with complaints about ICAC and assessing the effectiveness and appropriateness of ICAC's procedures. The Inspector would have expansive powers to investigate and assess these matters.
- 7.5.31 For these reasons expressed in section 7.3 I do not believe that it would be appropriate for the Parliamentary Committee to be able to investigate a particular matter, even if it is done so in private. If the Parliamentary Committee has particular concerns about a particular matter, it would be open to the Parliamentary Committee to refer that matter to the Inspector for consideration. I note that the Inspector of the Police Integrity Commission may exercise his functions in response to a reference from the Parliamentary Joint Committee on the Ombudsman and the Police Integrity Commission<sup>219</sup> and I envisage that a similar provision would apply to the Parliamentary Committee and proposed the Inspector of ICAC.

(f) MODIFICATION OF THE ROLE OF THE OMBUDSMAN

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- 7.5.32 The Ombudsman's capacity to investigate protected disclosures about ICAC might be repealed in the event that this function is held by an Inspector of ICAC. The Ombudsman should be given jurisdiction to investigate protected disclosures alleging corrupt conduct by the Inspector of ICAC.

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<sup>219</sup> *Police Integrity Commission Act 1996* section 89(2).

- 7.5.33 The Ombudsman has advised the review that he is opposed to the removal of his jurisdiction to investigate protected disclosures concerning corrupt conduct by ICAC on the basis that his Office has developed considerable expertise in dealing with protected disclosures, including protected disclosures involving ICAC. The Ombudsman acknowledges that the Inspector of ICAC would need to be informed of any protected disclosures concerning ICAC, but suggests that this could be achieved by an amendment to the Act requiring the Ombudsman to keep the Inspector informed of any such matters.
- 7.5.34 I remain of the view, however, that the Inspector should have primary responsibility for investigating protected disclosures about ICAC, subject to a power for the Inspector to refer a protected disclosure to the Ombudsman. This is the procedure that applies to the Inspector of the Police Integrity Commission<sup>220</sup> and is consistent with the function of the Inspector to improve the accountability of ICAC.
- 7.5.35 My recommendation that the Inspector assume primary responsibility for investigating protected disclosures in no way reflects adversely on the capacity of the Ombudsman to perform this role and there can be no suggestion that the Ombudsman's jurisdiction to investigate protected disclosures should be removed unless and until that role is given to the Inspector.
- 7.5.36 The Ombudsman has indicated that he is broadly agreeable to having jurisdiction to investigate protected disclosures concerning corrupt conduct by the Inspector of ICAC and that this would lessen to some degree his concerns about the transfer of his jurisdiction to investigate protected disclosures about ICAC to the Inspector.

(g) CONCLUSION

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- 7.5.37 The advantages of the Inspector, over existing accountability mechanisms that apply to ICAC, are that:
- The Inspector can review complaints from members of the public (rather than just from public officials) concerning abuse of power, impropriety or other forms of misconduct on the part of ICAC.
  - The Inspector can proactively audit the operations of ICAC and assess the effectiveness and appropriateness of ICAC's procedures.
- 7.5.38 The Inspector would not exercise an appellate role in relation to the decisions and findings of ICAC. He or she would not be able to direct ICAC, but rather would make reports and recommendations to the Parliament.
- 7.5.39 Although the Inspectorate will create an additional layer of review with attendant expenses, as the ultimate source of accountability of ICAC is neither the Government nor Parliament, this additional bureaucracy is not only

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<sup>220</sup> Section 12A of the *Protected Disclosures Act 1994* provides that a protected disclosure made to an investigating authority may be protected if it relates to a matter that is referred by the Inspector to the investigating authority.

justifiable, but necessary to secure public confidence in the legality and propriety of ICAC's actions.

7.5.40 If my recommendations are followed, there will also be savings. The proposal will put an end to the time and expenses associated with the Operations Review Committee. These include the resources expended by ICAC in preparing reports, the costs associated with the involvement of community members, and the time spent by senior bureaucrats in attending and preparing for meetings.

**Recommendations:**

- R7.1** That the Act be amended to provide for the establishment of an independent Inspector of ICAC to:
- (a) Audit the operations of ICAC and assess the effectiveness and appropriateness of its procedures; and
  - (b) Deal with complaints of misconduct by ICAC or its officers.
- R7.2** That the role, powers, and procedures of the Inspectorate be modelled on the provisions applying to the Inspector of the Police Integrity Commission.
- R7.3** That the Commonwealth Government be requested to include the Inspector of ICAC as an authorised recipient of telecommunications product under the *Telecommunications (Interception) Act 1979* (Cth).
- R7.4** That consideration be given to removing the Ombudsman's jurisdiction under section 14 of the *Protected Disclosures Act 1994* to investigate protected disclosures concerning corrupt conduct by ICAC on the basis that this function will be the responsibility of the Inspector and the Ombudsman will have jurisdiction to investigate protected disclosures concerning corrupt conduct by the Inspector.
- R7.5** That there be no change to the Parliamentary Committee's statutory oversight of ICAC.
- R7.6** That Part 6 of the Act governing the Operations Review Committee be repealed.
- R7.7** That section 76 of the Act be amended to require ICAC to include in its annual report to Parliament the average time taken to investigate complaints and the actual time taken to investigate matters about which an investigation report has been published.
- R7.8** That there be no amendment of the Act to require ICAC to afford procedural fairness to a person before publishing an adverse finding or statement because such an obligation already exists under the common law, it appears that ICAC complies with this obligation and, if it were to fail to do so, the remedy of judicial review is available to require it to do so.

## 7.6 Reasons

- 7.6.1 Some submissions to my inquiry criticised ICAC for not providing reasons to complainants for its decision not to investigate or to discontinue the investigation of a complaint.
- 7.6.2 This assertion is not supported by information published by ICAC. On its website, [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au), under the heading 'reporting corruption', ICAC advises:
- 'If you provide information to ICAC, it will be acknowledged in writing. We will write to you again to inform you of ICAC's assessment of your matter, with reasons for our decision.'*
- 7.6.3 ICAC acknowledged to the review that, in the past, it did not routinely provide reasons to complainants. However, ICAC advises that it now regularly provides complainants with reasons for its decisions not to investigate.
- 7.6.4 I support the practice of ICAC to provide reasons to complainants. Whilst there is no duty at common law for administrators to provide reasons,<sup>221</sup> it is well accepted that it is good administrative practice to do so.<sup>222</sup> Providing reasons enhances public confidence in the decisions of ICAC. It can improve the quality and consistency of decision-making as the process of articulating reasons may assist ICAC to assess and identify the relevant factors. Complainants may not agree with the reasons provided by ICAC, but they will be in a better position to understand the decision made by ICAC.
- 7.6.5 ICAC opposes the imposition of a statutory obligation to provide reasons on the basis that it is unnecessary and may invite challenges on administrative law grounds that could subject ICAC '*to time-consuming and costly litigation and protracted engagement with complainants*'.
- 7.6.6 In my view ICAC has overstated the potential adverse consequences of being required to provide reasons. The Ombudsman has a statutory obligation to inform a complainant in writing of his decision not to investigate or to discontinue investigation of a complaint and give reasons for this decision.<sup>223</sup>
- 7.6.7 I see no reason in principle why ICAC should not be subject to a similar obligation. A legislative requirement will emphasise the current practice voluntarily adopted by ICAC. It may serve to enhance public confidence in the complaints handling processes of ICAC. It should not have resource implications for ICAC given that it accords with current practice. It will provide a measure of routine accountability for the complaints handling decisions of ICAC in the absence of the Operations Review Committee.
- 7.6.8 In making this recommendation I am not suggesting that ICAC should be required to provide excessive detail or to reveal operational or confidential matters. If necessary these matters can be provided for in the drafting of the provision.

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<sup>221</sup> *Public Service Board of NSW v Osmond* (1986) 159 CLR 656

<sup>222</sup> See the Ombudsman's manual on administrative practice.

<sup>223</sup> See s15 of the *Ombudsman Act 1974*.

**Recommendation R7.9:** That the Act be amended to provide that ICAC is to provide reasons to a complainant for not investigating, or discontinuing an investigation, of an allegation of corrupt conduct.

## 7.7 Merits review

7.7.1 The Parliamentary Committee has submitted to the review that findings of ICAC should be subject to a full merits review. The Parliamentary Committee does not identify the precise form that this merits review should take. It states that:

*'If the Commission retains the right to make findings of corrupt conduct then some merits appeal mechanism would seem to be justified.'*

7.7.2 It is clear that there is no mechanism for an appeal against, or any general review of the merits of a finding of corrupt conduct.<sup>224</sup> Review of the findings of ICAC by the Courts may only be made on the administrative law grounds of illegality, irrationality or procedural impropriety. In other words, it is only where ICAC has exceeded its jurisdiction, or where its findings are so unreasonable that no reasonable person would make them, or they have been made without giving affected persons an opportunity to be heard, that the Court may review the findings of ICAC. ICAC itself may reconsider a finding, but is under no obligation to do so.<sup>225</sup>

7.7.3 In support of the proposal for merits review, the Parliamentary Committee points out that a finding of corrupt conduct will still stand, even where the affected person has been acquitted of a criminal offence arising out of the same conduct. ICAC has advised the Parliamentary Committee that it has never reviewed a finding of corrupt conduct on the basis that the person was subsequently acquitted of the associated criminal offence.

7.7.4 In my view, failure to obtain a conviction for an associated criminal offence does not of itself establish that the finding of corrupt conduct is wrong or must be reviewed. As an example, the acquittal might be explained by the fact that incriminating evidence obtained by ICAC under compulsion cannot be used in a criminal prosecution.

7.7.5 The reasons for the divergence between the outcome of criminal proceedings and the finding of corrupt conduct may not always be clear, particularly as juries do not give reasons for their decisions. Even where an acquittal might be explained by a Court accepting evidence disbelieved by ICAC, or vice-versa, it does not follow that the finding of corrupt conduct is wrong and requires review. ICAC is entitled, as a fact-finding investigative body to come to its own view of the facts of a matter. Of course, there may be occasions where a finding of corrupt conduct might warrant review in light of an acquittal, for example, where different evidence comes to light at the criminal trial. In these

<sup>224</sup> See *Greiner v ICAC* (1992) 28 NSWLR 125.

<sup>225</sup> See s74(1) of the Act which provides that ICAC may prepare reports in relation to any matter that has been or is the subject of an investigation.



cases, ICAC has the power to review its findings pursuant to the power in section 74(1) of the Act averted to at paragraph 7.7.2 above.

7.7.6 I am not persuaded that the proposal for merits review of findings by ICAC should be accepted. To give effect to it, it would be necessary for another independent body of greater standing than ICAC to re-examine findings of fact made by ICAC. Were this right to be exercised routinely, it could prove to be a costly proposal of dubious benefit, given the capacity of the Supreme Court to review findings of ICAC on the administrative law grounds of illegality, irrationality, or procedural unfairness, the ability of the proposed Inspector to investigate allegations of misconduct by ICAC and the capacity of ICAC itself to review its own findings.

