PARLIAMENT OF NEW SOUTH WALES

COMMITTEE ON THE ICAC

STUDY TOUR OF ORGANISATIONS AND OVERSIGHT BODIES COMPARABLE TO THE ICAC

London, Berlin, New York, Washington

February 1997

October 1997
Parliament House, Sydney

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December 1997

ISBN: 0 7313 1153 1

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COMMITTEE FUNCTIONS

Independent Commission Against Corruption Act 1988

"64 (1) The functions of the Joint Committee are as follows:

(a) to monitor and to review the exercise by the Commission of its functions;

(b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;

(c) to examine each annual and other report of the Commission and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;

(d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission;

(e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

(2) Nothing in this Part authorises the Joint Committee -

(a) to investigate a matter relating to particular conduct; or

(b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint; or

(c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint."

CHAIRMAN'S FOREWORD

On 25 September 1996, the Committee on the ICAC resolved to send a delegation of the Committee comprising myself, as Chairman, The Hon. Duncan Gay MLC representing the Opposition, and the Committee Project Officer, to selected cities in the USA and Europe to study bodies comparable to the ICAC and oversight bodies comparable to this Committee, and to look at forms of corruption prevention.

In addition, the Chairman was invited by the World Bank to present a paper on oversight to political bodies of anti-corruption organisations. The Chairman also delivered a paper to guests of the World Bank at a function. All papers and the extracts are appended to this report.

Proposed Study Tour

The Chairman outlined a preliminary itinerary for a study tour in February 1997. On the motion of Ms Meagher, seconded by Ms Andrews, the Committee resolved:

> *"That the Committee endorse the proposed study tour by the Chairman, one opposition Member and the Project Officer to London, Berlin and the United States in February 1997".*

The 20-day tour was approved as a precursor to a wide ranging review of the role and functions of the ICAC that the Committee has undertaken to conduct in 1997-98 to coincide with the 10th anniversary of the formation of the Commission. The draft Terms of Reference for the Inquiry are annexed to this Report.

During the trip, the delegation gained valuable insight into the conduct and oversight of anti-corruption bodies in each of the cities it visited. The cities were chosen based on the presence in each of anti-corruption organisations with functional parallels to either the ICAC or the Committee, and which operated within democratic governments broadly similar to our own. The delegation was also in contact with non-government anti-corruption agencies, eg. Transparency International of Germany and the Fairfax Corporation in Washington DC.

The delegation encountered a wide variety of approaches in the fight against public and private sector corruption, ranging from highly motivated and successful (and highly funded) forces, to poorly staffed and similarly poorly funded organisations. There were departmental off-shoots with a public education function. The delegation witnessed wildly different levels of success in the direct and indirect fighting of corruption, as well as in Parliamentary oversight of individuals and organisations charged with this task.

Successful anti-corruption activity and accountability to Parliament bear a direct relationship to a number of factors, both cultural and monetary, and are at differing stages of development in the cities the Committee visited on this tour. A major factor contributing to success borne out by those organisation is that of strong political and organisational leadership. Where leadership clearly and publicly articulated their support for anti-corruption, there was a resultant appropriate level of funding for anti-corruption bodies and greater public awareness of the issues.

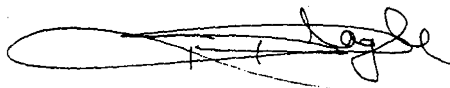
It was likewise clear to the delegation that the absence of financial support and commitment of Government engendered despondency within the organisations, reduced public awareness and limited achievements.

There is no doubt that within the public and private sectors of many countries the trend is towards diminishing corrupt activities. This generally has two strands: education and investigation/prosecution. Emphasis on these strands varied from city to city, but it was clear they formed inextricable partners in anti-corruption activity.

Our discussions with groups such as London's Serious Fraud Office, the Department of Investigations in New York, State Parliamentarians from Berlin, and private organisations Transparency International and the Fairfax Group, gave valuable perspective to the work of the ICAC in New South Wales and the functions of the Joint Parliamentary Committee.

This study tour gave impetus to the review process we are about to undertake. Forms of public education, styles of investigation and organisational structures of corruption fighting bodies and their relationships to parliaments and other elected officials experienced by the delegation will all feature in the upcoming review.

To summarise, the delegation concluded from its overseas experiences that on balance, the work of the ICAC stands in a good light and it is obvious that the Commission has worked hard to keep itself abreast of world trends and techniques. Nevertheless, the delegation believes that this tour will prompt some recommendations in the forthcoming review for the fine tuning of the Commission and its relationship with the Parliament and the people of New South Wales.



Peter Nagle MP
Chairman

ITINERARY AND RECORD OF MEETINGS

Monday, 3 February 1997

6.15 pm	Depart Sydney

LONDON

Tuesday, 4 February 1997

6.25 am	Arrive London
4.00 pm	Meeting with Mr Bertie de Speville and James Buckle

Wednesday, 5 February 1997

11.00 am	Second Meeting with Mr Bertie de Speville
3.30 pm	Meeting with Police Corruption Unit

Thursday, 6 February 1997

11.00 am	Roger Willoughby, Acting Registrar of Members Interests
2.30 pm - 4.30 pm	Mr David Veness, New Scotland Yard
5.00 pm	Rt Hon. Tony Newton, Lord President of the Council, Leader of the House of Commons, Chairman Committee on Standards and Privileges, and Mrs Ann Taylor MP, Shadow Leader and Committee Member

Friday 7, February 1997

10.30 am - 1.00 pm	Serious Fraud Office
1.30 pm - 4.00 pm	Lord Nolan, House of Lord

BERLIN

Monday, 10 February 1997

10.00 am - 2.00 pm	Meeting at Transparency International.
3.00 pm 5.00 pm	Meeting with Speaker of the Green Party/anti-corruption-corruption expert of State Assembly

Tuesday, 11 February 1997

9.00 am - 11.00 am	State Criminal Investigation Office
11.00 am - 1.00 pm	Ministry of Justice Interdisciplinary Group
2.00 pm - 4.00 pm	Auditor General

NEW YORK

Thursday, 13 February 1997

10.00 am - 12.00 pm	Tour of Surveillance Unit, Dept of Investigations
2.00 pm - 4.00 pm	Meeting with Chief of Internal Affairs

Friday, 14 February 1997

9.00 am - 4.30 pm	Meeting with the New York Department of Investigation, New York Crime Task Force, New York Police Department's Integrity Unit

Monday, 17 February 1997

10.00 am - 4.00 pm	Department of Investigation Tour

WASHINGTON

Tuesday, 18 February 1997

10.00 am - 12.00 pm	Meeting with the Fairfax Corporation
2.00 pm	Tron Brekke, Michael Varnum, FBI Section Chief, Political Corruption Section
4.30 pm - 5.30 pm	Office of Senator Thompson, Chairman Enquiry into the Presidential Election Campaign Funding, Michael Madigan.

Wednesday, 19 February 1997

Full day	Meeting with the World Bank. Two seminars held. Mr Peter Nagle MP, Chairman, Committee on the Independent Commission Against Corruption and The Hon. Duncan Gay MLC as guest speakers and chaired by Mr Jim Wesberry, Latin America Chief, World Bank.
4.00 pm - 5.30 pm	Meeting with the Anti-corruption Unit of the World Bank

Thursday, 20 February 1997

10.00 am - 12.00 pm	Jane Ley, United States Office of Government Ethics
6.00 pm	Depart Washington
8.30 pm	Arrive Los Angles

LOS ANGELES

Friday, 21 February 1997

	Meeting with Los Angles Police Department Anti-Corruption Unit (cancelled)

Saturday, 22 February 1997

10.30 pm	Depart Los Angeles

Monday, 24 February 1997

8.05 am	Arrive Sydney

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Appendix 1 - *Review of the Role and Functions of the ICAC* - Draft Issues Paper

Appendix 2 - Speech delivered to Senior Executive of the World Bank in Washington DC, 19 February 1997 entitled *Honesty, Ethics and Politics in New South Wales, Australia.*

Appendix 3 - Speech delivered to the World Bank's luncheon, Washington DC on 19 February 1997 entitled *Political oversighting of Anti-corruption bodies in Australia.*

1. PRINCIPAL DISCUSSION TOPICS

Meetings undertaken with groups and individuals overseas were structured around the draft *Review of the Role and Functions of the ICAC* Issues Paper.

The paper itself forms an annexure to this report. However, a summary of the Principle Discussion Topics is provided for the reader.

Structures

The delegation sought information on the structures of both anti-corruption and oversight bodies with a view to discovering what changes or improvements could be made to improve the effectiveness of the ICAC and the Committee, and their relationship with each other. This included information on the extent of jurisdictions and the relationship with prosecuting bodies.

Staffing

The delegation sought information on staff numbers and organisation (relative to the size and scope of jurisdictions), in particular, the number and role of Commissioners or their equivalent, and training and recruitment.

Complainants

The examination of techniques for handling complainants both genuine and vexatious, follow-up techniques, the use of anonymity, the treatment of records, witness protection, use of indemnities, progress reports, legal representation, the protection of "whistleblowers", and those who suffer from false allegations were all on the delegation's agenda.

Inquiry Processes

Discussions on the approaches, styles and quality of inquiry techniques, the extent of use of co-opted experts, the structure of investigative teams and how the media is used (or not used) were all of value. Moreover, information on the warrants, interview processes, limitations (practical and legal), success of prosecutions, the comparative use of internal checks such as ICAC's Operations Review Committee were important. The delegation found the use of undercover or "sting" techniques and integrity testing most interesting.

Education

Information concerning the use, extent and type of corruption prevention education programs, relationships with other organisations and the provision of advice are necessary for the forthcoming review.

Oversight Bodies

The extent of oversight bodies, their authority and effectiveness, relationships with oversight bodies, political influence and the relationship to political leadership were discussed.

Performance Measures

The use and effectiveness of performance measures, costs, prosecutions, acceptance of recommendations, public expectations and support from the political process needed examination.

2. LONDON - de Speville & Associates

The first two meetings of the delegation in London took place with Mr Bertrand de Speville and Mr James Buckle of de Speville and Associates, a private anti-corruption organisation. Mr de Speville is a former Commissioner of the Hong Kong ICAC and Mr Buckle, former Head of Operations for the Commission.

Much of what was discussed revolved around the structure and functions of the Hong Kong ICAC, with particular reference to the fact that public inquiry is not used in Hong Kong. Other topics which were discussed include the treatment of witnesses, the relationship of the Operations Review Committee (ORC) to the Commission and the relationship with complainants.

The Hong Kong ICAC investigates all complaints which are judged "pursuable". Where complaints are not pursued, complainants are provided with a personal explanation as to why this has occurred. This was considered a useful tool in keeping disgruntled complainants to a minimum.

The Hong Kong ICAC has an ORC comparable to that of the NSW ICAC. It is appointed by the Governor (now the Chief Executive) and comprises the Commissioner and senior public and community figures (16 in all, including the Police Commissioner and the Attorney General). It operates as an accountability mechanism by monitoring the progress of major cases which come to the Commission. It also reviews cases which the Commission wishes to close for lack of evidence or progress, and determines whether closure is the appropriate path. It has the power to require the Commission to conduct a second review of a case proposed to be closed, and in most cases decides the point of closure of a case.

Cases for progress report or closure are presented to the ORC by the case manager and the actual investigating officer, rather than being presented by the Commissioner. This technique is employed both to give the ORC the most accurate information on which to judge each case, and to give the investigator experience in articulating the merits or otherwise of cases.

Interim reports on the progress of cases go to the ORC on a regular basis, and any investigation of greater than six months duration would automatically go to the ORC for a review in which the case officer would be questioned by the Committee. This was considered to be both good for public relations and a useful accountability measure.

In the event that a member of the ORC had a conflict of interest in considering a case, the member is required to declare such conflict and stand aside. The ORC also uses sub-committees to review lesser matters. It was considered to be an advantage to have the Police Commissioner on the ORC to ensure an appreciation of the activities of the Commission.

The ORC is appointed by the Chief Executive from nominations put forward by the Chief Secretary after consulting the ICAC.

On the subject of investigations, the former Commissioner urged the use of experienced police officers, with lawyers playing an advisory role. It was considered important to let the experienced investigators "run" the case, guided by the legal knowledge of lawyers with an eye to the eventual prosecution of a case in a court of law. It was common to appoint outside consultants to teams such as lawyers, accountants and other professional expertise relevant to a case.

With respect to media involvement, the Hong Kong ICAC would use the media to promote and maintain public interest. They would never use secret briefings or similar devices to contain the media. Case matters are to be kept strictly confidential until ready for prosecution.

Funding was provided for paying informants, for the witness protection program, and for the conduct of surveillance and sting operations. In some cases the Attorney General would provide limited immunity to witnesses in the interest of resolving a case.

The delegation heard that the use of public hearings as an investigative tool was avoided, as it was considered expensive, could impact on investigation by prejudicing information, and raised civil liberties issues. Hong Kong ICAC believed that allegations of serious criminality like corruption should be dealt with only in the criminal courts.

It was a policy to always keep complainants and witnesses informed of progress and outcomes and to never name complainants to suspects. Generally, the duty to protect complainants, witnesses or whistleblowers was taken very seriously. The protection of the complainant was considered to be integral to the success of any investigation.

With respect to investigative and senior Commission staff, a blanket rule exists which precludes membership of political parties or candidature for political office. The reality and perception of impartiality were of crucial importance to an effective ICAC.

With respect to complaints from the public about ICAC staff, which were not uncommon, the former Commissioner described how administrative matters were referred to a process of investigation and review by an external complaints committee independent of the ICAC, while any criminal allegations would be referred to and investigated by the police.

Each of the three departments of the ICAC, and the Commission as a whole, has an independent advisory and oversight body to ensure accountability. The Commissioner is accountable directly to the Governor (now Chief Executive) who makes the appointment, and a Legislative Council "Security Panel" conducts parliamentary oversight and has the power to summon the Commissioner to a hearing. The Attorney General also has an oversight role since his consent is required for any corruption prosecution.

Serious fraud and any other criminality were also within the jurisdiction of the Hong Kong ICAC if they were related to corruption. However, this occasionally caused jurisdictional disputes with the police department over who was responsible to investigate particular cases. These matters were resolved between the Commissioner and Police Commissioner.

The Hong Kong ICAC has a 70-80% conviction rate of those cases that are prosecuted, but their former Commissioner pointed out that this was not a reliable measure of performance. Rather, he said, public confidence and support for the work of the ICAC, as reflected in independent polling, was a more accurate measure.

The meeting closed with an observation that the leading chambers of commerce, including the Chinese Chamber of Commerce, originally all against the ICAC, had become its greatest supporters since discovering the amount of money which could be saved by acting with probity.