**Recommendation R7.10:** That there continue to be no ‘merits’ review of the findings of ICAC.

# CHAPTER 8 - CONTEMPT

## 8.1 Summary

- 8.1.1 Contempt is a common law doctrine that empowers Courts of record to deal with persons who interfere with the administration of justice.<sup>226</sup> The law of contempt provides the protection necessary for Courts to perform their functions. Its primary purpose is to prevent interference with the administration of justice.<sup>227</sup>
- 8.1.2 Contempt of ICAC is dealt with in Part 10 of the Act. Section 98 sets out a list of conduct that amounts to contempt of ICAC. It covers contempts in the face of ICAC,<sup>228</sup> threats or insults to witnesses and other persons,<sup>229</sup> obstruction of ICAC,<sup>230</sup> contravention of non-publication orders,<sup>231</sup> and, under sub-section 98(h), any conduct that would amount to contempt of a Court of law.<sup>232</sup> In light of the breadth of the other types of contempt listed in section 98, the primary purpose served by the deemed contempt provision in sub-section 98(h) appears to be to prohibit contempt by publication. Contempt by publication aside, most of the contemptuous behaviour protected by section 98 is also covered by specific criminal offences set out in Parts 9 and 11 of the Act.
- 8.1.3 ICAC has no power of its own to punish for contempt. Under section 99 of the Act, only the Supreme Court may punish for contempt, once independently satisfied that the person is guilty of contempt.
- 8.1.4 In my view, the following circumstances distinguish ICAC from criminal and civil proceedings in a manner that diminishes the need for contempt by publication:
- An investigation conducted by ICAC is not just directed towards whether corrupt conduct has occurred, it also considers whether laws need to be changed or whether methods of work, practices and procedures facilitated the occurrence of corrupt conduct. Public interest in, and discussion of, the subject-matter of an inquiry is therefore likely to enhance ICAC's investigation.
  - ICAC has a greater capacity than the Courts to enter the public domain to rebut misleading allegations or mischievous journalism and indeed, in serious cases, individuals affected have the right to bring defamation proceedings.
  - There are no 'parties' to an ICAC inquiry whose interests can be prejudiced. ICAC has extensive powers to protect the integrity of a witness' evidence by holding private hearings or making non-publication orders. Courts may have greater justification for recourse to contempt by publication than ICAC as they are generally required to conduct all of their

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<sup>226</sup> Lowe & Sufrin *Borrie & Lowe's The Law of Contempt* (3<sup>rd</sup> ed Butterworths, London 1996).

<sup>227</sup> *R v Arrowsmith* [1950] VLR 78.

<sup>228</sup> See sub-sections 98(a)-(c),(e),(f) of the Act.

<sup>229</sup> See sub-section s98(d) of the Act.

<sup>230</sup> See sub-section s98(g) of the Act.

<sup>231</sup> See sub-section s98(i) of the Act.

<sup>232</sup> See sub-section s98(h) of the Act.

business in public. This is not the case with ICAC. Indeed, the more a body operates in secret, the less justification there can be for contempt by publication.

- ICAC inquiries are conducted by professionally trained and eminent members of the legal profession, whom no reasonable person would imagine could be susceptible to influence from media reports. Persons appointed to conduct ICAC inquiries have security of tenure, and are not subject to Executive or Parliamentary direction and control in the conduct of their inquiries.

- 8.1.5 ICAC, especially when investigating senior public office holders, may need some limited protection from sustained attacks on its integrity. This protection, in my view, is adequately provided by the law of defamation and the criminal offences in Part 9 of the Act. These include the offence to wilfully obstruct, hinder, resist or threaten ICAC or one of its officers.
- 8.1.6 To the extent that conduct merely has a tendency to create the appearance of undermining the authority of ICAC and its findings, and that conduct is not defamatory or otherwise criminal, ICAC's authority may be better re-enforced by recourse to strong public statements than by citation for contempt.
- 8.1.7 I am of the view that it is not in the public interest to retain an ill-defined residual category of contempt, the primary purpose of which is to restrict publications about ICAC, particularly given that there are alternative methods of protecting ICAC that do not curtail freedom of speech. ICAC, through robust public statements and directions, has the power to protect witnesses and address misrepresentations, inaccuracies and prejudicial comment. The protection of witnesses can be enhanced by amending the Act extend the criminal offence of causing detriment to a person on account of the person's evidence or assistance to ICAC to include threats to cause detriment.
- 8.1.8 In order to remove unnecessary restrictions on publications about ICAC, without compromising the integrity of ICAC's operations, I propose the following reforms:
- Restrict contempt of ICAC to contempt in the face or hearing of ICAC.
  - Extend the criminal offence of causing detriment to a person on account of the person's evidence or assistance to ICAC to threats to cause detriment.
  - Clarify the procedure for dealing with contempt of ICAC.
  - Extend the time limit for prosecuting breaches of ICAC's non-publication orders.
  - Facilitate the prosecution of the offence of giving false or misleading evidence at an ICAC hearing.

## 8.2 Nature of contempt

- 8.2.1 Contempt is a common law doctrine that empowers Courts of record to deal with persons who interfere with the administration of justice.<sup>233</sup> It includes:

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<sup>233</sup> *Lowe & Sufrin Borrie & Lowe's The Law of Contempt (3<sup>rd</sup> ed 1996)*.

- Contempt in the face of the Court by behaving improperly in Court, for example, by disrupting the proceedings.
- Contempt by publication or other acts such as:
  - Breach of the sub judice rule by publishing material which tends to prejudice the issues in the proceedings.
  - Scandalising the Court by publishing scurrilous allegations that tend to undermine public confidence in the administration of justice.
  - Interfering with witnesses, jurors or officers of the Court by, for example, publishing jury deliberations or bribing witnesses.
- Civil (or disobedience) contempt by failing to comply with a Court order or undertaking given to the Court.

8.2.2 Lower Courts have jurisdiction to punish contempts committed in their face,<sup>234</sup> however, the power to punish for contempts committed outside the Court resides exclusively with the Supreme Court.<sup>235</sup>

8.2.3 The law of contempt provides the protection necessary for Courts to perform their functions. Its primary purpose is to prevent interference with the administration of justice.<sup>236</sup>

8.2.4 A contempt occurs if a publication, as a matter of practical reality, has a tendency to interfere with the administration of justice.<sup>237</sup> The offence of contempt of Court by scandalising is the means by which the Courts deal with publications that have, in its view, a tendency to undermine public confidence in the administration of justice. To the extent that it is necessary to prevent a real and substantial prejudice to the administration of justice, the law of contempt overrides the public interest in the freedom of communication.<sup>238</sup>

### 8.3 Past reviews of contempt laws

8.3.1 The proper scope of the law of contempt has been subject to detailed consideration, principally by law reform commissions in Australia and other common law jurisdictions.<sup>239</sup> Contempt by publication has been criticised for being too wide, too uncertain, having a ‘chilling’ effect on free speech, and preventing the public from being informed about matters in which there is a public interest.<sup>240</sup> Use of contempt laws to restrict publications for the sole purpose of upholding public confidence in the institutions of justice (as is the case with scandalising contempt and to a lesser extent, breach of the sub judice

<sup>234</sup> District Court Act 1973 s199; Local Courts Act 1982 s27A.

<sup>235</sup> District Court Act 1973 s203; Local Courts Act 1982 s27B; *R v Metal Trades Employers’ Association; ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208; cf Special Commissions of Inquiry Act 1983 which gives the Commissioner the power of the Supreme Court to punish persons guilty of contempt or of disobedience of any order or summons made or issued by the Commissioner: s24.

<sup>236</sup> *R v Arrowsmith* [1950] VLR 78.

<sup>237</sup> *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 372.

<sup>238</sup> *Attorney General (NSW) v X* [2000] NSWCA 199; *Hinch v Attorney General (VIC)* (1987) 164 CLR 15 per Wilson J.

<sup>239</sup> These reviews are discussed in the NSW Law Reform Commission Discussion Paper 43 *Contempt by Publication* at page 13.

<sup>240</sup> See NSW Law Reform Commission Report 100 *Contempt by Publication*; Australian Law Reform Commission Report No 35 *Contempt*.

rule) has been subject to widespread criticism.<sup>241</sup> It is said that the law of contempt unfairly stifles public debate where it prohibits publications that do not pose a threat to particular proceedings.<sup>242</sup>

8.3.2 Some of the major reviews of the laws governing contempt by publication are discussed further below.

### **Commonwealth**

8.3.3 The Australian Law Reform Commission comprehensively examined the laws on contempt, including their relation to commissions and tribunals, in its Report No 35 *Contempt* published in 1987. The Australian Law Reform Commission was critical of statutory provisions prohibiting conduct which, if the commission or tribunal were a Court, would constitute contempt of Court. It recommended that there should be no 'deemed contempt' provision applicable to Commonwealth royal commissions, standing commissions or tribunals. It recommended that specific statutory offences should be substituted in lieu thereof.

8.3.4 The Australian Law Reform Commission considered that there should be no contempt protection for publications that may:

- Influence a commissioner (as there is no real risk of his or her decision being influenced by press reports or popular clamour).
- Undermine public confidence in the commission (as commissioners may avail themselves of the law of defamation and the special protection offered by contempt laws is more likely to be counter-productive of the commission's status and reputation).

8.3.5 These recommendations were not implemented.<sup>243</sup>

### **United Kingdom**

8.3.6 The United Kingdom has considered the application of deemed contempt to inquiries established under the *Tribunals of Inquiry (Evidence) Act 1921* (UK). The *Report of the Interdepartmental Committee on the Law of Contempt as it Affects Tribunals of Inquiry* chaired by The Right Honourable Lord Justice Salmon recommended that the law of contempt should apply to tribunals of inquiry in a clarified and modified form. It recommended that the law of contempt by publication should not apply to a Tribunal unless a person says or does anything that is:

- intended or obviously likely to alter, distort, destroy or withhold evidence from the tribunal or

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<sup>241</sup> See Chapter 10 of the Australian Law Reform Commission Report No 35 *Contempt*; and O Litaba 'Does the Offence of Contempt by Scandalising the Court have a Valid Place in the Law of Modern Day Australia?' [2003] *Deakin Law Review*6.

<sup>242</sup> Lowe & Sufrin *The Law of Contempt* (3<sup>rd</sup> ed 1996) at page 6.

<sup>243</sup> The Workplace Relations Amendment (Codifying Contempt Offences) Bill 2003 was introduced to partially implement the ALRC recommendations. However, this aspect of the Bill was defeated in the Senate.

- an unjustifiable attack upon the integrity of a member of the tribunal in his or her capacity as a member of that tribunal.
- in the face of the Tribunal and would have amounted to contempt of a Court of law.

Otherwise, there would be no prohibition on any comment about the subject-matter of the inquiry.

8.3.7 The Government did not implement these recommendations on the basis that it could render a tribunal powerless to deal with unforeseen circumstances. The introduction of the *Contempt of Court Act 1981* (UK) restricted the operation of the breach of the sub judice rule as it applied to tribunals, but not scandalising contempt.<sup>244</sup>

8.3.8 The British Government's current position appears to be that ad hoc inquiries established to investigate particular controversial events giving rise to public concern should not have deemed powers of contempt. A consultation paper produced by the Department for Constitutional Affairs in the United Kingdom on *Effective Inquiries* in advocates for the repeal of the deemed contempt provision in the *Tribunals of Inquiry Act 1921* (UK). In doing so, it states that:<sup>245</sup>

*'Contempt is a formal concept that is specific to the courtroom, and the Government believes that it is not appropriate to apply the law on contempt to today's inquiries, which are designed to achieve a different purpose to court proceedings.'*

### **New South Wales**

8.3.9 The Parliamentary Committee examined the contempt provisions in its 1993 review of the Act. The operation of the deemed contempt provision to contempt of ICAC by publication was a particular focus of the 1993 review by the Parliamentary Committee because of comments made by Mr Moppett, the State Chairman of the NSW National Party criticising the conduct of an ICAC inquiry.<sup>246</sup>

8.3.10 The Parliamentary Committee concluded as follows:

*'The Committee endorses the principle that nothing should be done which suppresses or discourages constructive criticism of ICAC. However, it is 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.'*

*The Committee does not recommend any legislative changes to the contempt provisions in ICAC Act. The Committee recommends that the Attorney General establish an inquiry into the contempt provisions which operate in*

<sup>244</sup> See Borrie & Lowe *The Law of Contempt* (3<sup>rd</sup> ed 1996) at page 546.

<sup>245</sup> CP 12/04 6 May 2004 at paragraph 71.

<sup>246</sup> See the discussion in the Parliamentary Committee's 1993 review page 113.

*the Courts and other tribunals, including ICAC, with a view to ensuring consistency across the range of bodies which have contempt powers.'*

- 8.3.11 The Parliamentary Committee's recommendation to the Attorney General was not implemented. However, in 1998 the Attorney General requested the NSW Law Reform Commission to conduct an inquiry into the law of contempt by publication. This reference originated from controversy surrounding the discharge of the jury in a murder trial following prejudicial comments made by a well-known media personality and subsequent proposals for the payment of compensation by the media.<sup>247</sup>
- 8.3.12 The NSW Law Reform Commission recommended the narrowing of contempt by publication by making the test of liability dependent upon mens rea and the creation of a 'substantial risk' of prejudice rather than 'a real and definite tendency'. The NSW Law Reform Commission has not specifically examined the operation of contempt in relation to tribunals or commissions of inquiry, such as ICAC.
- 8.3.13 It is not within my terms of reference to consider reform of the general law of contempt, only its application to ICAC.

## 8.4 Contempt under ICAC Act

- 8.4.1 Contempt of ICAC is dealt with in Part 10 of the Act. Section 98 sets out a list of conduct that amounts to contempt of ICAC. It covers contempts in the face of ICAC,<sup>248</sup> threats or insults to witnesses and other persons,<sup>249</sup> obstruction of ICAC,<sup>250</sup> contravention of non-publication orders,<sup>251</sup> and, under sub-section 98(h), any conduct that would amount to contempt of a Court of law.<sup>252</sup> In light of the breadth of the other types of contempt listed in section 98, the primary purpose served by the deemed contempt provision in sub-section 98(h) appears to be to prohibit contempt by publication. Contempt by publication aside, most of the contemptuous behaviour protected by section 98 is also covered by specific criminal offences set out in Parts 9 and 11 of the Act.
- 8.4.2 ICAC has no power of its own to punish for contempt. Under section 99 of the Act, only the Supreme Court may punish for contempt, once satisfied that the person is guilty of contempt. A person may be punished for either the criminal offence or contempt, but not both.<sup>253</sup>
- 8.4.3 The Police Integrity Commission, Royal Commissions, and Special Commissions of Inquiry have similar provisions,<sup>254</sup> although somewhat

<sup>247</sup> NSW Law Reform Commission Discussion Paper No 43 *Contempt by Publication* page 4.

<sup>248</sup> See sub-sections 98(a)-(c),(e),(f) of the Act.

<sup>249</sup> See sub-section s98(d) of the Act.

<sup>250</sup> See sub-section s98(g) of the Act.

<sup>251</sup> See sub-section s98(i) of the Act.

<sup>252</sup> See sub-section s98(h) of the Act.

<sup>253</sup> See section 101 of the Act.

<sup>254</sup> Police Integrity Commission Act 1996 s118; Royal Commissions Act 1923 s18A; Special Commission of Inquiry Act 1983 s24. *The Administrative Decisions Tribunal and the Consumer,*

anomalously, a Commissioner appointed under the Special Commissions of Inquiry Act 1983 may punish for contempt.<sup>255</sup> The Ombudsman does not have contempt powers.<sup>256</sup>

- 8.4.4 Consideration of the laws of contempt in relation to the Police Integrity Commission, Royal Commissions and Special Commissions of Inquiry is outside my terms of reference, although I acknowledge the similarity between the contempt provisions that apply to these bodies with those that apply to ICAC and the potential for reform of contempt of ICAC to lead to consideration as to whether similar reforms should be made to the laws governing these bodies.

## 8.5 Contempt of ICAC by the Premier

- 8.5.1 Contempt of ICAC arose as an issue during the course of the review when, on 20 August 2004, the Assistant ICAC Commissioner, The Honourable John Clarke, QC issued a summons to the Premier, The Honourable Bob Carr, MP. The summons required the Premier to show cause as to why he should not be dealt with for alleged contempt under section 99 of the Act in relation to public comments that he had made on 19 August 2004. These comments referred to evidence given the day before during the Assistant Commissioner's inquiry into allegations that the then Minister for Health, the Honourable Craig Knowles, MP threatened or intimidated nurses who had complained to him about perceived maladministration and misconduct at public hospitals.
- 8.5.2 The Premier, in a radio interview and in a press conference, made statements to the effect that evidence given by a whistleblower nurse to ICAC had been contradicted by her brother and other nurses and that this represented a vindication of the Minister.
- 8.5.3 The Premier's comments misrepresented the evidence that had been given to ICAC<sup>257</sup> and were made before all nurses had finished giving their evidence on the issue. The Premier subsequently withdrew his comments and expressed his regret in making them, having no wish to be seen to prejudge the outcome, pressure ICAC, or deter witnesses.<sup>258</sup>
- 8.5.4 Three separate types of contempt were alleged to have been committed by the Premier:
- Undermining public confidence in ICAC and its findings by exciting misgivings and giving rise to a serious risk that ICAC would appear not to be free from extraneous influences, in contravention of sub-section 98(h)

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*Trader and Tenancy Tribunal also have similar provisions, although their functions are quite different to inquisitorial bodies: Administrative Decisions Tribunal Act 1997 s131; Consumer, Trader and Tenancy Act 2001 s42.*

<sup>255</sup> Special Commissions of Inquiry Act 1983 s21.

<sup>256</sup> Ombudsman Act 1974 s19.

<sup>257</sup> While much of the whistleblower's evidence against the Minister had not been supported by other witnesses, some particular aspects of her evidence had been. As well, other nurses had made allegations against the Minister, some of these allegations were uncontradicted.

<sup>258</sup> Written submissions of the Premier in the matter of an alleged contempt of ICAC at paragraph 1.



of the Act which deems conduct that would amount to contempt of a Court of law as contempt of ICAC.

- Creating a real and substantial risk of adversely influencing actual or potential witnesses in relation to the present proceedings or future proceedings, again in contravention of sub-section 98(h) of the Act.
- Wilfully insulting a witness appearing before ICAC, in contravention of sub-section 98(d)(iii) of the Act<sup>259</sup>.

8.5.5 The Assistant Commissioner found that it was strongly arguable that the Premier's conduct constituted contempt on each of these grounds. However, he exercised his discretion not to refer the alleged contempt to the Supreme Court in light of the steps taken by ICAC, the Premier's retraction, and the publicity that these steps and the retraction had received.

8.5.6 Although the Supreme Court was not ultimately called upon to determine whether or not the Premier's conduct amounted to contempt, the matter brought to light problems in applying the law of contempt to inquisitorial tribunals such as ICAC, as well as highlighting uncertainty surrounding the procedure to be applied to alleged contempts of ICAC. The Assistant Commissioner, in considering the alleged contempt by the Premier, specifically drew to the review's attention problems that he identified in the Act concerning the certification of contempt of ICAC.

## 8.6 Contempt of ICAC by publication

8.6.1 Contempt of ICAC by publication is prohibited by the deemed contempt provision in section 98(h) of the Act. This provision prohibits any conduct that would amount to contempt of a Court of law.

8.6.2 The difficulties with this provision were referred to by Dean J who was required to apply a 'deemed contempt' provision to the Royal Commission into the Communist Party established in Victoria:

*'The problem is, how to apply to a Royal Commission which is not concerned in the administration of justice at all, doctrines designed solely to prevent interference with the administration of justice. Ex hypothesi, there is nothing to be interfered with. The very touchstone whereby the question of contempt or not contempt is to be judged has been withdrawn and some new criterion must be found. The solution must be that Parliament intended that the proceedings of the Commission are to be treated as themselves part of the general administration of justice, and that all acts which would be contempts in the case of a judicial proceedings shall, if committed in relation to the Commission be contempt. Difficulties will arise in forcing the old doctrine to new uses....'*<sup>260</sup>

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<sup>259</sup> Decision of Assistant Commissioner into alleged contempt by the Premier at paragraph 55.

<sup>260</sup> *R v Arrowsmith* [1950] VLR 78 at 85.

- 8.6.3 The Honourable Athol Moffitt, QC, in his submission to the 1993 review of contempt of ICAC by the Parliamentary Committee, also identified some of the problems that arise in applying the deemed contempt provision to ICAC:

*'It is difficult and productive of great uncertainty to endeavour to transpose to an administrative body, particularly an investigative one, the concept to contempt worked out at common law in relation to the unacceptable interference with the administration of justice, particularly in the field of what is known as scandalising. Unless kept under a tight rein, it can easily degenerate into suppressing criticism. To give an administrative body such a task, that's of itself dealing with this question, a task which is confusion of itself, inevitably will produce uncertainty and error and arguably it has already.'*

- 8.6.4 In considering whether contempt by publication should continue to apply to ICAC by virtue of the 'deemed contempt' provision or in a modified form, it is useful to recall the differences between ICAC and Courts of law:

- ICAC investigates the truth of an allegation with a view to making findings of corruption and recommendations for systemic reform. It is not adjudicating on a defined dispute between litigants. ICAC inquiries may be far broader in scope than adversarial proceedings, and are focussed on what happened and how it can be prevented, rather than criminal or civil liability of an individual.
- ICAC routinely examines matters subject to public comment, including matters of intense public interest of a political nature.
- ICAC can compel witnesses to give incriminating evidence.
- ICAC has broad powers to restrict publication of its evidence or hold hearings in private.
- ICAC hearings are conducted by persons qualified for appointment to high judicial office. There is no jury.

- 8.6.5 ICAC is a unique body. It has extensive compulsive powers, with jurisdiction over all public officials, including the judiciary, MPs and Ministers. Its findings, although not affecting legal rights and obligations, invariably have a significant impact on employment and reputation. The comments of the Salmon Committee about British tribunals of inquiry apply equally to ICAC:

*'The whole future of a number of persons depends upon the report of the Tribunal. Their political, commercial, and social reputations may be (and sometimes have been) utterly ruined and their careers brought to an abrupt end by the report. The findings of Tribunals of Inquiry are usually of much greater consequence to those concerned than any litigation in which they may ever have been engaged. It is certainly of no less public importance that justice should be done to individuals by Tribunals of Inquiry than that it should be done by the courts.'*<sup>261</sup>

- 8.6.6 It is axiomatic that ICAC must enjoy public confidence if it is to be successful in carrying out its primary function of exposing and investigating corrupt conduct. It is in the public interest that ICAC reaches the correct conclusions

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<sup>261</sup> *The Rt Hon Lord Justice Salmon, Report on the Interdepartmental Committee on the Law of Contempt as it Affects Tribunals of Inquiry 1969 page 8.*

and is not impeded in its efforts to do so. The crucial question, however, is whether a deemed contempt provision is the best way to secure public confidence in ICAC and its findings. Public confidence in ICAC may be misplaced if it is founded on the stifling of criticism and the absence of public debate.