Mr Jim Buckle viewed public inquiries as the short cut to good investigative work and believes that their detrimental value far exceeded their preventative and investigative value.

LONDON - Roger Willoughby, Clerk to the Parliament, House of Commons

Mr Willoughby acted as clerk for the Nolan Inquiry into Standards of Parliamentary Behaviour. The Nolan Inquiry was significant in that it led to the establishment of Sir Gordon Downey as an independent Ethics Commissioner. The Ethics Commissioner is an officer of the House, rather than a Member, and has the power to refer recommendations for action over Code of Conduct breaches to the Standards and Ethics Committee of the House of Commons.

The Code of Conduct which emerged from this activity has led to a number of practical changes to activities by Members of Parliament. For example, donations to Members are now required to be made to parties as a whole to avoid perceptions of conflict of interest, any contribution equivalent to 25% of campaign costs is registerable, and all paid consultancy work undertaken by Members must be disclosed, along with any agreements for same. The aim is to ensure transparency.

The balance of our conversation with Mr Willoughby concentrated on ethics, and the delegation heard that a breach of ethics may be the first step on the road to corrupt conduct.

LONDON - Assistant Commissioner David Veness QPM, and Detective Sergeant Chris Chainey Metropolitan Police Service Fraud Squad

The delegation interviewed Mr Veness on a number of topics relating to the Fraud Unit's handling of complaints and complainants, and the conduct of investigations.

The Fraud Squad is the central unit within the Metropolitan Police Service that handles Criminal Fraud cases principally involving the government sector. It serves as a repository for all records. Cases are allocated to an Investigator who is placed in control of the case until its conclusion. The Investigator guides the case and creates teams from internal officers and panels of outside expertise and consultants. Unlike the Serious Fraud Office (discussed later), the Police generally believe that it is more advantageous to allow them to lead the investigation, whilst working closely with the prosecuting authority on matters of evidential value and the interpretation of legislation.

Complaints can be made by citizens directly, or can be referred to the unit by local authorities. In any event efforts are made to communicate to complainants the progress and likelihood of success of a given operation. Information received anonymously is carefully assessed, researched and if any corroboration is found, submitted for a full investigation. Such information is better than no information, but carries less weight, and difficulties can be encountered in assessing its true value.

Cases are assessed internally and, if of sufficient strength or gravity, investigations begin using the Fraud Squad's powers to search tax and bank records, police records and other pertinent personal data of suspected individuals. "Sting" operations are often undertaken. These broad powers were considered to be very important in establishing a strong case. A full case would be developed by the investigator, concluding with the use of warrants and the arrest of individuals. Thereafter, a brief would be handed to the DPP for pursuit through the courts.

Due to the inherent danger of suspects disposing of evidence or of arranging a "defence" prior to interview if forewarned, they are almost without exception arrested at the time of the searching of their private or business premises. A suspect has the right to have a solicitor present during an interview by police and all interviews are tape recorded. Copies are provided to suspects once they are charged. Processes of review in this phase of investigation include the submission of records of interview to the Crown Prosecutor for assessment. If it is considered by the investigating team that a case has insufficient evidence to proceed, the internal review of evidence is done by an Inspector not connected to the case. The Crown Prosecutor has the overall conduct of the case once it has been passed to that Office, including decisions on prosecutions.

On a broader level, the Unit was accountable via the review of its functions by local government, the Parliament, and the Home Secretary.

The Unit did not undertake its own prosecutions. This was considered to maintain sound investigations, and having a separate body consider the results of an investigation before proceeding served as an additional accountability mechanism.

Whilst the media were often seen to be intrusive and sometimes counter productive during an investigation, a controlled relationship was permitted between them and the police.

The delegation also learned that the Unit would under no circumstances undertake any public hearings as an investigative tool because they believed that it could prejudice a subsequent trial.

The Unit considered itself a reactive body, not charged with a brief of education duties, but did promote campaigns against fraudulent activity. It established guidelines for behaviour in government departments and encouraged anti-corruption and anti-fraud Steering Groups to raise community awareness.

LONDON - Tony Newton MP and Ann Taylor MP, Members of the Committee on Standards in Public Life House of Commons

Tony Newton and Ann Taylor are key members of the Committee on Standards in Public Life, and, as members of opposing parties, represent what the delegation came to recognise as a bipartisan will to ensure that the Committee would be seen as working for the advancement of the parliament rather than as a party-political tool.

The Committee, in conjunction with the Independent Commissioner who reports to the Committee, is the British Parliament's principal enforcer of the House of Commons' Code of Conduct. The Code, which arose from a series of revelations about corrupt conduct of Members (most notably the acceptance of cash in exchange for the asking of questions in the House), defines the acceptable behaviour of Members and provides for sanctions and penalties for any breach.

In New South Wales the ICAC has an overall responsibility for anti-corruption activities in the public sector inclusive of elected Members. By comparison, the Committee on Standards in Public Life forms a branch of an informal network of anti-corruption agencies in Britain, this being the branch with jurisdiction over elected Members.

As discussed in a previous chapter, the British system employs an Independent Commissioner (Sir Gordon Downey in this instance) to respond to complaints and undertake investigations of Members' behaviour. Based on his investigations, he makes recommendations to the Standards Committee calling for penalties commensurate with the Members' actions. The Committee then implements those findings, acting as a conduit between the Independent Commissioner and the Parliament.

The delegation heard that the Committee has the power to re-investigate a matter subject to a Commissioner's report if it is dissatisfied with the result, but cannot suppress his report or change its conclusions.

LONDON - The Serious Fraud Office
Director George Staple
Assistant Director Fred Coford and Solicitor Lorna Harris

The Serious Fraud Office (SFO) was established in 1987 after extensive fraud and corruption was uncovered during an investigation into fraudulent activities in the public and private sectors in Britain in the late 1970s and early 1980s. The Office was created under the *Criminal Justice Act 1987* and operates as a combined investigation and prosecution agency in the field of serious and complex fraud. It is a separate government department and reports directly to the Attorney General. Police officers work closely with the Serious Fraud Office and are involved in all investigations.

It both investigates and prosecutes. While separation of investigation and prosecution was seen to serve as a check and balance within the Fraud Squad, the delegation heard that the SFO believes that its combined role allows it to pursue larger, sometimes politically sensitive cases in an unfettered manner.

In terms of the supervision of its activities, it is responsible to the Home Affairs Committee of Parliament, and to some extent to the Treasury and the Public Accounts Committee. It makes Annual Reports to Parliament and the Attorney General is answerable for its conduct in Parliament. These Committees have the right to ask any question they wish at hearings, and hearings are, with rare exception, held in public.

Internally, the SFO does not have a structure parallel to the ICAC's Operations Review Committee. Instead, the Director is the sole arbiter of which incidents will be investigated and which investigations will proceed to prosecution. The SFO has adopted the Code of Conduct for Crown Prosecutors as a guide for its actions. There does exist a "vetting" Committee made up of members of the SFO and the Crown Prosecution Service who together determine which cases are suitable for investigation.

The delegation noted the Director's comment that it would be an advantage to formally establish an Operations Review Committee of the kind used by ICAC, and that the Director proposes to establish a (senior) independent review officer, an equivalent to Sir Gordon Downey in the British Parliament, to review internal decision making.

Also unlike the ICAC, the SFO has no charter to detect fraud, or to educate the public and private sectors. All of its case work is that which is referred from members of the public, the government, local authorities, the police, and other regulators. Likewise, there is no requirement on any of these groups or individuals compelling them to come to the SFO.

In comparison to the Fraud Squad of the Metropolitan Police Service, the Serious Fraud Office has investigative teams, led by lawyers employed within the Office. The SFO's function as a

prosecuting agency has led it to give lawyers an enhanced role in guiding investigations. The lead lawyer, and the team members, stay with a particular case through to prosecution. The teams use a limited number of in-house specialists in accounting and other technical fields which are augmented by outside consultants. The SFO works in a cooperative manner with police and other agencies to obtain investigators on a needs basis.

A media officer is employed by the SFO, but this role is strictly to provide information about concluded cases and was not employed to assist ongoing investigations.

Like the ICAC, the Serious Fraud Office has the power to compel witnesses to testify, but the delegation was informed that the rules of natural justice applied to investigations. It was further noted that the SFO had declined to undertake public hearings into matters under investigation as it believed it could taint evidence, corrupt an investigation and limit successful prosecution.

LONDON - Lord Nolan

The delegation interviewed Lord Nolan, Chairman of the Committee on Standards in Public Life, and author of the report which recommended the establishment of the Parliamentary Commissioner for Standards and the Parliamentary Code of Conduct. The recommendations were accepted by the House of Commons in 1995. The Committee structure and its operation offered useful insights into the work of the ICAC Committee.

The role of the Committee is to examine standards of conduct in various areas of public life. It has studied arrangements in Parliament, the executive (Ministers and civil servants), public bodies (both national and local) and local government. It has established the seven principles of public life and attached importance to mechanisms such as independent scrutiny of decisions made by public bodies, the establishment of codes of conduct, proper accountability and whistleblowing.

Lord Nolan told the delegation that the Committee had worked well for a number of reasons. It was composed of people greatly experienced in public life and included senior representatives of the three main parties who had a degree of detachment from partisan politics. The Committee had thus delivered unanimous reports and had been able to work in a consensual and constructive way, which gave greater weight to its recommendations. The Committee reported formally to the Prime Minister and through him to the various institutions it had studied. It worked free from Government pressure and largely determined its own agenda.

3. BERLIN - Dr Peter Eigen Transparency International

The delegation met with the head of Transparency International (TI), Dr Peter Eigen. Transparency International describes itself as "the coalition against corruption in international business transactions". It has an educative and "coercive" role.

The delegation spent some hours with Dr Eigen and his Berlin staff discussing the techniques TI uses to promote awareness of corruption. TI has undertaken commendable work in this area and its contribution should not be underestimated.

Much of what was discussed relates to the educative role of the ICAC in New South Wales, and materials gathered will be forwarded to the ICAC for consideration.

BERLIN - Renate Kunast
Member of the Berlin Parliament

Ms Kunast is a Member of the Green party (no connection to the Australian Greens), a relatively well represented group in the multi-party Berlin Parliament. She expressed her frustration at the slow progress in changing laws which she claimed virtually allow, even encourage, the offering and acceptance of bribes. Strange anomalies between State and Federal laws allow bribes paid to be technically claimable as a tax deduction, and the receivers of bribes are encouraged to declare and pay tax on them. Yet the tax authorities are forbidden by law to disclose to the police the names of persons claiming a deduction on a paid bribe. Police action is limited to the pursuit of undeclared bribes (and the unpaid tax on them). Further, local elected Members are allowed by law to accept gifts (bribes) from any source. Ms Kunast described how these anomalies had led to massive corruption in the construction industry, in particular in the allocation of the extensive government contracts for the rebuilding of the unified Berlin.

She noted that unlike Australia, Berlin had not battled the culture of corruption with education programs, and the only functioning anti-corruption work within government was undertaken by a small, underfunded unit within the Justice Department. She lamented the fact that the final arbiter of corruption cases was part of the executive, and that this had led a number of times to interference at ministerial level. Independence clearly was lacking.

Ms Kunast admired the level of commitment to corruption in New South Wales and requested copies of legislation on the ICAC and Whistleblowers. This has been sent to assist her in her work.

BERLIN - Sigmar-Marcus Richter
Berlin Police Force

Mr Richter spoke to the delegation on the role of the Police Force in corruption fighting in Berlin. In many ways he echoed the concerns of Ms Kunast, reiterating the problems in detection and prosecution in a system where accepting bribes is condoned, very limited resources are applied to investigation, surveillance monitoring and telephone tapping are illegal, and police training is limited. He noted that government departments resist acknowledgement of corrupt activities because it is considered a "slight" on the reputation of an organisation, and every attempt is made to ignore the existence of corruption.

Mr Richter confirmed the extensive level of bribery within government. Allegations of corrupt activity were usually made anonymously, and many were vexatious. Training of police was strictly limited and outside expertise was not available due to lack of funds. Few cases ever reached court because of the difficulty in gathering evidence, and in many cases extraordinary income was the only evidence of corruption.

Little help was available from other Departments such as the Public Prosecutor or the Justice Department, despite the fact that where investigations have been pursued, extensive corruption has been uncovered. He noted that the media were of little assistance, in that they lacked any sophisticated understanding of the broader problems, tended to sensationalist reports, and generally hindered investigations.

BERLIN - Ministry of Justice Interdisciplinary Group

The principal response to corruption fighting in Berlin has been the establishment of a grouping of agency representatives as follows:

- Minister of Justice
- Interior Minister
- Public Prosecutor
- Police Force
- Finance Minister
- Minister for the Economy
- Public Works Minister
- Auditor General
- 3 District Mayors

These major players and stakeholders joined together in an attempt to coordinate anti-corruption activity within government. The Group's role is to exchange information, gather information on corrupt activities, and create guidelines for civil service activity. It aims to implement anti-corruption policies, act as a counsellor and mediator in cases, and promote awareness of ethical behaviour.

Operating as type of corruption "Commission", the group was established in response to the recognition of large-scale corruption within government agencies. It is in its formative stages, has no formal budget, and is staffed by two middle level officers of the Justice Ministry who spend only 20% of their time on Commission tasks. It is currently drafting an anti-corruption bill which calls for greater powers of prosecution, tougher sentences, and the right to undertake surveillance and telephone tapping. Unfortunately, it is in conflict with a parallel federal bill which declines protection for whistleblowers, denies telephone tapping powers, and allows continued protection for any civil servant receiving payments from prospective tenderers for government work.

The delegation was informed of a proposal to negotiate changes to the bills so that they reflect one another, and that government departments were opposing a section of the bill calling for civil servants to be compelled to report corrupt activity.

Enormous resistance to improvements in anti-corruption activity was evident to the delegation, exaggerated by historical, legal and cultural factors. Despite the efforts by the "Commission" described above, the officers charged with administering the group held grave doubts about its effectiveness while it remained part of the executive rather than a totally independent body.

BERLIN - Berlin Auditor General's Office

The delegation met with the President of the Auditor General's Office (AGO) to discuss its role in the fight against corruption in Berlin. The President confirmed much of the information the delegation had heard about corrupt activity in Berlin, notably that the construction industry, particularly relating to public works, was riddled with corruption, and that construction contract prices were inflated by 30-50% to accommodate bribes.

The Auditor's powers of office are similar to Auditors in Australia, in that it is independent of Parliament and has jurisdiction over all areas of government finance. The Berlin Auditor is appointed for life, much like a senior judge, to remove the temptation to lobby for extended appointment by favouring incumbent politicians.

The President was highly critical of the competence of the Justice Minister's corruption "Commission" for its bureaucratic approach and impractical solutions, particularly in respect of monitoring the construction industry. The AGO has attempted to promote and monitor the use of public tenders for government construction (optional in Berlin) but has met with resistance from the Public Works Ministry, which claims it would require too much administrative "energy". The Ministry further claims that public tender would disadvantage many local companies, which are admittedly inefficient and cannot compete on an open market, but which employ many local workers.

Every case the AGO has examined in which public tendering has not been used has revealed elements of corrupt activity. On one search of records of a company undertaking government work, a lengthy and detailed internal memo was discovered which amounted to a "manual" on how to bribe and defraud government officers and elected Members. The document had been circulated throughout the company marked "do not copy: do not retain".

The AGO admitted that, due to legal constraints preventing the exchange of information, training programs were the only area in which the AGO, the police, and the public prosecutor could cooperate.

4. NEW YORK - New York Police Department

New York City proved to be more successful than Berlin in its fight against corruption. The delegation's first meeting was with Charles Campisi, Chief of the Internal Investigation (IAB) Bureau of the Police Department, Charles Perrone, IAB Detective, and Kevin Ford, Deputy Director of the Department of Investigation (DOI).

This meeting covered the corruption fighting techniques implemented by the IAB over the last few years, many of which have produced significant results. The IAB had recently been reformed to create a more decentralised structure. The IAB had expanded its use of covert "sting" operations and what is known as "integrity testing".

Integrity testing involves random "tests" in which areas or individuals are targeted periodically for undercover surveillance where corrupt activity was suspected but unproven. Suspected officers would be secretly filmed while being presented with opportunities for corrupt conduct when handling cash or the proceeds of drug-related arrests in an apparently unsupervised environment. The delegation was shown a video tape of one such operation in which a suspected officer was asked to deliver the confiscated car of an arrested drug dealer to an impound yard. Cash was planted in the glove box and hidden in other places in the vehicle. The officer was filmed thoroughly searching the car and taking large portions of the hidden cash and returning the remainder to each hiding spot. He was latter charged, dismissed and jailed, and the video of his crime included in training sessions at the Police Academy. It has apparently served well as a deterrent to similar behaviour.

NEW YORK - Department of Investigations

Of particular interest to the delegation was the work of the Department of Investigations (DOI). It has responsibility for corruption investigations involving the almost half-million civil employees of the City of New York (excluding the Police Department), much like the ICAC in New South Wales.

The DOI is a chartered organisation that was formed in 1873 in response to public outcry over city corruption in the late 1870s.

Its officers include attorneys, prosecutors, investigators (both civilian and police), seconded detectives, analysts of all kinds, forensic auditors, surveillance technicians, and any other expertise it may need to employ on particular investigations. The Commissioner of the DOI has extraordinary powers to search records and compel interviews. All public employees are compelled by legislation to report corrupt activity to the DOI, it vets all public appointments, oversees all public tenders, and all payments to city contractors. It also works with the oversight bodies such as the "Conflicts of Interest Board" and the "Procurement Contract Board", and monitors the 12 year old "Whistleblowers Legislation" which protects disclosures and ensures reinstatement of any civic employee who suffers as a result of reporting corruption.

The DOI serves the people of the City of New York, its mayor and institutions by promoting and maintaining the integrity of government. The Department detects, investigates and apprehends those engaged in corrupt and fraudulent activities and unethical conduct. Through investigations, fact-finding, analyses and studies, the Department provides the mayor with information and recommendations for corrective actions that assist the mayor and agency heads in limiting waste and opportunities for dishonest activities, misconduct and in improving the management, operations and services of a government with an annual budget exceeding 31 billion dollars.

DOI, by law, concentrates on the actions and decisions of:

- about 215,000 City employees on the mayoral agency payrolls and another 200,000 who are employed by municipal, non-mayoral agencies (Board of Education, Housing Authority); and

- persons who provide goods and services to the City (home care, day care, building contractors, vendors, etc) and recipients of benefits and services provided by the City.

The Commissioner of Investigation is appointed by the Mayor, upon the consent of the City Council. DOI has the statutory authority to issue subpoenas and compel testimony.

DOI receives and acts on complaints received from the public. It initiates investigations upon the direction of the Mayor, requests from the City Council and other public officials. Many investigations are initiated by DOI itself. When investigation substantiates criminal activities, DOI prepares criminal cases for prosecution by the five (elected) District Attorneys or the two federal US Attorneys.

DOI prepares referrals to agency heads for disciplinary action to be taken against employees whose actions do not require criminal referrals. Virtually every significant DOI criminal investigation includes a review of controls and weaknesses and provides recommendations for constructive change to limit opportunities for further losses and reduce waste inefficiency.

The DOI issues public reports, often reported by the media, that serve to create a public record and remind the City's people that someone is watching the conduct of municipal affairs on their behalf.

In addition to the Commissioner of Investigation and the executive managers, the DOI staff includes 14 Inspectors General, reduced from 25 in 1990, each responsible for conducting criminal investigations within one or more mayoral agencies. These work with DOI investigative attorneys in preparing criminal cases for prosecution by the District Attorneys or the two federal US Attorneys.

The Attorneys and Inspectors General are assisted by criminal investigators (many of whom have "peace officer" designations), investigative auditors and accountants, and Police Department detectives who perform much of the undercover work and "sting" operations.

Corruption prevention analysts determine how corrupt and dishonest activities have occurred and devise opportunity-blocking strategies to limit the chance of losses from dishonest activities.

Background investigators examine the personal history of those who are appointed to manage mayoral agencies, those who hold sensitive or higher-paying provisional positions and those who do business with the City.

In assessing the success of its activities, the DOI stressed the need for political will and leadership at the mayoral level. Mayor Guilanios's endorsement of recommendations for change to the administration of public bodies made by the DOI was seen as crucial to their implementation.

On the use of the media, the DOI avoided contact until after investigations were concluded and an indictment secured, unless there was a clear case of public need to be informed, or in the event of a call for information when investigations stalled. DOI officers also rejected the concept of public hearings as an investigative tool, claiming it unnecessarily damages reputations and frustrates inquiries.

The New York City experience demonstrated how sophisticated anti-corruption measures,

supported by political leadership, could make an impression on decades of entrenched self-interested behaviour in the public sector in an effort to change a culture of corruption and nepotism. The delegation was impressed with the commitment of New York authorities and their enthusiasm for tasks.

The delegation wishes to thank the Mayor of New York, the DOI Commissioner, Howard Wilson, and in particular his Deputy, Kevin Ford, and their staff for all the help they gave us during the visit to New York and Washington.

5. WASHINGTON - The Fairfax Group Ltd

In the US Capitol the delegation first interviewed an international private anti-corruption organisation called the Fairfax Group. The group works both for private interests and to augment law enforcement activities. The group is the brainchild of investigator Michael Hershman, has offices across the globe, and it is staffed by former police, military, intelligence agency, law enforcement investigators and a range of specialist professionals. It is a private company with world-wide connections, including contracts in the US, Europe, Asia and Africa.

Of particular interest to the delegation, Fairfax has developed a program which is gaining currency in government circles, called the IPSIG or "Independent Private Sector Inspector General", a privately financed but officially sanctioned watchdog. IPSIGs are often certified by a regulatory, administrative or law enforcement agency relevant to the organisation's area of business.

When major companies dealing with government on, for example, civil works, are suspected or found to be indulging in corrupt activity, they can be required by a court of law or an administrative regulation to appoint, at their own cost, an IPSIG. The Inspector undertakes an operational audit of the company and oversees all of its transactions with the public authority, ensuring probity by signing off on each to the satisfaction of the government authority. The choice for the companies is simple, appoint an IPSIG or get no civil contracts. So popular is this process (at no cost to the public) that some companies are voluntarily engaging these independent auditors to gain favour with governments.

An IPSIG will monitor and investigate the activities of an organisation to detect illegal and unethical conduct and report violations of the law. It designs and supervises the implementation of programs to prevent violations and promotes ethical standards which enhance efficiency and effectiveness in transactions with taxpayer funded works. The programs also reduce costs and promote fairer competition. Another positive outcome is that the offending companies remained in business, under supervision, rather than facing closure and causing unemployment.

Fairfax, having built a reputation for trust and results, also works to augment state law enforcement agencies when government staff cannot be trusted or the source of corruption is unknown, or not uncovered by conventional investigation. It also indicates, according to Fairfax, a state resource vacuum which companies such as their own are now beginning to fill.

The delegation also learned about legislation in the US in which individual whistleblowers can receive a portion of recovered funds from successful actions against corrupt civil servants.

Evidence shown to the delegation revealed this had amounted to millions of dollars in some cases and could be used to counter the most cynically corrupt public servant.

In an echo of other agencies interviewed, Fairfax confirmed that although their use of covert (electronic) surveillance was legally limited, it still represented the "quickest and most effective way to gather evidence and succeed in a prosecution". Fairfax members went on emphasise that private rather than public investigation was "the only effective way" to bring to justice corrupt individuals and/or organisations.

WASHINGTON - The FBI

The delegation interviewed two members of the Federal Bureau of Investigation's Public Integrity Office, which is involved in corruption investigations, and handling cases of "violation of public trust" in the civil service. Their broad mandate canvassed any credible source of information in the formation of a case. The FBI, like most others the delegation interviewed, stressed the use of undercover surveillance and secrecy as the most effective tool in fighting corruption. At the time of our interview 1300 cases of suspected corruption were listed for investigation, absorbing an estimated 400 man-hours (sic) per week.

They used examples of concurrent and entirely legitimate congressional hearings into corruption cases which effectively destroyed clandestine investigations into the same matter. The public airing of personalities and subject matter resulted in a fruitless race for evidence on identical cases. This was verified during the delegation's interview with Mr Mike Madigan, the lead counsel for Senator Fred Thompson's Committee inquiry into 1995 Campaign funding.

Like many of the groups interviewed, the FBI had a limited time to assess the credibility of, and process, any complaint. Like the ICAC, they sought to develop resources and contacts in particular areas, and monitored patterns and trends in corrupt activity.

The FBI would accept anonymous tips on corrupt activity, however their work was principally gathering evidence to create a case strong enough to hand to a special prosecutor to prosecute. Their educative activities were limited, but the delegation heard of plans to expand this role at a senior departmental level.

WASHINGTON - Office of Government Ethics and the US Office of Special Counsel

The delegation interviewed officers from two other agencies in Washington: the Office of Government Ethics (OGE), which has overall responsibility for the ethics program of the executive branch of the US Federal Government; and the Office of Special Counsel (OSC), which oversees whistleblower protection legislation. They are two separate agencies of the US federal executive branch and have separate functions.

The OGE establishes the regulatory ethics policies, interprets the statutory ethics provisions including those dealing with conduct and financial disclosure, provides advice and guidance, reviews agency ethics programs, develops ethics educational materials for employees and trains agency ethics officials. It is not an investigative or prosecutorial agency. Investigations are carried out by agency Inspectors General or the Department of Justice. Administrative sanctions are imposed by agency heads, while prosecutions under criminal and civil ethics statutes are carried out by the Department of Justice.

The OSC administers the *Whistleblower Protection Act* and functions as an independent investigative and prosecutorial agency within the executive branch, litigating before the Merit Systems Protection Board. The primary role of the OSC is to ensure that employees, former employees and applicants for employment are protected from prohibited personnel practices, especially reprisal for whistleblowing. In addition to investigating allegations of prohibited personnel practices and initiating corrective or disciplinary action, the OSC provides a secure channel through which information of a violation of any law, rule or regulation may be disclosed without fear of retaliation and without disclosure of the identity of the employee without his or her consent. OSC also enforces the Hatch Act which is a statute limiting the political activities of government employees. In the Whistleblowing area, 90% of complaints by employees of reprisals are dismissed as vexatious or as a management problem. There were no prosecutions to protect innocent people who had false, vexatious, or frivolous complaints made against them.

Both groups were impressed with the New South Wales ICAC centralised structure and their powers to investigate.

6. CONCLUSIONS

How this report should be used

This study tour was structured to inform the Committee and Members of Parliament on the extensive review of the role and functions of the ICAC which the Committee will undertake during 1997/98.

Any conclusions drawn from information gathered during the tour should be seen, at this point, as topics for review and discussion, rather than recommendations for change. **This report cannot be divorced from the forthcoming review, and the Committee acknowledges that the review process itself will necessarily involve a close working relationship with the ICAC. To achieve any real value the Committee and the Commission must share the goals of the review.**

While the Committee reviews how the ICAC might better serve New South Wales, it is important to acknowledge that **expertise in the fight against corruption lies with the ICAC and not the Committee**. This report and the review to follow will not, indeed cannot, make recommendations for change without a high level of input and commitment from the Commission.

The Committee sees the review as a process whereby the Committee and the Commission work together to improve service to the public, and one in which the Committee's role ultimately is to facilitate change at the parliamentary level. It is in no way to be construed as criticism of the ICAC, even though views may be expressed from time to time by citizens of New South Wales adverse to the ICAC.

Overseas experience has, the delegation believes, called into question the manner in which public hearings are employed. Every successful anti-corruption body spoken to viewed the use of public hearings in an investigation as a last resort. It would not be inaccurate to relay that all of the groups and individuals interviewed considered public hearings as a limiting action, and one to be employed only in the narrowest sense when other avenues were exhausted.

Conversely, those bodies interviewed emphasised the use of private hearings, covert observation and secrecy during investigation until such time as sufficient evidence had been gathered to either successfully prosecute, declare an investigation void, or exonerate accused parties. The delegation cannot exaggerate the strength and frequency with which this view was proffered.

The delegation has considered this advice in light of the statutory obligations of the ICAC and the perceived desire by both the public and the Commission for openness and transparency. It will be an issue canvassed with the Commission and the New South Wales public during the review.

Members are very aware of the need to avoid both the reality and the perception of a "star chamber" within the ICAC which, in the opinions of some, may arise from a greater use of undercover surveillance. However, the Committee notes that no agency interviewed was subjected to the many points of review and accountability mechanisms to which the ICAC is responsible. Indeed, many of those agencies interviewed have sought additional information from the Committee about its oversight role, and in particular the role of the Operation Review Committee within ICAC.

It can be concluded by comparison with the standards of the groups interviewed that the ICAC is very well monitored and that enhanced statutory authority to employ clandestine investigative methods, such as those employed to great effect by the Police Royal Commission, may be more appropriate.

The delegation emphasises that in New South Wales, the ICAC has in place a greater level of formal oversight than any of those groups described in this report, namely the Operations Review Committee and the Parliamentary Joint Committee.

Regarding methods of investigation and the handling of complainants, overseas experience stressed the confidentiality of the complainant's identity without exception. Protection of complainants during investigation was paramount, as was constant and careful liaison with complainants on the progress, or otherwise, of investigations. In particular, the sensitive handling of complaints which were not pursued, for whatever reason, was of interest to the delegation. Recognising the stress involved in whistleblowing is as important as the pursuit of corruption itself.