- 8.6.7 Inquisitorial inquiries, especially those conducted by ICAC which may cover senior public servants, Members of Parliament or Ministers of the Crown, may need some limited protection from sustained attacks on its integrity. This protection, in my view, is adequately provided by the law of defamation and the criminal offences in Part 9. These include the offence to wilfully obstruct, hinder, resist or threaten ICAC or one of its officers.
- 8.6.8 To the extent that conduct merely has a tendency to create the appearance of undermining the authority of ICAC and its findings, and that conduct is not defamatory or otherwise criminal, ICAC's authority may be better re-enforced by recourse to strong public statements, than citation for contempt.
- 8.6.9 The following circumstances distinguish ICAC from criminal and civil proceedings in a manner that diminishes the need for contempt by publication:
- An investigation conducted by ICAC is not just directed towards whether corrupt conduct has occurred, but whether laws need to be changed or whether methods of work, practices and procedures facilitated the occurrence of corrupt conduct: s13(2). Public interest in, and discussion of, the subject-matter of an inquiry is therefore likely to enhance ICAC's investigation.
  - ICAC has a greater capacity than Courts to enter the public domain or pursue defamation action to protect its integrity.
  - In relation to ICAC inquiries, there are no parties whose interests can be prejudiced, and ICAC has extensive powers to protect the integrity of a witness' evidence by holding private hearings or making non-publication orders. The more a body operates in secret, the less justification there can be for contempt by publication. Courts may have greater justification for recourse to contempt by publication than ICAC as they are generally required to conduct all of their business in public. This is not the case with ICAC.
  - ICAC inquiries are conducted by professionally trained and eminent members of the legal profession, about whom no reasonable person would imagine could be susceptible to influence from media reports. Persons appointed to conduct ICAC inquiries have security of tenure, and are not subject to Executive or Parliamentary direction and control in the conduct of their inquiries.
- 8.6.10 Where there are available alternative methods of protecting ICAC that do not curtail freedom of speech, they are to be preferred. ICAC, through strong public statement and directions, has the power to protect witnesses, and address misrepresentations, inaccuracies and prejudicial comment. I am therefore of the view that it is not in the public interest to retain an ill-defined residual category of contempt, the primary purpose of which is to restrict publications about ICAC.

8.6.11 In recommending the repeal of sub-section 98(h), I do not propose to criticise or to comment on the published reasons of The Honorable John Clarke, QC, who as I said was of the opinion that it was ‘strongly arguable’ that the Premier’s comments amounted to contempt as defined in sub-sections 98(d)(iii) and 98(h). Mr Clarke was required to deal with the contempt according to law which, of course, included sub-sections 98(d) and 98(h) of the Act. However, Mr Clarke recommended that problems identified by him in the wording and application of section 99 be referred to my inquiry. Should the ‘contempt’ provisions in the Act remain, either as they are or in a modified form, section 99 should be amended to address the problems identified by Mr Clarke.

## 8.7 Other contempts of ICAC

### *General*

- 8.7.1 It remains to be considered whether the other contemptuous behaviour enumerated in section 98 should continue to apply to ICAC. There is significant overlap between the remaining matters covered by contempt in section 98 and the criminal offences in Parts 9 and 11 of the Act.
- 8.7.2 With the exception of insults not amounting to threats under sub-section 98(d), threats to witness under sub-section 98(d)(iii), and deemed contempt under sub-section 98(h), the contempts enumerated in section 98 are covered by specific criminal offences in Parts 9 and 11 of the Act.<sup>262</sup>
- 8.7.3 There are several advantages in relying on the offences under the Act rather than the contempt provisions in section 98:
- The maximum term of imprisonment and fine are defined, rather than being at large.
  - It reduces scope for uncertainty as to the basis and circumstances of liability.
  - An ICAC inquiry would not be diverted by consideration of the contempt proceedings.
  - The procedure for dealing with contempt is clumsy and lacking in clarity compared to that for prosecuting criminal offences under the Act.
- 8.7.4 Given that it is now well established that contempt must be satisfied to the criminal standard, there may be nothing to be gained from maintaining the dual regime, as long as ICAC is able to properly control the conduct of its proceedings.

### *Threats and insults*

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<sup>262</sup> See Appendix F for a detailed analysis of how the contempt provisions mirror the criminal offences in the Act.

- 8.7.5 It is contempt of ICAC under sub-section 98(d) to wilfully threaten or insult the Commissioner, Assistant Commissioner, officer of the Commission, counsel assisting ICAC, any witness or person summoned to attend before ICAC, or a legal practitioner authorised to appear before ICAC.
- 8.7.6 There are no criminal offences in the Act specifically covering insults to the Commissioner, Assistant Commissioner, officer of the Commission, counsel assisting ICAC, other legal practitioners, or witnesses.
- 8.7.7 Threats to the Commissioner, Assistant Commissioner, or officer of the Commission are specifically covered by the offence in section 80(a). It provides that it is an offence, without reasonable excuse, to wilfully obstruct, hinder, resist or threaten ICAC or an officer of ICAC in the exercise of functions under the Act.
- 8.7.8 It is arguable that the offence in section 80(a) also covers threats to counsel assisting ICAC. An ‘officer of the Commission’ is defined in section 3 of the Act to include ‘a person engaged to provide the Commission with services, information or advice under section 104.’ Section 104(6) provides that ‘The Commission may engage any suitably qualified person to provide the Commission with services, information or advice.’ This provision would appear, on its face, to cover Counsel assisting. However, it may be that section 104 was not intended to do so, as section 106 separately provides that ‘The Commissioner may appoint a legal practitioner to assist the Commission as counsel, either generally or in relation to a particular matter or matters.’ To avoid doubt, I recommend that section 80(a) be amended to clarify that it applies to Counsel assisting ICAC.
- 8.7.9 To the extent that an insult of the Commissioner, Assistant Commissioner, officer of the Commission or Counsel assisting, does not amount to a threat, refusal to comply with a lawful requirement of ICAC or its officers, or disruption of the hearing, I am not of the view that it should amount to a criminal offence.
- 8.7.10 There are no criminal offences in the Act that protect a legal practitioner authorised to appear before ICAC from threats or insults. If, as I suggest, section 98 is to be amended so as to apply only to contempts in the face of ICAC, it would mean that there would be no mechanism whereby threats to legal practitioners appearing before ICAC are prohibited. While I do not think it desirable to protect such persons from insults, I consider that they should be protected from threats because of the capacity that such threats have to interfere with ICAC’s functions, particularly, those involved in conducting public hearings.
- 8.7.11 It is contempt of ICAC to threaten or insult any witness or person summoned to attend before ICAC. There are many criminal offences in the Act protecting such persons. It is an offence to procure false testimony at an ICAC hearing (s89), bribe a witness (s90), practise fraud on a witness (s91), prevent a witness from attending to give evidence or produce documents (s92), cause injury or disadvantage to a witness (s93), dismiss a witness from employment on account of the assistance provided to ICAC (s94).

- 8.7.12 Despite the number of these provisions, there is no specific offence of threatening injury or other detriment to a witness on account of the evidence given or to be given, or assistance provided or to be provided to, ICAC. This should be rectified. Such protection is provided to witnesses in judicial proceedings by section 322 of the Crimes Act 1900. Witnesses before ICAC are entitled to equivalent protection.
- 8.7.13 The recommendations made in this section could be implemented by reframing section 80(a) as follows:  
*'without reasonable excuse, wilfully obstruct, hinder, resist or threaten:*  
(i) *the Commission or an officer of the Commission in the exercise of functions under the Act*  
(ii) *a legal practitioner appointed to assist the Commission as counsel*  
(iii) *a legal practitioner or other person authorised to appear before the Commission, or*  
(iv) *any witness or other person summoned to attend before the Commission.'*
- 8.7.14 Alternatively, the proposal could be implemented by appropriate amendment to section 93.

## 8.8 Submissions concerning contempt of ICAC

- 8.8.1 The Law Society, in its submission to the review,<sup>263</sup> recommended that the following matters should not be contempt of ICAC:
- Insulting an officer of ICAC, Counsel assisting, a legal practitioner appearing before ICAC, or a witness under sub-section 98(d) of the Act.
  - Misbehaviour or interruption of ICAC proceedings under sub-sections 98(e) and (f) of the Act.
  - Deemed contempt under sub-section 98(h).
- 8.8.2 The Law Society is of the view that these powers are too wide and vague and unfairly protect ICAC against criticism. Other persons expressed similar views in oral submissions to the review.
- 8.8.3 The Hon John Clarke, QC, in his decision on the alleged contempt by the Premier, drew the review's attention to some of the difficulties of interpretation in Part 10 of the Act.
- 8.8.4 The Parliamentary Committee expressed support for removing unnecessary restrictions on publications about ICAC without compromising the integrity of ICAC's operations and clarifying the procedure for dealing with contempt of ICAC.
- 8.8.5 The Police Integrity Commission opposes my recommendation to restrict contempt of ICAC to contempt in the face or hearing of ICAC. The Police Integrity Commission is of the view that contempt by publication is necessary to ensure that nothing is done which *'unreasonably interferes with the ability of a commission of inquiry to properly investigate and report upon matters of*

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<sup>263</sup> This aspect of their submission reiterates the recommendations made by the Law Society to the 1993 review of the Act by the Parliamentary Committee.

*public interest....This is not so much to protect the reputation or public standing or either Commission, but the integrity of the particular investigation and report.'*

- 8.8.6 The Police Integrity Commission advises that there have been occasions where *'media broadcasts have had real potential to undermine the public's acceptance of the Commission's final report to Parliament as the product of a thorough and objective investigation.'* I do not see this as a valid reason to retain contempt by publication. Public confidence in ICAC (or its investigation) may be misplaced if founded upon the stifling of public criticism and the absence of public debate.
- 8.8.7 The Police Integrity Commission is concerned that the absence of contempt by publication may reduce ICAC's standing and ability to protect the integrity of its investigation to that of a private individual. While I acknowledge that removal of contempt by publication would make it more difficult for ICAC to prevent adverse media broadcasts, I do not agree that this would mean that ICAC has no greater standing or ability to protect its investigations than a private individual. ICAC is a well-respected, autonomous organisation with significant powers and resources. It has a dedicated media unit. There are a number of criminal offences under its Act that prevent any person from obstructing or hindering ICAC officers and witnesses. Its investigation reports may be tabled in Parliament, thus receiving the protection of Parliamentary privilege. In my view, these mechanisms are more than adequate to protect the integrity of its investigations.
- 8.8.8 The concerns raised by the Police Integrity Commission are not echoed by ICAC. ICAC has expressed support for my recommendations for reform of contempt of ICAC.

**Recommendation R8.1:** That section 98 of the Act be amended so that it only applies to contempt in the face or hearing of ICAC.

**Recommendation R8.2:** That either section 80(a) or section 93 of the Act be amended so that threats to the following persons are made the subject of criminal liability:

(a) counsel assisting ICAC

(b) legal practitioners or other persons authorised to appear before ICAC and (c) persons giving evidence to or otherwise assisting ICAC.

## **8.9 Reform of the procedure for dealing with contempt of ICAC**

### ***Procedure for dealing with contempt of ICAC***

8.9.1 The procedure for dealing with contempt of ICAC under Part 10 may be summarised as follows:

- Where contempt of ICAC is alleged, the offender may be called upon to show cause as to why he or she should not be dealt with under section 99 for the contempt.<sup>264</sup> The offender may be taken into custody for the purpose of the show cause hearing where contempt is committed in the face or hearing of ICAC.
- ICAC may certify contempt of ICAC under section 98 in writing to the Supreme Court.<sup>265</sup> The certificate is prima facie evidence of the matters certified.<sup>266</sup>
- A warrant to arrest and detain the offender may be issued while the offender is before ICAC. The purpose of the warrant is to bring the offender before the Supreme Court. The warrant must be accompanied by the certificate or a statement in writing setting out the details of the alleged contempt.<sup>267</sup> The offender may be released prior to appearing before the Court.<sup>268</sup>
- Upon receipt of the certificate, the Supreme Court is required to inquire into the alleged contempt, and if satisfied that the person is guilty of contempt, may punish the offender as if the offender had committed that contempt in the Supreme Court.<sup>269</sup>

8.9.2 Sections 99 and 100 are reproduced in full below.

#### **99 Punishment of contempt**

- (1) Any contempt of the Commission under section 98 may be punished in accordance with this section.
- (2) The Commissioner may certify the contempt in writing to the Supreme Court.
- (3) If the Commissioner certifies the contempt of a person to the Supreme Court:
  - (a) the Supreme Court shall thereupon inquire into the alleged contempt, and
  - (b) after hearing any witnesses who may be produced against or on behalf of the person charged with the contempt, and after hearing any statement that may be offered in defence, the Supreme Court (if satisfied that the person is guilty of the contempt) may punish or take steps for the punishment of the person in like manner and to the like extent as if the person had committed that contempt in or in relation to proceedings in the Supreme Court, and
  - (c) the provisions of the [Supreme Court Act 1970](#) and the rules of court of the Supreme Court shall, with any necessary adaptations, apply and extend accordingly.
- (4) Such a certificate is prima facie evidence of the matters certified.
- (5) Neither liability to be punished nor punishment under this section for contempt referred to in section 98 (a) or (aa) excuses the offender from attending before the Commission in obedience to the summons, and the Commissioner may enforce attendance by warrant.
- (6) A person is not liable to be punished under this section where the person establishes that there was a reasonable excuse for the act or omission concerned.