In this regard, the Committee has been exposed to a number of disgruntled complainants who have interpreted the Committee as venue of secondary application for matters which the ICAC has declined to investigate. While the Committee accepts some measure of responsibility for the inadequate understanding by the public of its limited statutory role, and does not doubt the veracity of the Commission and the ORC deliberations, it nonetheless considers the handling of complainants as an issue which must be vigorously examined in the upcoming review.

It must be noted that the delegation examined this matter with diligence in its interviews with comparable overseas organisations, many of which encountered similar problems, and that no encompassing solution was evident.

Investigation methods varied, but the immediate and extensive use of covert surveillance techniques was a common theme. Most agencies considered this to be there greatest tool in the fight against corruption, and they both jealously guarded these powers and exercised them to the full. During its review, the Committee will work with the ICAC on this issue with a view to determining whether the statutory powers of the ICAC are sufficient in scope and effect and

whether it has the necessary technological equipment to carry on effective surveillance and filming operations.

Other matters, such as increasing the number of Commissioners available to hear cases, the separation of management and investigative and hearing roles at senior levels, the jurisdiction over private sector corruption, and the investigation of serious fraud were canvassed during the tour, and will be considered during the review.

With respect to education, many of the agencies interviewed did not have formal responsibilities beyond detection and investigation, but all agreed about the importance of public awareness in the fight against corruption.

In summary, the delegation gleaned a great deal from the perspective of agencies in other countries. The delegation, on behalf of the Committee, has been assured by overseas experience that the ICAC is an appropriate and useful tool, but is more than ever convinced that the coming review is timely, and with the ICAC's help, will yield improvements and refinements to its operation and the effectiveness of a very important tool in the fight against corruption.

APPENDICES

1. Draft Terms of Reference for ICAC Review.

2. Speech delivered to senior executive of the World Bank in Washington DC.

3. Speech delivered to the World Bank's Luncheon, Washington DC on 19 February 1997 titled "Political oversighting of Anti-corruption bodies in Australia".

APPENDIX 1

Review of the Role and Functions of the ICAC

Issues Paper

PARLIAMENT OF NEW SOUTH WALES

COMMITTEE ON THE ICAC

REVIEW OF THE ROLE AND FUNCTIONS OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION

ISSUES PAPER

October 1997
Parliament House, Sydney

REVIEW OF THE ROLE AND FUNCTIONS OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION

Introduction

The Committee on the ICAC resolved in 1996 to undertake a formal review of the role, functions and general operations of the Independent Commission Against Corruption. As part of its statutory obligations to monitor and review the exercise by the Commission of its functions, the Committee regularly meets with the Commissioner of the ICAC in the form of a public hearing to question the Commissioner about matters of concern, issues arising from Commission reports and general aspects of the Commission's operations. The Committee also undertook a major review into a number of key issues following criticism of the *Independent Commission Against Corruption Act* contained in the judgements of the Court of Appeal's decision in *Greiner v ICAC* in 1992.

The Committee considered that as the Commission will have been established for 10 years in 1998, that it would be timely to fully review the *Independent Commission Against Corruption Act* and the Commission's operations during 1997. The scope of the inquiry will be broad and submissions on any aspect of the exercise of the Commission's functions, structures and procedures will be welcomed (but not those matters outside the Committee's jurisdiction under s64, ie. matters relating to particular conduct, the Commission's decision to investigate or not investigate a particular complaint, or the Commission's recommendations or findings).

As a preliminary aspect of the inquiry, the Committee will also be examining appropriate techniques and approaches for review of an independent, investigatory body.

Background

Under the Independent Commission Against Corruption Act, the Committee on the Independent Commission Against Corruption, a Joint Committee comprising 11 members of the Legislative Assembly and Legislative Council of NSW, serves as one of the checks and balances in monitoring and reviewing the exercise by the Commission of its functions. Under s64 of the Act the Committee is empowered to report to Parliament on any matter appertaining to the Commission or connected with the Commission's exercise of its functions, and to examine trends and changes in corrupt conduct, and practices and methods elating to corrupt conduct, and report on any change to the Commission's functions, structures and procedures which the Committee thinks desirable.

Since the establishment of the Commission in 1988, and the first meeting of the Committee during the 48th Parliament in 1989, the Committee has met with the Commissioner at regular intervals and examined a large number of issues arising from letters received from members of the public and of concern to Members of Parliament.

The Committee has held formal inquiries into matters such as the Commission's procedures with witnesses, televising of proceedings, the Operations Review Committee, the registration of pecuniary interests by Members, and prior to the establishment of the Standing Ethics Committees, the question of a Code of Conduct for Members. Types of matters raised and discussed are listed below.

Review of the ICAC Act

Following the Court of Appeal decision in *Greiner v ICAC*, and the ICAC "Second Report on Investigation into the Metherell Resignation and Appointment" the Committee held a major review of the ICAC Act and in May 1993 brought down a report which discussed such issues as:

- the definition of corrupt conduct and the scope of s58
- the Commission's power to make findings about individuals
- judicial review of ICAC decisions
- standards to be applied by the ICAC
- availability and use of search warrants
- contempt provisions
- the problem of false complaints, and whether sanctions should apply
- s11: mandatory reporting, timeliness; adherence by departments; application to State owned corporations

The Committee continues to monitor these issues at the general meetings held regularly with the Commissioner.

Other than the current Chairman, Peter Nagle MP, who has served on the Committee from 1991-1997, all members have been appointed to the Committee after March 1995.

Other matters that have been canvassed and proposed to be included in the review are as follows:

Inquiry Processes

- a review of how the ICAC approaches an inquiry
- use of experts
- criteria for conduct of a public hearing
- the process of forming an opinion
- findings - extent of commentary in addition to illegality or criminal breaches
- relationships with the media during an inquiry

Witnesses - Procedure and Experiences

- legal representation under s52 and the availability of financial assistance or duty lawyers
- the principle underlying use of public hearings
- recommended procedures to protect reputations from hearsay allegations
- whether there should be an appeal mechanism for review of ICAC determinations or findings of fact
- protocols for obtaining warrants and interviewing witnesses
- use of indemnities
- notification of release of reports, availability of transcripts

Staff

- rights of ICAC employees
- operational training programs
- application of anti-discrimination legislation
- use of consultants or external agencies by the ICAC
- conduct of ICAC staff
- use of seconded Police as investigators
- issues of firearms to certain ICAC officers
- political associations of ICAC staff
- role of Counsel Assisting
- proposal for a Deputy Commissioner
- Assistant Commissioner responsibilities
- checks against internal corruption

Operations Review Committee

- Operation of the ORC under s59(1)
- Composition - appointment of ex-officio members
- Role and functions
- Expansion of numbers

Parliamentary Committee

- Relationship with the Commissioner
- Protocol for seeking advice on matters that relate the Commission's functions
- Value of the "veto power" over the appointment of a new Commissioner
- Code of Conduct for members, and the Pecuniary Interest Register
- Performance of the Committee; has it added value?

Relationships with other organisations

- Jurisdictional boundaries and interrelationship with the Auditor General, Ombudsman, State Crime Commission and Police Integrity Commission
- Protocols with the Royal Commission
- Liaison with the DPP in relation to prosecutions
- Sub-judice matters
- Success of prosecutions

Corruption Prevention

- Education strategies
- Public awareness of the ICAC
- Provision of advice to departments and organisations
- Public/private partnerships - a formal advisory role?

Whistleblowers

- Role of ICAC
- Effectiveness or otherwise of existing provisions
- Confidentiality of complainants

Outcomes, Performance Measures and Effectiveness

- Budget and funding
- Outcome of reports
- Performance indicators
- Productivity savings
- Cost of inquiries and counsel assisting
- Prosecutions arising
- Use of transcripts of ICAC proceedings in prosecutions
- Public expectations of the ICAC
- The Police Royal Commission

ISSUES OF CURRENT INTEREST

The following list, while not exhaustive or exclusive, includes matters of particular current interest:

- the future investigatory relationship between the ICAC, the Police Integrity Commission and the Police Inspector General

- the need for public and/or private inquiry powers as an investigative tool

- the definition of "corruption"

- the use of surveillance, telephone taps and search warrants

- measures of effectiveness

- inclusion of serious fraud investigation as an additional ICAC role

- the appointment of a Deputy Commissioner, Investigations, and a Deputy Commissioner Administration, to free the principal Commissioner for public inquiries.

AMENDMENTS MADE TO THE *INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988*

1988 No. 42 Independent Commission Against Corruption (Amendment) Act 1988.

Various fine tuning amendments including:

- amendments to authorise a person at a hearing before the commission to refuse to divulge a privileged communication passing between a legal practitioner and a person for the purpose of providing or receiving legal services in connection with a person's appearance, or anticipated appearance, before the Commission;
- amendments related to confessional privilege will authorise a member of the clergy to refuse to divulge to the commission the contents of a confession made by a person, unless the person agrees, or a criminal purpose was involved;
- amendments to repeal section 98(e) of the Act, which provides that a person is guilty of contempt of the Commission if by writing or speech the person uses words that are false and defamatory of the commission, the commissioner or an assistant commissioner. This amendment meets concerns that members of parliament may be unable to properly address criticism at the commission's operations.
- amendments to provide that nothing in the Act shall be taken to affect the rights and privileges of freedom of speech, debates and proceedings in Parliament;
- amendment extends the qualification of persons eligible to be appointed as a commissioner or assistant commissioner to persons eligible for appointment as a judge of the Supreme Court of any State or Territory in Australia, the Federal Court or the High Court.

1989 No. 28 Independent Commission Against Corruption (Amendment) Act 1989.

Amendments made to enhance the efficient and effective operation of the ICAC:

- to enable the appointment of part-time assistant commissioners who can conduct certain inquiries and undertake other action delegated by the Commissioner;
- matters relating to the employment of the staff of the Commission. Members of staff are under the control and direction of the Commissioner. This amendment ensures that the Commission is not bound by the provisions of the *Government and Related Employees Tribunal Act*, or by the *Industrial Arbitration Act* in certain circumstances.

No. 187 Evidence (Religious Confessions) Amendment Act 1989.

This Act amended the *Evidence Act 1898* so as to entitle members of the clergy to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the member of the clergy. It does not apply if the communication involved in the religious confession was made for a criminal purpose. The Act specifies that the privilege will apply to any hearing or proceedings established under the *Independent Commission Against Corruption Act 1988*).

No. 195 State Bank (Corporatisation) Act 1989.

(Consequential amendment of the *Independent Commission Against Corruption Act 1988* after arrangements made to corporatise the State Bank - removes the state bank from the ICAC's jurisdiction.)

1990 No. 80 Independent Commission Against Corruption (Amendment) Act 1990.

Amendments to clarify the Commission's powers in relation to the contents of its reports to Parliament and other matters:

- ➢ amendments arose out of the confusion and uncertainty generated by the decision from *Balog and Stait v. Independent Commission Against Corruption*, which examined the commission's powers to make and report findings of corrupt behaviour.
- ➢ amendments made will clearly allow the Commission to examine in its report the evidence before it and state its opinion as to the weight which should be given to that evidence. The Commission will be able to comment on the credibility of witnesses.
- ➢ This Act makes it clear that the Commission does not have the power to recommend prosecution. At most the Commission will be able to state its opinion as to whether or not consideration should be given for prosecution for a criminal or disciplinary offence.
- ➢ the legislation provides that the Commission is to consider not only whether an individual's behaviour has been corrupt but also whether laws, practices and procedures and methods of work have created a situation where there is a potential for corrupt conduct to occur.
- ➢ Section 18 of the ICAC Act imposes certain restrictions on the Commission's exercise of its functions while court proceedings are on foot. This amendment limits the restrictions in section 18 to criminal proceedings for indictable offences that are to be tried by a jury. The Commission will be required to conduct hearings in private, suppress the publication of evidence and defer

presenting its report to Parliament to the extent necessary to protect an accused's right to a fair trial.

- other amendments were of a procedural nature:
  - (i) to protect the confidentiality of complaints made by prisoners to ICAC;
  - (ii) to enable a summons to appear before the Commission to be issued by a judge or magistrate and served outside the state;
  - (iii) to ensure that task forces which the Commission assists are subject to the secrecy requirements of the Act in relation to information received from ICAC on a confidential basis; and
  - (iv) to enable documents required to be produced to the Commission to be received by an authorised officer of the Commission.)

1991 No. 17 Statute Law (Miscellaneous Provisions) Act 1991.

The amendments to the *Independent Commission Against Corruption Act 1988* provide that employees (other than those employed on a temporary basis) of the ICAC, who at present are entitled to return to public sector employment in certain circumstances, are not prevented from doing so because of their age.

No. 38 Government Insurance Office (Privatisation) Act 1991.

Consequential amendment of the *Independent Commission Against Corruption Act 1988* after the privatisation of the Government Insurance Office - removes the GIO from the ICAC's jurisdiction.

No. 54 Independent Commission Against Corruption (Amendment) Act 1991.

Amendments made:

- ensure that the Commission has greater flexibility in determining whether to hold a hearing in public or in private.
- authorises the Commission to hear closing submissions in private, to assist in ensuring that unwarranted damage to reputations is avoided.
- clarifies the right of unincorporated associations such as political parties to appear and be legally represented at Commission hearings.
- Streamlines the procedure for the transmission of evidence of criminal offences against a law of the Commonwealth or a State to the appropriate authority of the Commonwealth or a State.
- allows information about a public authority's performance to be

given directly to the public authority as well as to the responsible Minister.

- clarifies the grounds on which the Attorney General may grant financial or legal assistance in respect of witnesses appearance before the Commission.

1992 No. 43 Statutory Appointments Legislation (Parliamentary Veto) Amendment Act 1992.

Amended *Independent Commission Against Corruption Act 1988*, amongst others, to provide for the vetoing by the Parliamentary Committee on the ICAC of proposed appointments to Commissioner for the Independent Commission Against Corruption.

1994 No. 86 Independent Commission Against Corruption (Amendment) Act 1994.

Amendments to expand the jurisdiction of the Independent Commission Against Corruption in relation to Ministers and of the Crown and members of Parliament.

- amendments made to resolve concerns arising from the decision of the Court of Appeal in *Greiner v Independent Commission Against Corruption* regarding the definition of corrupt conduct contained in the ICAC Act.
- amendments place members of Parliament and Ministers on a similar footing to public sector employees by providing that a breach of a code of conduct applicable to them can attract the ICAC's jurisdiction and result in a finding of corrupt conduct when it is found that a substantial breach has occurred.
- amendments give each House of Parliament the responsibility to develop its own code to regulate the conduct of its members.

1995 No. 3 Parliamentary Committees Legislation Amendment Act 1995.

Amendments increased the number of members of the Legislative Assembly on the Committee on the ICAC from 6 to 8; increasing the Committee membership from 9 to 11.

No. 11 Statute Law Revision (Local Government) Act 1995.

Consequential amendment of the *Independent Commission Against Corruption Act 1988* to ensure that the changes made by the *Local Government Act 1993* are reflected in other New South Wales legislation.

No. 27 Evidence (Consequential and Other Provisions) Act 1995.

Consequential amendment of the *Independent Commission Against Corruption Act 1988* following the enactment of the *Evidence Act 1995*.

Amendment ensures that even though the Commission is not bound by the rules or practice of evidence that section 127 (Religious confessions) of the *Evidence Act 1995* applies to any hearing before the Commission.

No. 99 Statute Law (Miscellaneous Provisions) Act (No. 2) 1995.

Amendments made to sections 72C and 72E of the *Independent Commission Against Corruption Act 1988* to extend the deadline for the Standing Ethics Committees of the Legislative Council and Legislative Assembly to prepare and present to their relevant House a draft code of conduct.

1996 No. 29 Police Legislation Amendment Act 1996.

Consequential amendments to the *Independent Commission Against Corruption Act 1988* after amendments made to the *Police Service Act 1990* to make further provision for dealing with complaints about police and as a result of the establishment of the Police Integrity Commission.

No. 30 Statute Law (Miscellaneous Provisions) Act 1996.

Amendments made to sections 72C and 72E of the *Independent Commission Against Corruption Act 1988* to extend the deadline for the Standing Ethics Committees of the Legislative Council and Legislative Assembly to prepare and present to their relevant House a draft code of conduct.

No. 73 Independent Commission Against Corruption Amendment (Codes of Conduct) Act 1996.

Act to amend the *Independent Commission Against Corruption Act 1988* to extend the time within which draft codes of conduct are to be presented to each House of Parliament.

No. 108 Police Legislation Further Amendment Act 1996.

(Consequential amendment to the *Independent Commission Against Corruption Act 1988* after amendments made to the *Police Service Act 1990* to abolish the Police Board and to provide for the removal from the police service of police officers in whom the Commissioner of police has no confidence.)

No. 121 Statute Law (Miscellaneous Provisions) Act (No. 2) 1996.

Minor amendment made to the *Independent Commission Against Corruption Act 1988* as a consequent of the enactment of the *Industrial*

Relations Act 1996.

LIST OF COMMITTEE REPORTS:

March 1990	Report on Witnesses prepared by the Commissioner of the Independent Commission Against Corruption (prepared by ICAC; released by Committee).
May 1990	Coalition of evidence of the Commissioner of the Independent Commission Against Corruption, Mr Ian Temby QC, on general aspects of the Commissions operations.
July 1990	Concerning the Inquiry for the Televising of Public Hearings of the Independent Commission Against Corruption.
September 1990	Discussion paper concerning Openness and Secrecy in Inquiries into Organised Crime and Corruption: Questions of Damage to Reputations (prepared for the Committee by the Hon A.R. Moffitt QC CMG).
September 1990	Further information about witnesses before the Independent Commission Against Corruption: correspondence between the Committee and the Commissioner, Mr Ian Temby QC.
November 1990	Concerning the Inquiry into Commission Procedures and the Rights of Witnesses: First Report on Openness and Secrecy in Inquiries into Organised Crime and Corruption.
November 1990	Collation of Evidence of the Commissioner, Mr Ian Temby QC, on general aspects of the Commissions operations taken before the Committee on 15 October 1990.
February 1991	Inquiry into Commission Procedures and the Rights of Witnesses: Second Report.
April 1991	Collation of Evidence of the Commissioner, Mr Ian Temby QC, on general aspects of the Commissions operations.
October 1991	Collation of Evidence of the Commissioner, Mr Ian Temby QC, on general aspects of the Commissions operations.
December 1991	Inquiry into matters raised by Paul Gibson MP.

May 1992	Collation of Evidence of the Commissioner of the Independent Commission Against Corruption, Mr Ian Temby QC, on general aspects of the Commissions operations.
July 1992	Report on the Fifth International Anti-Corruption Conference, 8-12 March 1992, and Hong Kong Study Tour, 11-18 April 1992.
July 1992	Report on Operations Review Committee and Assistant/Deputy Commissioners.
September 1992	Discussion Paper on the Review of the Independent Commission Against Corruption Act.
December 1992	Collation of Evidence of the Commissioner of the Independent Commission Against Corruption, Mr Ian Temby QC, on general aspects of the Commissions operations.
April 1993	Report on the Visit to Brisbane, 2-3 November 1992.
April 1993	Collation of Evidence of the Commissioner of the Independent Commission Against Corruption, Mr Ian Temby QC, on general aspects of the Commissions operations.
May 1993	Minutes of evidence taken before the Committee concerning the Review of the Independent Commission Against Corruption Act.
May 1993	Correspondence on Prima Facts Issue concerning the review of the Independent Commission Against Corruption Act.
May 1993	Minutes of Evidence and Correspondence concerning a matter raised by Andrew Tink MP.
May 1993	Review of the Independent Commission Against Corruption Act.
May 1993	Inquiry into Section 52 Independent Commission Against Corruption Act.
October 1993	Minutes of Evidence taken before the Committee on the Independent Commission Against Corruption.

November 1993	Collation of Evidence of the Commissioner of the Independent Commission Against Corruption, Mr Ian Temby QC, on general aspects of the Commissions operations.
April 1994	Collation of Evidence of the Commissioner, Mr Ian Temby QC, on general aspects of the Commissions operations.
April 1994	Collation of Evidence taken at Kyogle.
April 1994	Sixth International Anti-Corruption Conference and the United States Study Tour.
April 1994	Discussion Paper on Code of Ethics for Parliamentarians.
October 1994	Collation of Evidence of the Acting Commissioner, Mr John Mant, on general aspects of the Commissions operations.
October 1995	Visit to Brisbane 22-23 June 1995.
September 1995	Collation of Evidence of the Commissioner of the Independent Commission Against Corruption, The Hon. B S J O'Keefe AM QC, on general aspects of the Commissions operations.
May 1996	Collation of Evidence of the Commissioner of the Independent Commission Against Corruption, The Hon. B S J O'Keefe AM QC, on general aspects of the Commissions operations.
October/ December 1996	Collation of Evidence of the Commissioner of the Independent Commission Against Corruption, The Hon. B S J O'Keefe AM QC, on general aspects of the Commissions operations.
July 1997	Collation of Evidence of the Commissioner of the Independent Commission Against Corruption, The Hon. B S J O'Keefe AM QC, on general aspects of the Commissions operations.

Appendix 2

Honesty, Ethics and Politics in New South Wales, Australia

Speech

HONESTY, ETHICS AND POLITICS IN NEW SOUTH WALES, AUSTRALIA

Speech presented by
Mr Peter Richard Nagle, M.P.,
Chairman of the Joint Parliamentary Committee on the I.C.A.C
New South Wales Parliament
to the World Bank, Washington, D.C.

19 February 1997

I am the New South Wales Parliament's Chairman of the Joint Parliamentary Committee on the Independent Commission Against Corruption. An anti-corruption body, independent from Government and Parliament. I am also the Chairman of the New South Wales Legislative Assembly's Standing Ethics Committee.

There are two Houses of the New South Wales Parliament:

(i) The Legislative Assembly or the Lower House which elects its Members from geographical Electorates (Districts).

(ii) The Legislative Council or Upper House which selects its Members from a statewide Electorate.

In 40BC a poet named Sallust wrote of the Politicians of his time, "In public life, instead of modesty, incorruptibility and honesty - shamefulness, bribery and rapacity prevail".

The fact that 2036 years later the morning newspaper, *The Sydney Morning Herald* is saying the same things about public office in New South Wales, speaks volumes about the nature of political life, and demonstrates just how unsuccessful politicians have been in turning around this perception. And it is only a perception, not a reality.

This perception that politics is exclusive of ethics and honesty is not new. It's been with us as long as society has elected representatives to govern.

For State Parliamentarians in New South Wales, Australia, this process began in earnest in 1988, when the then Greiner Liberal/National Conservative Government introduced the ICAC Act in response to the perception of state wide corruption.

The events which followed, rich in irony as they were, led to the demise of a conservative Premier; gave impetus to the greater exposure of corruption; saw promises from politicians of all political complexions to root out corruption; changed the attitude of whole sections of the media; and culminated in the Wood Royal Commission into widespread corruption in the New South Wales Police force. The astounding revelations of the Wood Commission were splashed across the pages of our newspapers and our televisions daily. The citizenship was glued to their

television sets as wave after wave of corruption in the New South Wales Police force was exposed. **Corruption** it was and corruption most prevalent.

Where political ethics do not exist, despotism and tyranny find root, and corruption prevails behind a mask of a good single party system. Even in a democracy if there is a corrupt electoral system then there is a corrupt political system. For example, Queensland under the Nationals.

I have always felt that power is unique for the common good, not for the few. Maybe it is because of my role, or because of the relationship of the role of all politicians to an increasingly hysterical media, that we do need to adopt and embrace higher standards of honest behaviour to ensure the common good prevails.

Unfortunately, some people in New South Wales believe that corruption in society is greater today than ever, and that all public life is riddled with self serving individuals. Moreover politicians are always depicted as evil and self serving individuals and some are, but the majority want and do serve the community. All these stereotypes are substantially untrue and it takes a lot of effort and time to be involved in politics in Australia.

The truth is (trust me, I'm a lawyer and a politician) that what is happening in New South Wales is something that we as politicians should be proud of and something that as a group we should embrace. Please note that politicians make laws for peace, welfare and good government and because of this enormous power they should be the first to show to the community real moral and honest leadership.

Five hundred years of struggle, death, torture and slavery have given us our judicial legal and political system and we should defend it with our might. I know the cynical may laugh, but the fact is, whether you think it's for reasons of expediency or not, we work hard.

It is the electorate, not us in Parliament, that precipitates this dialogue on honest government and ethics. We politicians only respond.

It is a popular pursuit of some young politicians these days to look for a "win/win" solution to conflicting priorities. Unfortunately, it is an illusion most of the time because every decision has a down side built into it.

The reality in decision making is that priorities must be made and someone, or some group, will come out better than someone else or group.

Sometimes there is a no win situation for politicians who really do make honest decisions. Nevertheless, the perception will always be that the government has *"stiffed"* yet another person or group after the decision is made. Ask any journalist about *"stiffing"* and they will tell you that it makes good copy for the morning edition.

In my view, what ethics in politics is really about, is ***how*** the decision was reached, not the decision itself. Any code of conduct should aspire to inform and make transparent the process of decision making, thus allowing the decision and its outcomes to withstand criticism. This does not mean that when the political Party's Parliamentary Caucus meets and deliberates on

issues, that it is unethical not to tell your political opponents what was said and how the political decision was reached. In fact, if honesty and integrity has been met during the process of decision making, then the decision itself is correct, even though it might not be plausible.

Public confidence lies, as JFK observed to the US Congress in 1961, in order to have effective government possessing and retaining public confidence, and that confidence is endangered when ethical standards falter or appear to falter.

The key to public confidence must surely be in demonstrating that hard decisions are made in a ***fair*** and honest manner. Politicians will always do unpopular things, but unpopular does not necessarily mean lacking in integrity or honesty. Perhaps it is our greatest fault as politicians that we do not make it clear to the electorate this very point about process. Instead we grasp sometimes, the slippery eel of popularity, to justify our decision, thus pushing the public into scepticism and cynicism. We do not give the general populace credit to disregard media "gammon" (bulldust). Nevertheless, in the end, the judgement of all these decisions lie in the electorate and their vote to throw out governments making bad and/or dishonest and corrupt decisions.

In 1885, Robert Louis Stevenson wrote somewhat sarcastically, "Politics is perhaps the only profession for which no preparation is thought necessary" - **UNTRUE**.

Alluding to the lack of formal education of many of the politicians of his time, he suffers, I think, from a misconception which is common to many critics of modern politics that only intellectuals and the rich can tell us what is good for us.

If representatives cannot come from every walk of life and if they must all be lawyers (hang on, lawyers are OK - I'm one) or otherwise are elitist by education or class then we diminish the level of representation we currently enjoy. For example: in New South Wales, Bo Bo, Bob Harrison, Member for Kiama, is not a university educated man. However, on moral and environmental issues he has found his nitch and his honesty on these issues are never questioned. His views may be questioned, but not his integrity. I believe that the only preparation that he needs to be an effective politician, is to have lived in the real world, managed to be a good bloke, and had the desire to serve and to convince his fellow citizens to vote for him. He is above reproach. Some academics in politics could not move a stone let alone a mountain for the community, Bob Harrison has moved mountains for his constituents.

My point is that parliamentarians do not have to be academics or possess some higher educational training. There are not a lot of criminals or dishonest people because there are more lucrative pursuits for those so inclined outside politics and in a lesser media scrutinised occupation.

What politicians now do realise, is the need to do the right thing, and to be seen to be doing the right thing. It is a good idea to have a set of public guidelines to help our public figures in what is ethical and what is not. The norms and morals of our society move with the times. In one era, what is ethical behaviour maybe the next era unethical.

To that end, and because of a New South Wales political scandal now called the

Greiner/Metherell Affair, the New South Wales Parliament established an Ethics Committee to draft a Code of Conduct for its Members. For the first time in its Parliamentary history, the Legislative Assembly had to prepare a code. However, the Legislative Assembly's Committee went further and ensured that its Ethics Committee was made up of both, Members of Parliament and Members of the community. In fact, there are three Community members.

Community members are unique in our Assembly's history and are, I believe, of great benefit in keeping our feet firmly placed on the ground. Nevertheless, the Legislative Council with an Ethics and Privileges Committee, could find no reason to have community representatives on its Committee.

The draft Code of Conduct we have formulated in the Lower House has been widely publicised for public comment. That process is now over and we have tabled the proposed code in the Legislative Assembly for discussion and ratification. It is hoped that adoption by the House will occur this April (1997).

This process to determine ethical standards is the continuation of the democratic relationship between the elected and the electorate. It is another step in the evolution of our society, our government and political system, and ourselves.

Over the last seventeen months, the Legislative Assembly's Committee has spent hundreds of hours studying codes of conduct from public and private organisations and in particular from other Parliaments and Legislatures throughout the world. It has taken evidence from interested citizens and institutional representatives.

On the issue of the nature of the code itself, two themes have emerged clearly.

A code of conduct can be specific or aspirational. That is to say, a code could be a detailed document designed to anticipate every possible circumstance in the life of a parliamentarian and then to provide specific answers as to what behaviour is ethical or not in response to a given situation; or a document can demonstrate behavioural aspirations. That is, a document which stated basic positions about behaviour which must be borne in mind by the representative when considering actions or determining a conflict of interest.