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<sup>264</sup> Section 100(1)-(3) of the Act.

<sup>265</sup> Section 99(2) of the Act.

<sup>266</sup> Section 99(4) of the Act.

<sup>267</sup> Section 100(6) of the Act.

<sup>268</sup> Sections 100A and 100B of the Act.

<sup>269</sup> Section 99(3) of the Act.



**100 General provisions regarding contempt**

- (1) In the case of any alleged contempt of the Commission, the Commissioner may summon the offender to appear before the Commission at a time and place named in the summons to show cause why the offender should not be dealt with under section 99 for the contempt.
- (2) If the offender fails to attend before the Commission in obedience to the summons, and no reasonable excuse to the satisfaction of the Commissioner is offered for the failure, the Commissioner may, on proof of the service of the summons, issue a warrant to arrest the offender and bring the offender before the Commissioner to show cause why the offender should not be dealt with under section 99 for the contempt.
- (3) If a contempt of the Commission is committed in the face or hearing of the Commission, no summons need be issued against the offender, but the offender may be taken into custody in a prison or elsewhere then and there by a member of the Police Force and called upon to show cause why the offender should not be dealt with under section 99 for the contempt.
- (4) The Commissioner may issue a warrant to arrest the offender while the offender (whether or not already in custody under this section) is before the Commission and to bring the offender forthwith before the Supreme Court.
- (5) The warrant is sufficient authority to detain the offender in a prison or elsewhere, pending the offender's being brought before the Supreme Court.
- (6) The warrant shall be accompanied by either the instrument by which the Commissioner certifies the contempt to the Supreme Court or a written statement setting out the details of the alleged contempt.
- (7) The Commissioner may revoke the warrant at any time before the offender is brought before the Supreme Court.
- (8) When the offender is brought before the Supreme Court, the Court may, pending determination of the matter, direct that the offender be kept in such custody as the Court may determine or direct that the offender be released.

***Provision of particulars***

- 8.9.3 A notable omission from the procedure governing contempt of ICAC is a requirement to inform a person brought before ICAC of the contempt that he or she is alleged to have committed. Such a requirement is found in the procedure for dealing with contempt in the Supreme Court, District Court and Local Courts.<sup>270</sup> To ensure procedural fairness, a person should be informed of his or her alleged contempt before being called upon under s100 to show cause why he or she should not be dealt with under s99 for contempt. As this requirement has been given statutory force with respect to contempts of Courts, similar provision should be made for contempts of ICAC.

***Certification***

- 8.9.4 The Assistant Commissioner, in considering the alleged contempt by the Premier, criticised the language of Part 10 for its lack of clarity, particularly in

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<sup>270</sup> Supreme Court Rules 1970 Part 55, rules 3 and 7; District Court Act 1973 s199; Local Courts Act 1982 s27A.

relation to the process of certification of contempt of ICAC. Section 99(2) requires the Commissioner to ‘certify the contempt in writing to the Supreme Court’. The Supreme Court is then called upon under section 98(3) to ‘inquire into the alleged contempt’.

- 8.9.5 It is not clear from these provisions whether, in certifying the contempt, the Commissioner is required:
- to be satisfied, as a matter of law, that a contempt has occurred; or
  - to state the facts that the Commissioner is satisfied constitute the alleged contempt.
- 8.9.6 I agree with the Assistant Commissioner’s decision<sup>271</sup> that the better view is that the certificate should set out the relevant facts that the Commissioner has found to have occurred. This interpretation accords with the role of the certificate as ‘prima facie evidence of the matters certified’.<sup>272</sup>
- 8.9.7 ICAC should not be required to be satisfied beyond reasonable doubt that contempt has occurred before it issues the certificate. That is a question for the Supreme Court to decide.
- 8.9.8 The complexities in the process of certification arise mainly in relation to contempts committed outside ICAC. For the most part, where contempt is committed in the face or hearing of ICAC, there is unlikely to be any practical difference between finding the facts and forming the opinion that contempt has been committed. For example, if the Commissioner is satisfied that a person has refused to answer a question put by the Commissioner, the Commissioner would also be satisfied that the person was in contravention of section 98(c).
- 8.9.9 The Act should be amended to make it clear that a certificate presented to the Supreme Court by ICAC is a certificate of the facts that ICAC considers constitute the alleged contempt. The equivalent provisions in the *Royal Commissions Act 1923* and the *Police Integrity Commission Act 1996*, and the *Corruption and Crime Commission Act 2003* (WA) section 163(1) follow this approach. The certificate should continue to be prima facie evidence of those facts.
- 8.9.10 The certification process should only apply to contempts alleged to have been committed in the face or hearing of ICAC. Contempts committed outside ICAC will not be within the particular knowledge of ICAC. ICAC will be in no better position than the Supreme Court to ascertain the facts of these contempts. The certification process as it applies to contempts outside the Court merely serves to divert attention and resources from ICAC’s substantive inquiry. Contempts committed outside the face or hearing of ICAC should be instituted by ICAC by application to the Supreme Court in accordance with the rules of the Court.

### ***Statements in writing***

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<sup>271</sup> See page 11.

<sup>272</sup> Section 99(4) of the Act.

8.9.11 Section 100(6) provides that the warrant to bring the person before the Supreme Court for contempt must be accompanied by either the certificate of contempt or a written statement setting out the details of the alleged contempt. Neither the purpose nor benefit of permitting the warrant to be accompanied by a written statement instead of the certificate is made clear in the legislation. If the certificate is restricted to the details considered by ICAC to constitute the alleged contempt, there seems to be no reason for an alternative procedure whereby ICAC may set out the details of the alleged contempt in a written statement. The reference to the written statement in section 100(6) has been omitted from the equivalent provision in the *Royal Commissions Act 1923* (see sub-section 18C(6)) and it should also be removed from section 100(6) of the Act.

**Recommendation R8.3:** That the provisions of the Act which set out the procedure for dealing with contempt of ICAC be amended so that:

- A person brought before ICAC is informed of the contempt that he or she is alleged to have committed.
- It is clear that a certificate presented to the Supreme Court by ICAC certifies the facts that constitute the alleged contempt, and is presumed to be the truth of the certified facts, in the absence of contrary evidence.
- There is no power to commit for contempt by a statement in writing.

**Recommendation R8.4:** That, if section 98 is not amended in accordance with recommendation R8.1 above, the Act be amended so that only contempt in the face or hearing of ICAC is capable of certification by ICAC and proceedings for other types of contempt are commenced by ICAC by application to the Supreme Court.

## CHAPTER 9 – MISCELLANEOUS AMENDMENTS

### 9.1 Offence of giving false or misleading evidence

- 9.1.1 Section 87 of the Act makes it an indictable offence punishable by imprisonment for five years or a fine of up to \$22000 to knowingly give false or misleading evidence at an ICAC hearing.
- 9.1.2 ICAC has sought two amendments to this provision to facilitate the prosecution of this offence:
- To extend the prohibited conduct to whenever a person gives false or misleading evidence, and *did not believe it to be true*.
  - To permit conviction for the offence where contradictory statements on oath have been made.
- 9.1.3 These amendments would bring the offence under the Act into line with the provisions applying to perjury and false evidence given to Courts of law.
- 9.1.4 Currently, the mental element of the offence under section 87 of the Act only extends to persons who *knew* that the statement in question was false or misleading. The mental element of like offences under Division 4 of Part 7 of the *Crimes Act 1900* is that the person *knew* that the statement was false or misleading *or did not believe it to be true*.
- 9.1.5 The addition of these latter words makes it easier for the prosecution to prove the offence as the prosecution only need establish that the accused person did not believe that the statement was true, not that the accused person actually knew the statement was not true.
- 9.1.6 The proposed change does not offend the general principle that criminal liability should only arise upon proof of *mens rea*. The prosecution will still be required to prove that at least one statement is false and that the accused person knew that it was false or at least did not believe it to be true. If the statement is made mistakenly, but

genuinely believing it to be true, the offence will not be made out.<sup>273</sup> I see no reason why this amendment should not be made.

- 9.1.7 It will sometimes happen that a witness will give two pieces of evidence that is inconsistent. For example, a witness may give evidence that he was in Perth at a particular time, and then on another occasion give evidence that he was in Melbourne at that same time. Both pieces of evidence cannot be true and it may be proper to conclude that one of them is false to the knowledge of the witness. It may, however, be impossible to prove which piece of evidence is false.
- 9.1.8 This problem is overcome in relation to the offence of perjury under section 327 of the *Crimes Act 1900* and the offence of making a false statement on oath under section 330 of the *Crimes Act 1900* by section 331 of that Act.
- 9.1.9 Section 331 facilitates the proof of these offences by removing the requirement for the tribunal of fact to identify which of the two statements is the statement that is false.
- 9.1.10 Section 331 provides that where a person is charged with the offence or perjury or of giving false evidence, the person may be convicted where:
- The jury is satisfied that the accused has made two statements on oath and one is irreconcilably in conflict with the other; and
  - The jury is satisfied that one of the statements was made by the accused knowing it was false or not believing it was true but the jury cannot say which was statement was so made.
- 9.1.11 Section 331 does not apply to the offence of giving false or misleading evidence under section 87 of the Act. This means that offences under section 87 of the Act are more difficult to prove than like offences under the *Crimes Act 1900*. I see no reason why this should be so.
- 9.1.12 The criminality attached to offences of giving false evidence derives from giving false evidence when under an obligation to tell the truth. It matters not whether this occurs before a Court or before an ICAC hearing. Both forms of giving false evidence should be equally protected.
- 9.1.13 The DPP is of the view that there is no need for an amendment to section 87 of the Act as matters referred to the DPP by ICAC for prosecution under section 87 generally can be established by the evidence.
- 9.1.14 The proposed amendment would, however, facilitate prosecutions under section 87 of the Act and promote consistency with the offence of perjury under the *Crimes Act 1900*. For these reasons, it is worthy of support.

**Recommendation R9.1:** That the offence of giving false or misleading evidence at an ICAC hearing under section 87 of the Act be amended to:

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<sup>273</sup> *MacKenzie v The Queen* (1996) 190 CLR 348.

- Make it an offence to give evidence that is false or misleading in a material particular, knowing that the evidence is false or misleading, or not believing it to be true.
- Apply the provisions of section 331 of the *Crimes Act 1900* so that the Court is not required to identify which evidence is false, where satisfied that one of two irreconcilable pieces of evidence is false to the knowledge or belief of the accused.

## 9.2 Non-publication orders

9.2.1 Under section 112 of the Act, ICAC may direct that evidence or other facts or information not be published. Contravention of a non-publication order is a criminal offence punishable by fine or imprisonment. The provision is reproduced below:

### 112 Restriction on publication of evidence

(1) The Commission may direct that:

- (a) any evidence given before it, or
- (b) the contents of any document, or a description of any thing, produced to the Commission or seized under a search warrant issued under this Act, or
- (c) any information that might enable a person who has given or may be about to give evidence before the Commission to be identified or located, or
- (d) the fact that any person has given or may be about to give evidence at a hearing,

shall not be published or shall not be published except in such manner, and to such persons, as the Commission specifies.

(1A) The Commission is not to give a direction under this section unless satisfied that the direction is necessary or desirable in the public interest.

(2) A person shall not make a publication in contravention of a direction given under this section.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

9.2.2 Breach of a suppression order is a summary offence.<sup>274</sup> This means that the prosecution must be commenced within six months of the offence taking place.<sup>275</sup>

9.2.3 ICAC has requested that the Act be amended to extend the statutory limitation period for commencing a prosecution under section 112 from six months to two years.

<sup>274</sup> Section 116 of the Act.

<sup>275</sup> *Criminal Procedure Act 1986* section 179.

- 9.2.4 ICAC states that it ‘*may not always be operationally desirable or practical to commence proceedings for a breach of an s112 order within the six-month time limitation period.*’
- 9.2.5 In ICAC’s *Report on Investigation into matters concerning John Kite and the National Parks and Wildlife Service* (December 2001) the then Assistant Commissioner, The Honourable Jerrold Cripps, QC, noted that he would have stated that consideration be given to the prosecution of a witness for such an offence if the six-month time limitation had not expired, but that it was not appropriate or desirable to forward evidence of breach to the DPP during the investigation.
- 9.2.6 I agree that there may be sound reasons why it would not be in the public interest to initiate criminal proceedings for breach of a non-publication order while the investigation is underway. To do so may compromise the integrity of the investigation or unfairly disadvantage a person subject to investigation.
- 9.2.7 The Act already extends the limitation period in relation to the offence of misleading ICAC under section 80(c) of the Act and the offence of making a false complaint about corruption under section 81 of the Act from six months to three years after the commission of the alleged offence.<sup>276</sup>
- 9.2.8 I agree with ICAC’s submission that the Act should be amended to extend the statutory limitation period for commencing a prosecution under section 112 to two years. This should be a sufficient period of time to enable ICAC to conclude its investigation and commence proceedings.
- 9.2.9 The Legal Representation Office has urged me to recommend that the Act be amended to require ICAC to give notice to an affected person before lifting a non-publication order for the purpose of permitting submissions to be made as to whether or not the non-publication order should be lifted.
- 9.2.10 I have given careful consideration to this proposal and in particular to the concern that ‘*the mischief created by publication of the material cannot be undone.*’
- 9.2.11 The Director of the Legal Representation Office, Ms Annette Sinclair, has advised the review that ICAC usually does give notice where a non-publication order is to be varied, but that it is not invariably the case.
- 9.2.12 ICAC has also advised the review that it would ordinarily give notice to affected persons before lifting a non-publication order.
- 9.2.13 ICAC may only make a non-publication order where satisfied that it is necessary or desirable in the public interest.<sup>277</sup> It would seem that the purpose of the non-publication order is to protect the public interest, such as the public interest in the integrity of the investigation, not private or personal interests.

<sup>276</sup> Section 116(4) of the Act.

<sup>277</sup> Section 112(1A) of the Act.

- 9.2.14 While the views of a person affected by a non-publication order well may be relevant to a consideration of the public interest, those views alone will rarely determine the matter.
- 9.2.15 The requirements of procedural fairness would ordinarily require ICAC to give an affected person an opportunity to be heard in relation to the making or lifting of a non-publication order. For these reasons set out in section 7.3 above I do not consider that it is desirable for the rules of procedural fairness to be set out in the Act.

**Recommendation R9.2:** That the Act be amended to extend the statutory limitation period for the prosecution of breaches of ICAC’s non-publication orders under section 112 from six months to two years.

### 9.3 False complaints

- 9.3.1 Some submissions to the review complained about the adverse consequences arising from false or anonymous allegations of corruption.
- 9.3.2 Investigation by ICAC may well be a harrowing experience, with great potential for harm to reputation and employment prospects. That harm would be increased where it arises from the investigation of a false complaint.
- 9.3.3 Under section 81 of the Act it is a criminal offence to make a false or misleading allegation of corruption to ICAC. Burwood Council has expressed concern that ICAC has no impetus to take action to prosecute a complainant for making a false or misleading complaint under section 81 of the Act and noted that where allegations prove to be unsubstantiated little recourse is available against the complainant.
- 9.3.4 Burwood Council has suggested detailed amendments to the Act to discourage the making of false complaints and to assist those affected by false complaints to bring defamation proceedings. Under this proposal, ICAC would be required to disclose to an affected person the identity of a complainant (where the complaint has been unsubstantiated), except where to do so would contravene other legislation such as the *Protected Disclosures Act 1994*.
- 9.3.5 I do not support these changes. There is a vast difference between an unsubstantiated claim and one that is false. It may not be in the public interest for ICAC not to disclose the identity of a complainant to the affected person.
- 9.3.6 The comments made by the Parliamentary Committee in its examination of this issue in 1993 are relevant to this proposal:<sup>278</sup>

*‘Complaints from members of the public are an important source of information for ICAC and ICAC has an important role to play in dealing with*

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<sup>278</sup> See chapter 8 of the *Report on the Review of the ICAC Act* (May 1993).



*complaints. 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 ICAC.'*

- 9.3.7 ICAC has demonstrated a willingness to pursue persons who make false statements to ICAC, especially in the context of public investigations. The conviction of former Minister Face for making a false statement to ICAC in a letter sent by his lawyers is a recent example.
- 9.3.8 I regard the current criminal offence in section 81 of the Act as sufficient sanction against false complaints of corruption and I make no recommendations for changes to the Act in this regard.

## **APPENDIX A – PARLIAMENTARY COMMITTEE REPORTS**

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The following is a list of reports published by Parliamentary Committees that have been considered during the review.

### **I. Parliamentary Joint Committee on ICAC**

1. *Examination of the 2002-2003 Annual Report of the ICAC* Report No 3/53  
September 2004
2. *Regarding the Prevention and Investigation of Misconduct and Criminal  
Wrongdoing Involving Public Officials* Report 1/53 May 2004
3. *Report on Matters Arising form the General Meeting with the ICAC  
Commissioner* Report 9/52 November 2002
4. *Review of the ICAC Stage III The Conduct of ICAC Hearings* Report 8/52  
June 2002
5. *Review of the ICAC Stage II Jurisdictional Issues* November 2001
6. *Report into General Meeting with the ICAC Commissioner* November 2001
7. *Report on Consideration of Proposed Powers* October 2000
8. *Report into General Meeting with the ICAC Commissioner* November 2000
9. *The ICAC Accounting for Extraordinary Powers* Report No 2/52 May 2000
10. *Report into General Meeting with the ICAC Commissioner* January 1999
11. *Report on Inquiry into Pecuniary Interest Provisions for MPs and Senior  
Executives and a Code of Conduct for MPs*
12. *Report on Review of the ICAC Act* May 1993

**II. Legislative Council Standing Committee on Parliamentary Privilege and Ethics**

13. *Parliamentary privilege and seizure of documents by ICAC No 2* Report 28  
March 2004
14. *Parliamentary privilege and seizure of documents by ICAC* Report 25  
December 2003

**III. Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission**

15. *Report on Sixth General Meeting with the Inspector of the Police Integrity Commission* Report No 4/53 September 2004
16. *Research report on trends in police corruption* December 2002

## **APPENDIX B – LIST OF SUBMISSIONS**

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**I.** The following is a list of persons who have provided written submissions to the review.

<b>Name</b>	<b>Position</b>	<b>Organisation</b>
1. <b>AZZOPARDI, Jane</b>	Private citizen	
2. <b>BARBOUR, Bruce</b>	NSW Ombudsman	NSW Ombudsman
3. <b>BLACKADDER, Stephen</b>	General Manager	Warringah Council
4. <b>BREEN, MLC, Peter</b>	Member	Legislative Council
5. <b>CRISP, GA</b>	Private citizen	
6. <b>CUMBERLAND, Barry</b>	Private citizen	
7. <b>ENDERS, Michael</b>	Private citizen	
8. <b>GORDON, Angus</b>	General Manager	Pittwater Council
9. <b>GRIFFIN, Dr John</b>	General Manager	Tweed Shire Council
10. <b>HALL, QC Peter</b>	Private citizen	
11. <b>HULLICK, Les</b>	Acting General Manager	Burwood Council
12. <b>KERR, Malcolm</b>	Member	Legislative Assembly
13. <b>LATHAM, Ian</b>	Local Councillor	Canterbury Council
14. <b>LUCIRE, Dr Yolande</b>	Private citizen	
15. <b>MARSDEN, John</b>	Private citizen	
16. <b>MILLER, Cr Phyllis</b>	President	Shires Association of NSW
17. <b>MILLS, John</b>	Member	Legislative Assembly
18. <b>MOSS, Irene</b>	Commissioner ICAC	
19. <b>MURRAY, Cr Dr Sara</b>	President	Local Government

		Association NSW
20. <b>PASSAS</b> , Julie	Private citizen	
21. <b>PRIMROSE</b> , The Hon Peter	Chair	Privileges Committee Legislative Council
22. <b>RHIANNON</b> , Ms Lee	Member	Legislative Council, The Greens
23. <b>SALIER</b> , Gordon	President	Law Society of NSW
24. <b>SINCLAIR</b> , Annette	Director	Legal Representation Office
25. <b>SOULIOS</b> , Jim	Private citizen	
26. <b>TRIDGELL</b> , Neil	Private citizen	
27. <b>WAITE</b> , Peter	Private citizen	
28. <b>WATERHOUSE</b> , Martin	Private citizen	
29. <b>WARBURTON</b> , John	Internal Ombudsman	Warringah Council
30. <b>WHITTON</b> , Evan	Private citizen	
31. <b>YEADON</b> , Kim	Chair	Parliamentary Committee on ICAC

**II.** The following is a list of persons who have provided written comments on the draft Report.

<b>Name</b>	<b>Position</b>	<b>Organisation</b>
1. <b>BARBOUR</b> , Bruce		NSW Ombudsman
2. <b>BREEN, MLC</b> , Peter	Member	Legislative Council
3. <b>COWDERY, AM, QC</b> , Nicholas	Director of Public Prosecutions	
4. <b>CRIPPS</b> , The Hon Jerrold	Commissioner	ICAC
5. <b>CRISP</b> , G.A.	Private citizen	
6. <b>ENDERS</b> , Michael	Private citizen	
7. <b>GARDINER, MLC</b> , The Hon Jenny	Legislative Council Member	Nationals (NSW)
8. <b>GRIFFIN</b> , Terry	Commissioner	Police Integrity Commission
9. <b>HOPE</b> , Andrew Ross	Private citizen	
10. <b>KEATS</b> , D.F.	Private citizen	
11. <b>McINTYRE</b> , John	President	Law Society
12. <b>MILLS, MP</b> , John	Member	Legislative Assembly
13. <b>PRICE, MP</b> , John	Chair	Legislative Assembly Ethics Committee
14. <b>ROMANO</b> , Pat	General Manager	Burwood Council
15. <b>TRIDGELL</b> , Neil	Private citizen	
16. <b>WAITE, OAM, JP</b> , Peter	Private citizen	
17. <b>WATERHOUSE</b> , Martin	Private citizen	
18. <b>WHITTON</b> , Evan	Private citizen	
19. <b>YEADON, MP</b> , Kim	Chair	Parliamentary Committee on ICAC

**III.** Although invited to do so, the NSW Opposition did not make a submission to the review. The Leader of the Opposition, Mr John Brogden, MP wrote to my predecessor to advise as follows:

*‘It is not the usual practice of the NSW Opposition to make submissions to inquiries such as yours given our ability to participate directly in any parliamentary debate that flows from such reports. However, given the importance of the institution of the ICAC to New South Wales, I place on record the continuing support of the Liberal/National Coalition for retention of the independent watchdog.’*

## **APPENDIX C - LIST OF INTERVIEWS**

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The following is a list of individuals and representatives of organisations who have been interviewed during the review.