The Legislative Assembly Ethics Committee concluded that an aspirational code with some specific items was preferable.

There are a number of reasons for this:

(i) Aspirational codes, such as that proposed by the Legislative Assembly, provide a framework, within which all kinds of behaviour - inclusive of any subtleties and nuances - may be judged. The other great benefit of this model is that it is by definition fluid, it is alive and flexible.

(ii) Changing levels of socially acceptable behaviour can be accommodated within aspirations, while detailed black letter codes would need to be constantly re-written and interpreted.

Recent developments of a prescriptive Federal Ministerial code are a case in point. Wherein, some Ministers were always in trouble because of the black letter nature of the detailed code which was interpreted by the media in their way.

It is impossible to anticipate every contingency in political life within an exhaustive code. If any aspect was overlooked, the code could be criticised and behaviour would go unchecked. Conversely, particular behaviour described as unethical in an exhaustive code could be used politically to unfairly attack a Member when clearly the code was not intended to cover that Member's particular breach.

That which contrasts the black letter law and rules of behaviour is different for people who make political decisions. That is, it could tend to limit the ability to move to reach a decision without fear that one has dotted every i and crossed every t.

For the moment, there is a distinction between the codes of the New South Wales Upper and Lower Houses. The Upper House has opted for a slightly more prescriptive (but by no means exhaustive) code, while the Lower House has opted for a declaration of principles.

What is significant about the Legislative Assembly's code is the process by which the code came about.

As I said earlier, a unique move occurred when the three Community members were appointed: namely, Mrs Leonie Tye of Saratoga, New South Wales, a businesswoman of 25 years experience and mother of three; Mr Stan Hedges, a businessman an Ex Local Government Councillor since 1958, former mayor and member of the Local Government Appeals Tribunal; and Mr Kim Wilson, a former Judge of the High Court of Papua New Guinea, member of the Native Title Tribunal, the Immigration Review Tribunal and Associate Commissioner of the Trade Practices Commission.

This was done with the express purpose of avoiding the creation of a soft or meaningless code. If members are to reflect the role and morals of their community, the Community members should and did have a say, and in New South Wales they have a large say.

This modelled Code attempts to fetter some forms of political behaviour, even though of all the public submissions that were received, only 4 actually came from members of the public; whereas, the rest were from academics or people involved in the field of ethics.

The failure of the larger community not to make submissions did not endear itself to some of my Parliamentary colleagues who did not see any reason, or indeed, any demand from the public for a code of conduct. Nevertheless, in all States of the United States, including the Congress, in all Provinces of Canada including its Federal Parliament, and in the United Kingdom, and some other Westminster systems of Parliaments, there are various types of codes of conduct for elected representatives.

It was inevitable, irrespective of the Greiner/Metherell Affair or a public demand for a code of conduct Members of Parliament eventually would have to adopt a code of ethical behaviour.

I have annexed to this paper the Legislative Assembly's Issues Paper which was distributed widely and also the Code of Conduct which is waiting adoption in the House in April.

The Code has a Preamble to set out the principles and general aspirations for the representative. The ten clauses set out the "does" and "dont's" as well as the obligations of the elected representatives.

The Members of the Legislative Assembly, as elected representatives, acknowledge their responsibility:

- to maintain the public trust placed in them
- to work diligently and with integrity
- to use the influence gained as elected office-holders to advance the common good of the people of New South Wales
- to respect the law and the institution of Parliament
- and to foster an understanding of parliamentary decision making which involves balancing the interest of constituents, the electorate and the State of New South Wales.

The Preamble to the Code of Conduct is an introductory statement which places the Code in context. It contains the most aspirational standards and serves as a model of best practice for elected representatives. It is hoped that these aspirational aims will inspire Members to acknowledge their position within our system of government and their civic responsibilities to increase public understanding of a Member's fundamental role and their inter-relationship, through the Parliament, with the various levels and elements of government.

A view has been expressed that in addition to visionary elements such as honesty and integrity, there should also be greater emphasis on transparency of decision-making. Inter alia, this proposal is put forward to address the public perception that politicians make decisions about matters on the basis of short term political expediency. An emphasis on fostering transparency of decision making in the preamble would lift the veil of secrecy of the decision making process and give credit to the decision making process. This would encourage sound long-term strategic planning and it would improve the public perception of politicians.

In addition, the Preamble should also include an acknowledgement of a local Member's responsibility to represent constituent views and to facilitate their participation in democratic decision making. He considers that the concept of a representative democracy where the parliamentarians are voted in with no need to consult further with their constituents is old-fashioned and inappropriate. The three pillars of democracy - decentralisation of power, openness, and accountability - should be reflected in the preamble. The concept of a participatory democracy, should be enshrined in the code, to encourage parliamentarians to directly represent constituents' views, and balance the interests of all constituents.

The Code of Conduct is now tabled in the House and will come up for debate in the very near future.

The Code has 10 parts which sets out the obligations and responsibilities for Members of Parliament:

The Code

1. Members must act honestly, strive to maintain the public trust placed in them, and exercise the influence gained from their public office to advance the public interest.

This provision acknowledges that there has been a level of disquiet in the community about certain activities of elected representatives, occurring in a climate of increased recognition of ethical standards and the introduction of codes in the professions and broader public sector. Opinion polls reveal rising cynicism in the community about politicians' motives, and reveal the low esteem in which MPs are held. The Code should be seen as a first step in reconstituting trust between the electorate and the elected representative.

The general aspirational exhortation to "act honestly" is a fundamental moral obligation and a common element in both professional codes and in elected representatives' codes in other jurisdictions.

This clause also acknowledges that the special position of elected representatives to public office warrant higher standards of behaviour.

2. Members must conduct themselves in accordance with the provisions and spirit of the Code of Conduct and ensure that their conduct does not bring the integrity of their office or the Parliament into serious disrepute.

The emphasis on the "spirit of the Code" reflects its aspirational nature. The Code is not intended to be another black-letter law to be legally interpreted, or open to loop-holes. The ten provisions are broadly stated in order to cover standards that may change and evolve over the years, and not require revision every year to adjust to particular circumstances.

The Code is not meant to supplant other existing laws, such as the regulation requiring financial disclosure, or provisions of the Crimes Act. It works in conjunction with these requirements and law.

The prohibition against conduct bringing the integrity of a Member's office or the Parliament into serious disrepute is a direct incorporation of s9(4) of the *Independent Commission Against Corruption Act 1988*, which provision was unanimously supported by the Parliament when enacted.

The Committee is of the view that the reference to "serious disrepute" reflects the intention that the Code is not intended to cover trivia. Neither should the Code become a tool for vexatious or trivial political point-scoring or complaints. But if you do bring the Parliament into serious disrepute, it is a substantial brach of the Code of Conduct.

3. Members are individually responsible for preventing conflicts of interest and must endeavour to arrange their private financial affairs to prevent such conflicts of interest arising.

Clauses 3 and 4 are the heart of the Code and stipulate that members must not hold personal financial interests in conflict with the public interest.

The emphasis in this aspirational provision is on Members' individual responsibility to reflect on their personal circumstances and the issue of conflict of interest. The prevention of conflicts of interest is not a matter for the Speaker, The Clerk, the Whip, the party leader nor the parties. The reference to "private financial affairs" also recognises that there are some matters that will remain in the domain of a member and that do not have to be made public unless there is a cause for complaint. The Committee considered a broader application, but ultimately recommended a less general provision that is in conformity with the existing understanding of "conflict of interest" Standing Orders and laws already applying to members.

The Committee also debated imposing a time-frame for rectifying conflicts, for example the elapse of six months during which time members would have to bring their financial affairs to order. However, the range of foreseeable contingencies resulted in a wide range of opinion within the Committee as to what would constitute a reasonable time, and therefore no time-frame has been imposed. "Reasonable time" reflects the seriousness of the conflict. If a matter was before the House for debate and there was a conflict with the members, then six months would allow him to vote. Whereas reasonable time may mean he should not vote.

The Committee will have an educative role to assist Members to understand their responsibilities under this provision.

4. Members whose private financial interests give rise to a conflict with the public interest must take all reasonable steps to resolve that conflict.

This clause builds on clause 3 and requires members becoming aware of a conflict of interest to take reasonable action to resolve the conflict. The clause is restricted to financial interests as if that qualification was absent and applied to any "interest" of a Member, it would place members in a conflict of interest in relation to an extremely wide range of matters and could constitute an active deterrent to action which might otherwise be considered appropriate in representing constituents' interests.

The term "reasonable steps" maybe too vague and discretionary. Financial conflict is a serious breach of the Code and firm measures to eliminate it must be taken - a time limit would ensure the conflict did not continue for an unacceptable time after it was discovered. However, if time is of the essence to resolve its conflict, six months is too long. "Reasonable steps" is not an unknown term.

5. (1) A conflict of interest exists where a member participates in or makes a decision in the execution of his or her office knowing that it will improperly and dishonestly further his or her private financial interest or another person's private financial interest directly or indirectly.

(2) A conflict of interest does not exist where the member or other person benefits only as a member of the general public, or a broad class of persons.

This definition clearly defines what constitutes a conflict of interest for the purpose of the Code. Official activities or decisions made by members that improperly result in financial benefits for the member or any other person, including family or associates, are prohibited. The clause , which clearly covers spouses interests, applies where members have a knowledge of the financial

benefit arising as a consequence of their decision or action. The Committee considers that it would be impractical for a member to be liable to a breach of the Code in circumstance where they have no knowledge of the result of their decision. To do otherwise would be too onerous a burden and could have unintended consequences.

This clause inter-links with existing regulations and reflects the intent that members should fulfill regulatory requirements in a spirit of compliance with both the Code and the pecuniary interest regulations. The second part of the clause incorporates the existing Standing Order that clarifies that an interest held by a member "in common" with a general class of citizens, eg lawyers, or wheat farmers, is not prohibited.

6. (1) If members directly or indirectly hold an interest which conflicts with their public duty, or which could improperly influence their conduct when discharging their responsibilities, they shall disclose that interest before speaking in a debate or voting on the matter in parliament or in a parliamentary committee.

(2) A member is not prevented from speaking in a debate or voting on a motion when they personally are the subject of the debate or motion.

Failure to disclose a direct pecuniary interest has long been a grounds for disallowing a member's right to vote on a motion or bill. Transparency of decision making is a check and balance and aid to accountability, in that the public has a right to know whether there is any circumstance that may improperly influence a member's vote. The Committee thought it sufficient for a member to declare an interest, and believes that the public interest would not be served by preventing a member with an interest (but not a pecuniary interest) in a matter from speaking or voting on a matter.

This clause reflects existing Standing Orders 186 and 187 which state: "A member cannot vote on any question in which the member has a direct pecuniary interest not held in common with other citizens of the State. A member's vote may be disallowed, by way of substantive motion moved without notice after the division is complete, on the grounds of a pecuniary interest." The clause goes further in that it requires members to disclose any interest which could improperly influence their conduct when discharging their responsibilities.

The second part of the clause is included to confirm that members are not prevented by the existence of this clause, from speaking in their own defence if personally subject of a motion in the House (eg. privilege, censure, or commendation).

7. Members may not solicit, accept or receive any remuneration, benefit or profit in exchange for promoting or voting on a bill, a resolution or any question put to parliament or a parliamentary committee.

This provision is a restatement of the principle embodied in clause 5, and directly prohibits receipt of compensation for services rendered as a Member, such as the "cash for questions" relationships between members of the House of Commons in the UK and lobbying or business organisations.

8. (1) Members must not accept a gift that may pose a conflict of interest or which might interfere with the honest and impartial exercise of their official duties.

(2) Members must declare all gifts and benefits arising from or in connection with their official duties in accordance with the requirements of the pecuniary interest register.

(3) Members may accept incidental gifts and customary hospitality.

This provision is underpinned by the Constitution (Disclosures by Members) Regulation 1983 which requires all members to annually declare interests held in real property, sources of income, gifts over $500, contributions to travel, interests or positions in corporations, positions in trade unions, professional or business associations, debts and certain dispositions of property, which declarations are published in a Pecuniary Interest Register. (See Chapter 4 for a full description).

Clause 8(1) is an extra responsibility over and above the regulatory requirements, and imposes an obligation on members to comply with the spirit of the Code.

In debate on this clause within the Committee, one Committee member argued that Clause 8(3) should be less vague, and proposed the following wording:

(3) A Member must not accept gifts, benefits or favours that are connected directly or indirectly with the carrying out of the duties of a Member except when they are of token value or consist of hospitality of a conventional nature".

The member considers that this addition to the clause sends a clear message that no gift other than one of incidental value, should be accepted. Offering of gifts to politicians, like political donations, is clearly motivated by the desire to influence decisions. Even on the rare occasion where it may not be perceived so by those involved, it is clearly perceived so by the public. On this basis, the acceptance of other than incidental gifts should be strongly discouraged.

Nevertheless, a gift of a bottle of scotch, a watch or a donation etc. maybe made, but unless it was given to the member for voting on an issue which ? He would not have voted, there is no problem. If a member can be bought for a small gift, he would eventually be exposed. Gifts have to relate to the successful result of encouraging the member to disregard his impartial and honest exercise of his judgement.

Notice of this amendment has been given in the House.

9. Members must apply public resources for proper purposes, and not for private financial benefit.

This type of provision is common to many codes of conduct and is aimed at preventing gross breaches of existing administrative guidelines and entitlements. The Committee expressed this clause in general terms as it is to be read in conjunction with existing administrative and Remuneration Tribunal guidelines applying to members. For example, a member cannot ? His business from his electoral office.

10. Members must not use official information which is not in the public domain, or information obtained in confidence in the course of their parliamentary duties, for personal gain or the personal gain of others.

This clause expands the principle previously stated in clauses 5 and 7, but is specifically directed at use of information obtained officially or in the course of parliamentary duties. It will also encourage members to be responsible and discreet in dealings with constituents.

The Code is not exhaustive, but it is a beginning and can be added to and amended easily as situations occur.

The legislation establishing the Committee set out a mandatory consultative process. The final draft of the Code as outlined above, was developed by the committee following public circulation of a preliminary draft Code. The preliminary Code was drafted by the Committee following its study of codes from other jurisdictions, review of the evidence heard at hearings and consideration of submissions received in response to advertisements.

As I have said, the preliminary draft Code was tabled and it was publicly released on 27 June 1996, and a deadline for comment set for 23 August 1996. Copies of the draft Code were distributed to public libraries, universities and other educational institutions, and many copies were sent directly to interested members of the community on request. The draft was released with a discussion paper detailing the legislative history of the code and providing contextual information.

The committee received a variety of responses to its draft code, ranging from serious analysis to spurious attacks on the political process generally. All submissions were considered by the committee, but only ten submissions were judged to be within the Committee's terms of reference and are published in the second volume of this report.

Five common themes emerged from the submissions.

1. The definition of interest is broader than "financial" and should be expanded to cover the families and associates of Members.
2. Abuse of parliamentary privilege is not addressed in the Code.
3. Reference to "perceptions" of conflict should be avoided.
4. An accompanying document to the code should be prepared to incorporate additional detailed information on sanctions, mechanisms, procedures, historical examples for new members and information for the public.
5. Education of members and the public is essential and should be adequately funded.

The majority of the submissions suggested variations and changes to the wording of existing clauses of the code. Only the ICAC submission suggested an entirely new clause, related to the exchange of a seat in return for reward. During the period of public comment on the draft code, there was considerable media coverage and public discussion on the Code, and related issues such as application of the Anti-Discrimination Act to members of Parliament. The matters discussed below were the subject of detailed examination by committee members and although not explicitly incorporated in the Code, had a bearing on the final draft presented to the House.

The second theme woven through our deliberations is the issue of sanctions and how the code is to be enforced.

Again, three models exist:

(1) A Committee of the Parliament
(2) The Speaker could administer the code, or
(3) It is administered by an outside and independent person - Ethics Commissioner.

Many sound arguments exist for all models. The Legislative Council Ethics and Privileges Committee has opted to recommend the use of an outside person or body, on the basis that an independent arbiter may better judge ethical behaviour. It is argued by others that the establishment of an Ethics Commissioner will create a new authority above the parliament, a move seen as being in conflict with our system of Parliamentary democracy. Journalists, Lawyers, Doctors in large degree govern themselves in their ethical endeavours so why not the Parliament that makes laws for the peace, welfare and good government for the people of New South Wales? If the Legislative Assembly cannot govern itself effectively, then the criticism is that it cannot govern the people. The general consensus amongst witnesses before the Committee was that the Legislative Assembly should at least have the opportunity to govern itself in the short term. If it fails and the whole ethical process becomes politicised, then maybe an independent person can be engaged as an arbitrator and determiner of the allegation.

Whether or not a commissioner or a Parliamentary Committee is given charge of the code of conduct is less important than the fact that a code of conduct ***will apply to Parliamentarians***. It is a process which will evolve as experience is gathered, the code fine-tuned, and as our parliamentarians become aware of the expectations of their constituents.

No code can be effective without some type of sanctions being applied against the wrong-doer.

It is my view that the Committee does not have the power to apply sanctions against a Member. Nevertheless, it can recommend to the Parliament when it reports on a complaint that some sanctions should apply.

The only sanctions that can apply against a Member are as follows:

1. Expulsion from the House and a declaration of his seat being vacant.
2. Suspension from the services of the House for a given period of time.
3. Censure against a Member for admonishment.

We have begun a process which must be supported by vigorous education programs for new and existing parliamentarians. We have planted a seed which I hope will grow with experience and practice. Internal education will over time eradicate the unfounded fear that a code of conduct is a necessary fetter to the freedom and privileges of a politician. Hopefully it will be seen as a support, a platform, from which to undertake the duties of public office.

In conclusion, it is hoped that this Code of Conduct is a living document embraced by those who make laws that regulate the public's behaviour. It is a requirement of the *Independent Commission Against Corruption Act* that at least every two years the code is examined and

amendments made accordingly. This will be done, the document is alive and well.

It is the beginning.

BACKGROUND INFORMATION

THE GREINER METHERELL AFFAIR

On 10 April 1992, Dr Terry Metherell resigned as the Member for Davidson in the Legislative Assembly and was appointed to a public service position from which he subsequently resigned. Two weeks later, both Houses of Parliament referred the matter to the Independent Commission Against Corruption for investigation.

For the ICAC to be able to deem conduct corrupt, it must fall within section 8 *and* section 9 of the ICAC Act.

The relevant parts of section 8 of the Act say for conduct to be considered corrupt it must:

(a) adversely affect the honest of impartial exercise of official functions by a public official;
(b) involve the dishonest or partial exercise of any of his or her official functions;
(c) involve the misuse of information or material that he or she acquires in the course of official duties.

Prior to the amending Act of 1994, section 9 provided that for conduct to be considered corrupt it must *also* be found that it could constitute or involve:

(a) a criminal offence
(b) a disciplinary offence; or
(c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.

The ICAC found in its report that the conduct of the then Premier Mr Greiner and the then Environment Minister Mr Moore constituted corrupt conduct in terms of the ICAC Act because their conduct involved the partial exercise of official functions, a breach of public trust, and could involve reasonable grounds for their dismissal as Ministers.

When the ICAC reported its findings, Mr Greiner and Mr Moore took their case on appeal to the Supreme Court of Appeal.

A majority of Judges of the Court of Appeal found that the conduct of Mr Greiner and Mr Metherell fell within section 8 of Act.

A majority of Judges, however, decided that the ICAC's finding that the conduct constituted reasonable grounds for dismissal as a Minister was subjective because legally recognisable standards as to what constitutes reasonable grounds for dismissal did not exist. What was needed was a code which spelt out the types of behaviour that would be grounds for a Minister's or Member of Parliament's dismissal.

The ICAC Act was then amended in 1994, in a bid to ensure that Members of Parliament were drawn into the ICAC's jurisdiction.

The amendment added a subclause to Section 9 thus:

> (d) in the case of a Minister of the Crown or a Member of a House of Parliament - a substantial breach of an applicable code of conduct.

The amendment also added a new section, **Section 7A - Parliamentary Ethical Standards**, which led to the creation of the Ethics Committees by both Houses of Parliament. The Act charged the Committees with, among other things, drafting a code of conduct for the consideration of their respective Houses, giving advice to members on ethical matters and conducting educative work.

The Legislative Assembly Committee has three appointed Community members in addition to the eight Members of the Legislative Assembly. The Legislative Council Ethics and Privileges Committee has no community members.

The Parliamentary Joint Committee on the Independent Commission Against Corruption tabled a Discussion Paper in April 1994, on Pecuniary Interest Provisions for Members of Parliament and Senior Executives and a Code of Ethics for Members of Parliament.

That Committee's terms of reference were to examine the need for and suggested content of a code of ethics for Parliamentarians. The Discussion Paper examined the legal responsibilities of a Member of Parliament, the requirements of the New South Wales Pecuniary Register, and identified a number of difficulties that would arise in the task of formulating a Code of Ethics. The current pecuniary disclosure regulations and form are included in the Discussion Paper as an appendix. Copies of this report are available from the Committee Secretariat.

The Legislative Assembly Standing Ethics Committee met for the first time on 30

May 1995, when the House was reconstituted following the election. As required by the Act, three Community representatives, Mr Kim Wilson, Mrs Leonie Tye and Councillor Stan Hedges were appointed in August, following state wide advertisement, to assist the Committee in drafting the Code.

A delegation of two members of the Committee, accompanied by the Committee Clerk, undertook a study tour in July 1995, to speak to legislators and officials in the US, Canada, England and Ireland about ethical codes and regulations in those jurisdictions. Discussions were held on the operation and activities of Ethics Committees and Commissioners, conflict of interest provisions, counselling and advice. The delegation examined the development and refining of legislation in Ottawa and Ontario and met with Lord Nolan, Chairman of the UK House of Commons Select Committee on Standards in Public Life and discussed the outcome of that Committee's recommendations on principles and ethics for Members of Parliament. A report of major findings of the study tour was tabled in the Parliament during the 1995 Budget session.

An advertisement calling for submissions was placed in the press and preliminary hearings commenced in October 1995.

Examples of the types of areas or activities which are covered by codes of conduct in other jurisdictions are:

- disclosure of interests
- proper exercise of influence
- gifts, benefits and hospitality
- relationships with lobbyists
- use of official information for personal gain or otherwise
- diligence and economy in use of public property and services
- integrity
- responsible exercise of rights and privileges of an MP
- use of campaign funds
- engagement of Ministers or Members in other paid employment, or as company directors
- dealing with or lobbying by former Members and Ministers (post-employment restrictions)
- prohibitions on receipt of compensation for services rendered as a Member

APPENDIX 3

Political oversighting of anti-corruption bodies in NSW

Speech

Independent Commission Against Corruption

Speech delivered by
Mr Peter Richard Nagle MP
Chairman of the Committee on the Independent Commission Against Corruption
To Senior Executives of the World Bank, New York on 16 February 1997
Political Oversight of Anti-Corruption Bodies in Australia

New South Wales is the Premier State and like all states with extensive business and commercial activities, it has corruption.

However, corruption is not endemic or systemic to our Australian culture. It is not the necessary way that a politician or bureaucrat promotes themselves through the political system. However, when people are dealing with great sums of money, exercising political power and/or are in positions of power, there could be a tendency by some to be corrupt. "It seems to go with the territory", to quote that famous line from Arthur Miller's "Death of a Salesman".

In 1988, the ruling elite were shattered when the Australian Labor Party (equivalent to Democratic Party) who had been in government for just on 12 years lost its position of power to the Liberal/National Party (the conservative force).

The then leader and Premier was a man named Nicholas Greiner. The Premier is equivalent to being the Governor of a US state except that the Premier is actually a Member of the Parliament, and is elected on a geographical basis. As a Member of the Legislative Assembly[1] in New South Wales, the Premier performs both legislative and executive functions.

I was elected in 1988, to the Legislative Assembly and into opposition for seven years.

The policy of the then Conservative Opposition Party the Liberal/National Party was to attack the Australian Labor Party as being corrupt.

One might say the ALP just had a few hiccups like the Minister for Prisons going to his own prison for taking bribes to release prisoners on early release programs.

Another Minister alleged to have taken bribes, misuse of Ministerial equipment, credit cards and an assortment of allegation against the government. There were allegations of police corruption

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[1]The Lower House (Legislative Assembly) is elected on a geographical basis and the Upper is elected on a statewide franchise. The Lower House is optional preferential voting. This Upper House is proportional representation. Both Houses have the same powers, except the Upper House cannot create the budget nor the Government. The Government must always come from the Lower House and whoever has 50% + 1 of the Lower House seats is the Government. The Government must have the majority to control the purse strings of the state.

at all levels which was later to be proved to be correct. There was substance to the allegations that were made.

But a lot of it was the perception of corruption in politics is reinforced by the "good" media.

But as consequence of the reality and/or the perception of corruption in the state the Liberal/National Party did fulfil its election promise and created an anti-corruption body called the "Independent Commission Against Corruption".

This Commission has very wide and draconian powers to weed out corruption. Its mission statement is to wipe out and to prevent corruption in government.

Now some say, and I am one of them, that those powers are too wide to fulfil the brief given to the ICAC from the people of New South Wales through their elected body the Parliament.

One example; the ICAC has Public Inquiry powers, which are very simply, that can conduct a public hearing into allegations of corruption.

There is a Commissioner or deputy Commissioner sitting high on a dias, who has the same powers of a judge. There are other men and women at the bar table. The other Counsel Assisting is usually a Senior Counsel. The others are Barristers and Solicitors who may be representing people substantially affected by the Inquiry. Barristers are litigation lawyers used in the adverserial system of our Court System and most of the Solicitors are either instructing a Barrister or have some litigation experience.

A person can be placed into the witness box and they swear on oath or affirmation that you they tell the truth. They are questioned and surprise, surprise, the allegations are corruption or improper conduct. There is a very broad interpretation of the word "corrupt".

If you are wise you take a Lawyer with you because anyone who receives a telephone call or summons from the ICAC for a little chat should always take a Lawyer.

If one goes to the ICAC for a chat, by the time the chat is finished, one may require a lawyer for longer than one first thought. Nevertheless, that power of compulsion does exist and it is draconian.

These powers, were created, as I said, arising out of the reality and or the perception of corruption in politics in New South Wales from about 1980 to 1985.

The legislation was passed, endorsed by the Liberal/National Party and strongly supported by the Australian Labor Party. For the record, the most famous head the ICAC has ever collected fairly or unfairly was its creator the former Liberal Premier, Nick Greiner. He steered the ICAC legislation through the Parliament and he made all the relevant important speeches. However, this former Premier was found by the ICAC to have acted corruptably and subsequently forced to resign as Premier and shortly he retired from the Parliament.

The ICAC is a very powerful body in the fight against corruption and its brief is set out in the Act. It's function is to expose and minimise corruption in the public sector through investigation, corruption prevention and education. A combination of these methods showed ensure a long term reduction in corruption.

Corrupt conduct is broadly defined in the ICAC Act, as the misuse of public office which commonly involves the dishonest or biased use of power or position resulting in one person being advantaged over another. Section 8 says that "any conduct that can be conducive to corruption is a corrupt act". You do not have to actually take a bribe, it is that certain things that you do can be maybe perceived as conduct which is conducive to create corruption, thus a breach of the ICAC Act.

When one is found to have committed an act of corruption there are very terrible sanctions that go with such a finding. The Act does not provide for sanctions, nor can it prosecute, but after the media and/or ICAC legal Counsel get through with the guilty or innocent victim of the ICAC then there is nothing left. Some people who have been found to have been involved in corrupt conduct have committed suicide. If however, one is involved in substantial corrupt conduct, then

Therefore, the ICAC focuses on significant forms of corruption and not necessarily those people can involved in criminal conduct, it could be disciplinary offences or conduct serious enough to warrant dismissal.

Corruption takes many forms and section 9 talks about official misconduct, bribery, blackmail, fraud, theft, embezzlement, tax evasion, forgery, homicide violence etc. and a large number of other criminal offences. These are acts of corrupt conduct under the provisions of the ICAC Act.

Uncovering corruption is a vital part of the ICAC's work. The ICAC gathers information about suspected corrupt activities from public officials, the general public and from its own proactive work and the latter is a very important aspect because the ICAC takes all information and holds it on an in-exhaustive and life-long database of information.

They keep all the information on file so if they see a pattern developing, a profile being created, then they can take a closer look at the particular area.

They create profiles of people, organisation and government bodies which have been or has the potential to be corrupt. On these profiles, there analysis can work on a percentage basis of the likelihood of who could be or who might become corrupt.

It probably has information from people given to it during state elections about me as an MP. They value information on all sides of politics.

The ICAC is very effective in swifting out the nonsense from the reality and therefore they do not take much notice to vindictive or malicious types of allegations.

To this date, I hope that there has been no profile on me. So I am safe or am I?

The ICAC says it needs to keep this type of information and they strenuously defend their right to hold it. I agree that they should hold such information. To their credit, very little, if any information has leaked out to the media from the ICAC to cause damage to people's reputation. However, of late information has leaked to media about a so-called "Travel Rort Affair" by some MPs some of that information, in my view could only have come from the ICAC.