### **I. ORGANISATIONS**

#### **Director of Public Prosecutions**

Mr Nicholas Cowdery, QC and Ms Janis Watson-Wood

#### **Independent Commission Against Corruption**

Ms Irene Moss AO, The Honourable Jerrold Cripps, QC Mr John Pritchard, Mr Clive Small, Mr Roy Waldon and Ms Linda Waugh

#### **Inspector, Police Integrity Commission**

The Honourable Morris Ireland, QC

#### **Legal Representation Office**

Ms Annette Sinclair

#### **Local Government Association of NSW**

Cr Maire Sheehan, Mr Frank Loveridge

#### **NSW Ombudsman**

Mr Bruce Barbour

#### **Parliamentary Committee on the ICAC**

The Hon Kim Yeadon MP, Mr John Mills MP

#### **Parliamentary Committee on the Ombudsman and the Police Integrity Commission**

Mr Paul Lynch MP

#### **Police Integrity Commission**

Mr Terry Griffin, Mr Stephen Robson

#### **Premier's Department**

Dr Col Gellatly, Mr Alex Smith

#### **The Cabinet Office**

Mr Roger Wilkins, Ms Leigh Sanderson, Mr Anthony Lean

#### **Whistleblowers NSW**

Ms Cynthia Kardell, Dr Jean Lennane

### **II. INDIVIDUALS**

Mr John Mant

Mr Bron McKillop

The Honourable John Slattery AO QC

Mr John Price MP

Mr Ian Temby QC

Mr John Mills, MP

Mr John Marsden

Mr Michael Enders

Acting Professor Merrilyn Walton

Professor Mark Findlay

Mr Keiran Pehm

The Honourable Nick Greiner



## **APPENDIX D – ICAC COMMISSIONERS**

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1989 - 1994	Mr Ian Temby, QC
1994 - 1999	The Honourable Barry O’Keefe, AM QC
1999 - 2004	Ms Irene Moss, AO
2004 -	The Honourable Jerrold Cripps, QC

## **APPENDIX E - DRAFT RECOMMENDATIONS**

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Listed below are the draft recommendations as to changes to the Act that I published in my draft report in December 2004. These recommendations have in some instances been modified as identified in the body of this report. I set out the list of my draft recommendations for historical reasons.

### **CH 2 – WHETHER THE TERMS OF THE ACT REMAIN APPROPRIATE**

#### **Objectives and principles**

- R2.1 That the Act be amended to specify that the objectives of the Act are:
- To establish an independent and accountable body to investigate, expose and prevent serious corruption involving or affecting public authorities and public officials.
  - To confer on this body special powers to inquire into allegations of corruption.
  - To promote the integrity and accountability of public administration.
- R2.2 That the Act be amended to provide that, in exercising its functions, ICAC is to:
- direct its attention, so far as practicable, towards corruption that is serious or systemic; and
  - have regard to the responsibility that public authorities and public officials have, with the assistance of ICAC, to prevent and deal effectively with corruption.

### **CH 3 – SPECIFIC ISSUES FOR CONSIDERATION**

#### **Functions – corruption prevention**

- R3.1 That section 16(2) of the Act be amended to add the Ombudsman to the list of persons and organisations that ICAC is required to co-operate with in exercising its corruption prevention and education functions.

#### **Functions – criminal prosecutions**

- R3.2 That the Act be amended to provide expressly that ICAC may, after considering the advice of the Director of Public Prosecutions (DPP), institute criminal proceedings arising from its investigations.

- R3.3 That section 74A of the Act be amended to change the statement about prosecution that ICAC is required to include in a report under section 74 from ‘*whether or not in all the circumstances it is of the opinion that consideration should be given to prosecution*’ to ‘*whether or not in all the circumstances it is of the opinion that the advice of the DPP should be sought*’.
- R3.4 That consideration be given to permitting ICAC to commence criminal proceedings without first seeking the advice of the DPP, where ICAC is satisfied that there are reasonable prospects of conviction of a person for offences under its own Act or under Part 4A of the *Crimes Act 1900* (corruptly receiving commissions and other corrupt practices).

### **Definition of corrupt conduct**

- R3.5 That no substantial amendments to the definition of corrupt conduct in sections 79 of the Act be made, except to redraft the provisions to more clearly distinguish between corruption by public officials and corruption that adversely affects the performance of public official functions, without involving official wrongdoing.

### **Findings of corruption**

- R3.6 That the power of ICAC to make findings of corrupt conduct be retained, but the Act amended to clarify that ICAC may only make findings of corrupt conduct where satisfied of the existence of conduct which had adversely affected, or would (if engaged in) adversely affect official functions or, similarly, was or would be a criminal offence, disciplinary offence, reasonable grounds for dismissal, or a substantial breach of an applicable code of conduct; and the making of the finding is in the public interest.

### **Jurisdiction**

- R3.7 That there be no change to the jurisdiction of ICAC over:
- public authorities
  - public officials
  - boards appointed by the Governor
  - Government businesses
  - outsourced Government functions
  - private citizens.
- R3.8 That ICAC’s jurisdiction over Local Government be amended to:
- Clarify that ICAC may, upon commencement of the *Local Government Amendment (Discipline) Act 2004*, make a recommendation that consideration be given to the suspension of a councillor from civic office on the grounds set out in section 440I of the *Local Government Act 1993*.
  - Replace the power that ICAC will have on the commencement of the *Local Government Amendment (Discipline) Act 2004* to present a report stating that ‘*grounds exist that warrant a councillor’s suspension*’ with a power to recommend that consideration be given to the suspension of a

councillor from civic office on the grounds set out in section 440I of the *Local Government Act 1993*.

R3.9 That consideration be given to the establishment of a Parliamentary investigator to investigate minor matters involving Members of Parliament so as to permit ICAC to focus on serious and systemic allegations of corruption.

**Powers – proposals for expanding ICAC’s powers**

R3.10 That the police powers to stop, search, seize, detain, arrest, and convey firearms and narcotics for testing, analytical and evidentiary purposes not be conferred upon civilian officers of ICAC.

R3.11 That, upon the establishment of the Inspector of ICAC as recommended at R3.18, officers of ICAC be permitted to apply for urgent listening device warrants by telephone.

R3.12 That ICAC be given the power to apply to a Court for a direction as to the disposal of property, where:

- The property is lawfully in the custody of ICAC in connection with an investigation.
- The property is not required for the purpose of an investigation or other proceedings (such as a criminal prosecution or disciplinary proceedings).
- There is no person who appears to be lawfully entitled to the property.

- R3.13 That the provisions of Part 6 of the *Criminal Procedure Act 1986* (or, if commenced, Part 17 Division 2 of the *Law Enforcement (Powers and Responsibilities) Act 2002*) be adapted, so far as practicable, to apply to the disposal of property on application by ICAC to the Court.
- R3.14 That the power to issue a statutory notice under section 21 of the Act for the production of a statement of information to ICAC not be extended to non-public officials .
- R3.15 That the use-immunity under section 26 of the Act that applies to statements, documents or things obtained under objection (following a notice issued under section 21 or section 22) not be extended to documents or things obtained pursuant to the power of entry under section 23.

#### **Powers – hearings**

- R3.16 That the Act be amended to rename ICAC’s power to conduct private hearings as a power to conduct compulsory examinations. Compulsory examinations would be conducted for the purposes of an investigation, where ICAC is satisfied that it would be in the public interest to do so. Compulsory examinations would be conducted in private and on oath by the ICAC Commissioner or an Assistant Commissioner and carry the protections for affected persons that currently apply to private hearings.
- R3.17 That the Act be amended to rename ICAC’s power to conduct public hearings as a power to hold public inquiries. Public inquiries would be held for the purpose of an investigation, where ICAC is satisfied that it would be in the public interest to do so, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements. The powers and privileges that currently apply to public hearings would apply to public inquiries. A public inquiry could be closed to the public for a particular purpose (for example, to hearing closing submissions in private).

## Accountability

- R3.18 That the Act be amended to provide for the establishment of an independent Inspector of ICAC to:
- Audit the operations of ICAC and assess the effectiveness and appropriateness of its procedures; and
  - Deal with complaints of misconduct by ICAC or its officers.
- R3.19 That the role, powers, and procedures of the Inspectorate be modelled on the provisions applying to the Inspector of the Police Integrity Commission.
- R3.20 That the Commonwealth Government be requested to include the Inspector of ICAC as an authorised recipient of telecommunications product under the *Telecommunications (Interception) Act 1979* (Cth).
- R3.21 That the Government consider removing the Ombudsman's jurisdiction under section 14 of the Protected Disclosures Act 1994 to investigate protected disclosures concerning corrupt conduct by ICAC on the basis that this function will be the responsibility of the Inspector.
- R3.22 That there be no change to the Parliamentary Committee's statutory oversight of ICAC.
- R3.23 That Part 6 of the Act governing the Operations Review Committee be repealed.
- R3.24 That the Act be amended to provide that ICAC is to provide reasons to a complainant for not investigating, or discontinuing an investigation, of an allegation of corrupt conduct.
- R3.25 That section 76 of the Act be amended to require ICAC to include the time taken to deal with allegations of corrupt conduct in its annual report to Parliament.

R3.26 That there be no amendment of the Act to require ICAC to afford procedural fairness to a person before publishing an adverse finding or statement because such an obligation already exists under the common law, it appears that ICAC complies with this obligation and, if it were to fail to do so, the remedy of judicial review is available to require it to do so.

R3.27 That there be no 'merits' review of findings of ICAC.

### **Contempt and related amendments**

R3.28 That section 99 of the Act be amended so that it only applies to contempt in the face or hearing of ICAC.

R3.29 That Part 9 of the Act be amended to make it a criminal offence to threaten detriment to a person on account of the person's evidence or assistance to ICAC.

R3.30 That the provisions of the Act which set out the procedure for dealing with contempt of ICAC be amended so that:

- A person brought before ICAC is informed of the contempt that he or she is alleged to have committed.
- It is clear that a certificate presented to the Supreme Court by ICAC certifies the facts that constitute the alleged contempt, and is presumed to be the truth of the certified facts, in the absence of contrary evidence.
- There is no power to commit for contempt by a statement in writing.

R3.31 That, if section 99 is not amended in accordance with recommendation 3.28 above, the Act be amended so that only contempt in the face or hearing of ICAC is capable of certification by ICAC and proceedings for other types of contempt are commenced by ICAC by application to the Supreme Court.

R3.32 That the offence of giving false or misleading evidence at an ICAC hearing under section 87 of the Act be amended to:

- Make it an offence to give evidence that is false or misleading in a material particular, knowing that the evidence is false or misleading, or not believing it to be true.
- Apply the provisions of section 331 of the *Crimes Act 1900* so that the Court is not required to identify which evidence is false, where satisfied that one of two irreconcilable pieces of evidence is false to the knowledge or belief of the accused.

R3.33 That the Act be amended to extend the statutory limitation period for the prosecution of breaches of ICAC's non-publication orders under section 112 from six months to two years.

## **APPENDIX F - COMPARISON OF CONTEMPT AND CRIMINAL PROVISIONS**

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The following is a comparison of the provisions in the Act concerning contempt and the equivalent provisions in the Act making the same conduct subject to a criminal offence.

### *Contempts in the face of ICAC*

The contempts in sub-section 98(a)-(c) concerning failure to attend before ICAC, failure to produce documents, and refusal to be sworn, make an affirmation, or answer questions are also dealt with as offences under section 86 of the Act. The provisions are reproduced below.

#### **98 Contempt**

A person who:

- (a) having been served with a summons to attend before the Commission as a witness, fails to attend in obedience to the summons, or
- (aa) having been released under section 36 (6) on condition (under section 36A (1) (a)) that the person appear and report himself or herself before the Commission, fails so to appear and report, or
- (b) having been served with a summons to attend before the Commission, fails to produce any document or other thing in the person's custody or control that the person is required by the summons to produce, or
- (c) being called or examined as a witness before the Commission, refuses to be sworn or to make an affirmation or refuses or otherwise fails to answer any question put to the person by the Commissioner or Assistant Commissioner.....  
is guilty of contempt of the Commission.

#### **86 Failure to attend etc**

- (1) A person summoned to attend or appearing before the Commission at a hearing shall not, without reasonable excuse, fail:
  - (a) to attend before the Commission in accordance with the summons, or
  - (b) to be sworn or to make an affirmation, or
  - (c) to answer any question relevant to an investigation put to the person by the Commissioner or other person presiding at the hearing, or
  - (d) to produce any document or other thing in the person's custody or control which the person is required by the summons or by the person presiding to produce.
- (2) It is a defence to a prosecution for failing without reasonable excuse to produce a document or other thing if the defendant establishes that the document or other thing was not relevant to an investigation.
- (3) A person who without reasonable excuse fails to comply with a condition to which the release of the person under section 36 (6) or 100A is subject, is guilty of an offence.

### *Obstruction of ICAC*



Contempt in sub-section 98(g) of obstructing ICAC, the Commissioner or Assistant Commissioner or person acting under the lawful authority of ICAC in the exercise of any lawful function is covered by the offences under section 80 of the Act, as well as sections 82-85 and sub-sections 88(2) and 88(3). There are also criminal offences covering false complaints to ICAC,<sup>279</sup> giving false evidence to ICAC,<sup>280</sup> impersonation of an ICAC officer<sup>281</sup> and bribery of an ICAC officer.<sup>282</sup> Sections 98(g) and 80(a) are reproduced below.

## **98 Contempt**

A person who...

- (g) obstructs or attempts to obstruct the Commission, the Commissioner, an Assistant Commissioner or a person acting under the authority of the Commission or the Commissioner in the exercise of any lawful function.....

is guilty of contempt of the Commission.

## **80 Obstruction of Commission**

A person shall not:

- (a) without reasonable excuse, wilfully obstruct, hinder, resist or threaten the Commission or an officer of the Commission in the exercise of functions under this Act.....

### *Breach of a non-publication direction*

Contempt under sub-section 98(i) concerning publishing of evidence in contravention of an order of ICAC is covered by the offence in s112. The provisions are reproduced below.

## **98 Contempt**

A person who.....

- (h) publishes, or permits or allows to be published, any evidence given before the Commission or any of the contents of a document produced at a hearing which the Commission has ordered not to be published,

is guilty of contempt of the Commission.

## **112 Restriction on publication of evidence**

The Commission may direct that:

- (a) any evidence given before it, or
- (b) the contents of any document, or a description of any thing, produced to the Commission or seized under a search warrant issued under this Act, or
- (c) any information that might enable a person who has given or may be about to give evidence before the Commission to be identified or located, or
- (d) the fact that any person has given or may be about to give evidence at a hearing, shall not be published or shall not be published except in such manner, and to such persons, as the Commission specifies.

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<sup>279</sup> Section 81 of the Act.

<sup>280</sup> Section 87 of the Act.

<sup>281</sup> Section 95 of the Act.

<sup>282</sup> Section 96 of the Act.

(1A) The Commission is not to give a direction under this section unless satisfied that the direction is necessary or desirable in the public interest.

(2) A person shall not make a publication in contravention of a direction given under this section.

### *Disrupting a hearing*

The contempt in sub-section 98(e) of misbehaving before ICAC and sub-section 98(f) of interrupting proceedings of ICAC are adequately covered by the offence in section 80(d) of disrupting a hearing before ICAC and the offence of refusing to comply with any lawful requirement of ICAC or its officers without reasonable excuse under section 80(b). The provisions are reproduced below.

#### **98 Contempt**

A person who.....

- (e) misbehaves himself or herself before the Commission, or
  - (f) interrupts the proceedings of the Commission....
- is guilty of contempt of the Commission.

#### **80 Obstruction of Commission**

A person shall not.....

- (b) without reasonable excuse, refuse or wilfully fail to comply with any lawful requirement of the Commission or an officer of the Commission under this Act.....
- (d) disrupt a hearing before the Commission.

## **APPENDIX G – CODE OF CONDUCT FOR MEMBERS OF PARLIAMENT**

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The following provisions have been adopted as the Code of Conduct for Members of the Legislative Assembly and for Members of the Legislative Council.

### **Preamble**

*\_ The Members of the Legislative Assembly and the Legislative Council have reached agreement on a Code of Conduct which is to apply to all Members of Parliament.*

*\_ Members of Parliament recognise that they are in the unique position of being responsible to the electorate. The electorate is the final arbiter of the conduct of Members of Parliament and has the right to dismiss them from office at regular elections.*

*\_ Members of Parliament accordingly acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution of Parliament, and using their influence to advance the common good of the people of New South Wales.*

### **The Code**

#### **1 Disclosure of conflict of interest**

- (a) Members of Parliament must take all reasonable steps to declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their office.
- (b) This may be done through declaring their interests on the Register of Disclosures of the relevant House or through declaring their interest when speaking on the matter in the House or a Committee, or in any other public and appropriate manner.
- (c) A conflict of interest does not exist where the member is only affected as a member of the public or a member of a broad class.

#### **2 Bribery**

Members must not promote any matter, vote on any bill or resolution, or ask any question in the Parliament or its Committees, in return for payment or any other personal financial benefit.

#### **3 Gifts**

- (a) Members must declare all gifts and benefits received in connection with their official duties, in accordance with the requirements for the disclosure of pecuniary interests.
- (b) Members must not accept gifts that may pose a conflict of interest or which might give the appearance of an attempt to corruptly influence the member in the exercise of his or her duties.
- (c) Members may accept political contributions in accordance with part 6 of the Election Funding Act 1981.

#### **4 Use of public resources**

Members must apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources.

#### **5 Use of confidential information**

Members must not knowingly and improperly use official information which is not in the public domain, or information obtained in confidence in the course of their parliamentary duties, for the private benefit of themselves or others.

## **6 Duties as a Member of Parliament**

It is recognised that some members are non-aligned and others belong to political parties. Organised parties are a fundamental part of the democratic process and participation in their activities is within the legitimate activities of Members of Parliament.

## APPENDIX H – LETTERS PATENT

*ELIZABETH THE SECOND, by Grace of God, Queen of Australia  
and Her other Realms and Territories, Head of the Commonwealth*

TO


The Honourable Jerrold Sydney Cripps

GREETING:

By these Our Letters Patent, made and issued under the authority of Our Prerogative, We hereby, with the advice of the Executive Council, authorise and commission you to conduct an inquiry to:

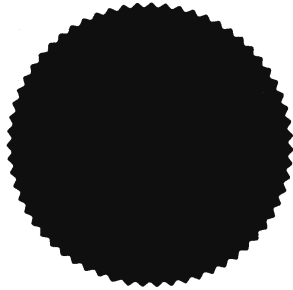
1. review the *Independent Commission Against Corruption Act 1988* (the Act) to determine whether the terms of the Act remain appropriate for securing its objectives, without departing from the Government's intention to retain the Independent Commission Against Corruption (ICAC) as an independent, stand-alone corruption investigation body to ensure accountability in the public sector;
2. specifically consider as part of that review of the Act:
  - a. whether the functions of the ICAC remain appropriate;
  - b. the definition of corrupt conduct, and the capacity of the ICAC to make findings of corrupt conduct;
  - c. the jurisdiction of the ICAC, including the application of the Act to public agencies, public officials, local government, government businesses, outsourced government functions and Members of Parliament;
  - d. whether the ICAC's powers are appropriate to meet its objectives;
  - e. the adequacy of accountability mechanisms for the ICAC;
  - f. any other matters relating to the operation of the Act.

ENTERED on Record by me, in REGISTER OF PATENTS, No, 88 Page 329 this 23rd  
day of June, 2004

  
DIRECTOR-GENERAL  
THE CABINET OFFICE

AND OUR further will and pleasure is that you do, as expeditiously as possible, but in any case on or before 29 October 2004, deliver a report in writing of the results of your inquiry to the office of our Governor in Sydney.

IN TESTIMONY WHEREOF, WE have caused these Our Letters to be made Patent and the Public Seal of Our State to be hereunto affixed.



WITNESS Her Excellency Professor Marie Bashir,  
Companion of the Order of Australia, Governor of the  
State of New South Wales in the Commonwealth of  
Australia

Governor

Dated this 23<sup>rd</sup> day of June 2004

By Her Excellency's Command,

Premier

*ELIZABETH THE SECOND, by Grace of God, Queen of Australia  
and Her other Realms and Territories, Head of the Commonwealth*

TO

Mr Bruce McClintock SC

GREETING:

WHEREAS BY Letters Patent issued in Our Name by Our Governor of Our State of New South Wales dated 23 June 2004, We authorised and commissioned the Honourable Jerrold Sydney Cripps to conduct an inquiry to review the *Independent Commission Against Corruption Act 1988* (the Act) and deliver a report in writing of the results of the inquiry to the office of our Governor in Sydney on or before 29 October 2004;

AND WHEREAS the said Letter Patent were revoked on 11 November 2004;

AND WHEREAS it is necessary to commission a person to conduct the said inquiry and deliver a report in writing of the results of the inquiry to the office of our Governor in Sydney;

NOW THEREFORE BY these Our Letters Patent, made and issued under the authority of Our Prerogative, We hereby, with the advice of the Executive Council, authorise and commission you to:

ENTERED on Record by me, in REGISTER OF PATENTS, No. 88 Page 42, this 11th day of November, 2004

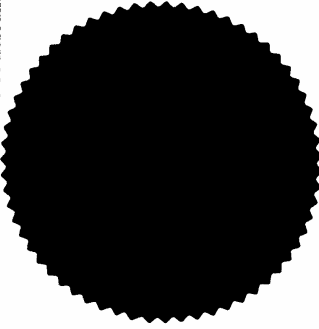
  
DIRECTOR-GENERAL  
THE CABINET OFFICE

1. review the Act to determine whether the terms of the Act remain appropriate for securing its objectives, without departing from the Government's intention to retain the Independent Commission Against Corruption (ICAC) as an independent, stand-alone corruption investigation body to ensure accountability in the public sector;
2. specifically consider as part of that review of the Act:
  - a. whether the functions of the ICAC remain appropriate;
  - b. the definition of corrupt conduct, and the capacity of the ICAC to make findings of corrupt conduct;
  - c. the jurisdiction of the ICAC, including the application of the Act to public agencies, public officials, local government, government businesses, outsourced government functions and Members of Parliament;
  - d. whether the ICAC's powers are appropriate to meet its objectives;
  - e. the adequacy of accountability mechanisms for the ICAC;
  - f. any other matters relating to the operation of the Act;
3. have regard as part of that review of the Act to any relevant material received by the Honourable Jerrold Sydney Cripps prior to the revocation of the said Letters Patent dated 23 June 2004.



AND OUR further will and pleasure is that you do, as expeditiously as possible, but in any case on or before 31 January 2005, deliver a report in writing of the results of your inquiry to the office of our Governor in Sydney.

IN TESTIMONY WHEREOF, WE have caused these Our Letters to be made Patent and the Public Seal of Our State to be hereunto affixed.



WITNESS Her Excellency Professor Marie Bashir,  
Companion of the Order of Australia, Governor of the  
State of New South Wales in the Commonwealth of  
Australia

Dated this ~~Eleventh~~ day of November 2004

  
Governor

By Her Excellency's Command,

  
Premier