There are heavy penalties for an officer of the ICAC to leak information about another person. Later I will return to the Queensland model which is called the Criminal Justice Commission (CJC) and as allegations go, it seems to leak like (and I will use the old Australian idiom) a "sieve" like a broken sewerage system. It leaks so badly that it has created enormous controversy in Queensland. Yet, who ??? leaks and for what reason.

But I again repeat, to the ICAC's credit it is really in control in the arena of avoiding the dropping of a file or note onto the desk of a journalist. If however, I ever learnt that it gave information to journalists like J Edgar Hoover which the FBI used to do, then I would use all my strength, ability and knowledge through the rest of my life to expose it.

The types of investigations carried out by ICAC vary but they always relate to public corruption.

The ICAC has the power to hold its inquiries in-camera and the reason is the sensitive nature or secrecy that is needed during the inquiry. I think it goes without saying that if a sensitive matter was leaked, it could destroy people's reputation and even a government.

In Australia, there are various Aboriginal (Indigenous) Land Council's like your Indian ??? which help our indigenous brothers and sisters in education, employment and training etc. The indigenous people run the Council's and elect their own officials. Unfortunately, in some of these councils there has been nepotism, corruption, bribery and theft. The ICAC is presently conducting an investigation into this problem and it is doing some of it in-camera (closed session). Whereas most inquiries are in public, the ICAC has been sensitive to protecting the Aboriginal community from racism over its inquiry. It has been successful and the criteria for this work - "good".

Investigations
Investigation involve exposing and deterring corrupt behaviour by investigating complaints, conducting hearings (public and private) and reporting on corruption to Parliament, which the ICAC does regularly.

Corruption Prevention
Prevention is better than cure and the Corruption Prevention Unit does an enormous amount of education and training programs about the evils of corruption. They are conducted in primary and secondary schools and as part of the curriculum at universities. They even do it for unemployed people and youth. They go to Rotary, Lions and Apex Clubs and speak at international conferences. That Unit in my view, is the great success story of the ICAC.

The Unit has built structures and systems within Government Departments to try to avoid corruption and bribery. As it say here and I quote "... a well informed community is an important element in the fight against corruption. Community education projects are designed to inform the public about the impact of corruption and to motivate individuals to act against it".

The Checks and Balances

When Parliament creates a body like the Independent Commission Against Corruption, with extraordinary and draconian powers, the one thing that you have to have are checks and balances on the ICAC power. There has to be some way to ensure men and women who exercise there enormous powers do so fairly and honestly and do not abuse them. The method used to check their temptation is done in three ways, the Operational Review Committee, the Joint Parliamentary Committee and thirdly the Director of Public Prosecutions.

The Joint Parliamentary Committee on the ICAC

The Parliamentary Committee of which I am at present, the Chairman is a Joint Committee of 11 Members from both the Legislative Council and the Legislative Assembly of New South Wales. This ensures accountability in the political process on the role and functions, but not the operational side of the ICAC.

Our joint Committee's functions have been set out in section 64:

(a) to monitor and to review the exercise by the Commission of its functions.

But it does not mean operational functions. Although there is an argument that looking at the ICAC function means looking at some operational matters. However, the priority of its Committee view is not to interfere in operational matters. The ICAC have always said "no you cannot". It would be difficult in my view for politicians to be involved in the operational side. There is one marked disadvantage to the Committee looking at the operational side of the ICAC is that the politicians will know that one of their own or the government is being investigated they would have to firstly deal with the corrupt issue. We politicians should monitor and review the exercise of the Commission's powers, such as the way they use their public inquiry powers, interpret the Act and there functions, and the effectiveness of Corruption Prevention Unit but that is all.

(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.

And that is why we are overseas at the present moment. We have been to London, Berlin, New York and now in Washington. The Committee has resolved unanimously to do a review of the ICAC Act and its functions.

That review will reflect the ten years of the ICAC Act (1988) because the ICAC did not come into operation until 1989. We will examine how well it has performed, what it has done, is it worth the 12 million per annum the taxpayers are paying. Some opponents have argued that the

ICAC has achieved very little to combat corruption and the $100 million over the last ten years could have been used to equip a hospital in a working class area, more police and better public transport.

One of our Committee members describes it as one and a half hospitals over the last ten years that could have been It is our intention to ask people to give evidence in-camera and/or publicly about their views of the ICAC and its future.

Now of course, you can be certain that there will those who do not like the ICAC and who will be only too happy to come and tell us their view. Some of these people have been waiting a long time to find someone to tell it all to. However, the Committee will hear from those people who really have something constructive to contribute.

(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.

To this point, the Committee has not implemented that power, simply because the reports are tabled in Parliament. I believe most Committee members have formed the view that the matters can be debated in the House. If the ICAC are inquiring into electoral funding of the Labor Party, which is my party, equivalent to the Democrat Party in the USA and the report is tabled by the Commissioner of the inquiry, then Parliament can debate it in the House. Nevertheless, the Committee still has the power to look at an ICAC report and any member who wishes

to do so can ask for such an examination and I believe it will never be rejected.

In examining reports of the ICAC as to supporting or opposing them or the recommendations, is that the Committee has not been privy to the investigation, operation or hearings and the conclusions drawn from the evidence. This makes it near to impossible for one to decide one way or the other on the conclusions.

(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.

This is a very wide ambit for review and we may make recommendations to the Parliament in relation to the future of any function and role of the ICAC.

(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.

At this point in time, that power has not been implemented as neither House has rarely asked the Committee to look into any matter. The provision that keeps the Committee looking at only the role and function is s.64 of the Act:

Nothing in this part authorises the joint Committee:

(a) to investigate a matter relating to particular conduct; or

(b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint; or

(c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint..

In other words, do not stick your nose in operational matters.

However, if the Committee is supposed to be the check and balance of the abuse as Commissioner O'Keefe the head of the ICAC often states. However, if we cannot look at operational matters, how do we resolve the dilemma? If knowing that the ICAC is doing the job and not selecting cases to investigate for its own reason? This is resolved by the Operational Review Committee which compromises of 7 prominent citizens of the state, the Police Commissioner, the ICAC Commissioner and a representative of the Attorney General. It is their job, in secret, to ensure that the ICAC officers, investigators, lawyers, accountants, auditors and all staff do not abuse the powers given by Parliament and that they act as has been directed in the Act. To date, they have performed reasonably well in controlling any abuse of power, however there is a body of thought that the Operations Review Committee is too close to the ICAC. In my opinion, the ORC is sufficiently funded to carry out its functions effectively.

The Operational Review Committee meets secretly in a sense, in that no information is conveyed outside the Operation Review Committee. All information is kept within the Operations Review Committee and it examines reports, and looks at how investigations are proceeding. Particularly those investigations which I would suspect are very serious and complexed and indeed allegations of corruption involving politicians, Local Councils or Councillors.

The Parliamentary Committee and ORC work together to kerb any attempt of its power.

The last of the three Accountability mechanisms and probably the less direct body is the Director of Public Prosecutions.

The ICAC has conducted a number of public inquiries and has gathered a lot of evidence and has sent some evidence to the Director of Public Prosecutions. The Director's office examine the evidence and if they do not find that in all the circumstances the evidence is sufficient to get a conviction, then they do not proceed.

The final group that may indirectly hold the ICAC accountable is the media. But the media usually attacks the accused person attending the Independent Commission Against Corruption for a public hearing. It rarely is critical for the Independent Commission Against Corruption, except occasionally the Commissioner when he journeys to the House for his six monthly meeting with the Committee.

Journey to the House

The Commissioner and has to come twice a year and appear before our Committee. He swears

on oath that he will tell the truth and we go on to question him. The media attend our public hearings and we do carry out our obligations to question and they report the events that happened on television or the next day in the press.

We as Members of Parliament, are performing and fulfilling our role and function. Our Committee has conducted inquiries into witness protection, televising public hearings.

This is basically what the Committee does. The functions of the ICAC is to investigate any allegation or complaint of corruption; and section 13 sets out the functions of the ICAC. It is section 14 which is interesting because it deals with other functions of the Commission; ie. to assemble evidence that may be admissible in the prosecution of a person for a criminal offense against the law of the state in connection with corrupt conduct.
Secret investigations, internal investigations, public inquiries, inquiries in-camera all form part of:

(a) to assemble the evidence for a prosecution and;

(b) to furnish other evidence obtained in the course of its investigation refer it to the Attorney General

I believe that people have a right to know and that is why the ICAC has public inquiries. Also, I believe that organisations like the ICAC who have exceptional powers needed also to be kept under close scrutiny and made accountable.

The Queensland experience
In Queensland our Northern state it was not a perception, but a reality of corruption. Queensland was infamous for corruption on both sides of politics. One Conservative party dominated the electorate for 26 years and so remained in power.

The Gold Coast of Queensland was the mecca of holiday enjoyment, a little like Miami is to tourism in the USA. The Premier of Queensland announced that there was absolutely no prostitution existing in Queensland and "I am going to prove it because we are going to have an inquiry and I am going to appoint someone to carry out this inquiry into prostitution". So he appointed a QC advocate Mr Fitzgerald - big mistake. Mr Fitzgerald is as straight as a dye, honest as the day is long. He decided to have a real look. Arising out of the inquiry he uncovered police and political corruption, and as a result the Police Commissioner, the Deputy Police Commissioner and among other people, MPs went to jail.

The Premier was charged with perjury but he was too smart for the trial and the jury 11 to 1 wanted to convict him. One man was holding out and he ultimately, turned everyone around and acquitted. Revelations like the Fitzgerald inquiry made a

recommendation to create the Criminal Justice Commission with public inquiry powers.

However, they can only be used in public inquiry powers for special circumstances unlike the ICAC which can use their power anytime. Unlike the joint Parliamentary Committee in New South Wales, the joint Parliamentary Committee in the Queensland Parliament can look at

operational matters and they can have reports made available to them on such matters.

The Committee is entitled to be informed of the basis of any investigations. The Committee was not to hinder or prevent investigations but could ask about them and they could have investigations reported to them on a confidential basis.

The Criminal Justice Commission has a larger budget than the ICAC, but it deals with not only corruption but crime generally, such as drugs, money laundering, serious crime, whereas the ICAC only investigates corruption within the state by the public sector only.

The CJC PC and CJC came not without conflict and controversy on 11 and 17 February 1993, when the Courier Mail reported and leaked confidential CJC intelligence report about an inquiry. As a result of that, the Parliamentary Committee investigated and reported on it and made some recommendations about tightening up on security with the CJC. To my knowledge, the ICAC has not alleged to have ever leaked material to the media.

A confidential document was given to the joint Parliamentary Committee on the CJC and it was allegedly leaked. The CJC joint Parliamentary Committee accused the CJC of leaking it. The CJC in turn accused the joint Parliamentary Committee of leaking it, then they had an inquiry into each other. But it gets worse.

It was a real fight between the then Chairman of the Parliamentary Committee, Mr Davies, who subsequently lost his seat in Parliament and the CJC.

During the by-election of a deal was made by the Conservative opposition and the police about the election. The CJC decided it would have an inquiry in the promises made to the police. Now the government has their own inquiry into the CJC into its callers inquiry into the government over the police. So things are very interesting up in Queensland, but New South Wales has not had that problem.

In Queensland and because of this operational power of the joint Parliamentary Committee being able to look at operational matters, the relationship between the Parliament and the CJC which was once reasonably good, is now tainted.

The Criminal Justice Commission reports every month to the Parliament on operations that have been concluded. Again, Operation Wilder dealt with a leak from the CJC or the joint Parliamentary Committee then there is what they call "Operation Melody", where they had a witness protection program and this particular witness, he did very well out of the witness protection program and he now lives the USA. The joint Parliamentary Committee on the CJC were concerned about how much money was paid to him and the type of cars he got and was he bribed. So there was a report by the Parliamentary Committee. Witness protection is an operational matter and the CJC joint Parliamentary Committee can investigate the alleged abuse of power of the CJC in regard to an operational matter. Whereas the New South Wales ICAC could not do that.

National Crime Authority

Last but not least oversighting of the National Crime Authority, a Federal body dealing with national corruption. The Federal joint Parliamentary Committee under section 55(1) have the same powers that ... the ICAC Parliamentary Committee. They cannot look into operational matters, but they do have one power we do not have. They can call for any document or any report from the National Crime Authority which gives them a little nitch into operational matters.

New South Wales looks at the role and functions, and we monitor those. Queensland looks at the functions, monitors the functions, and looks at operational matters. The National Crime Authority which is oversighted by the Federal Parliament House of Representatives and the Senate, looks at functions, monitors the functions and assess the performance of the National Crime Authority.

Recently the ... heard of the National Crime Authority refused to hand out documents to Parliament and the Chairman of that Committee rang the Director and said "I have in my hands a subpena that you are going to be given in 15 minutes and you are to be here in half an hour and answer questions as to why you are not handing these documents over". Half an hour later a very angry Director of the National Crime Authority turned up before the Parliamentary Committee and there pursued a public brawl between he and the Committee over handing these documents to the Parliamentary Committee.

Remembering, of course, that the ICAC is a creature of Parliament, likewise the CJC and the National Crime Authority. They would never come into existence and stay in existence except by the will of the people. At any point in time, oversighting of these Committees, Parliament can change the rules. Although in the Fitzgerald Inquiry, Fitzgerald argues very strongly against forming an ICAC type organisation in Queensland. The ICAC existed before the CJC came into existence. When I suggest to the ICAC about changing the rules to be a bit like the CJC or taking in serious fraud they say "no ... no ... no ....", we want to stay where we are. This is our power, we do not want to go anywhere else, so do not change it". I assume that if the Parliamentary Committee in the Queensland Parliament wish the change the CJC, they would fight the change.

Western Australia

They are the three major players in corruption, Queensland, New South Wales and the National Crime Authority. Of late, in Western Australia, because the Premier of Western Australia retired to the prisons for a short period of time for corruption. I said it was not endemic, but it is still a part of the culture of people who get too much power. Premier Burke went to prison twice I think. The former Liberal/National Premier went to prison and a couple of Ministers. I do not know whether David Parker was the Deputy Premier and of course my Party is out in government in Western Australia and take it from there, it is going to be out of power for some time.

In South Australia, they lost 4 billion dollars, the Labor government but they did not end up in jail. Victoria of course, is so clean sweet and holy that corruption is only in every state except Victoria. Therefore, the Victorians say there is no need to have any corruption body in Victoria, so says the Premier and so says the rest of the government. But scandal breaks and that is how

the ICAC, the CJC and the NCA came about, and in Western Australian they have adopted the model that you have here in regards to Independent Counsel. They do not have a standing Commission like we have. The way the Act says now in Western Australia if a serious allegation of corruption occurred, then the three Commissioners are advised. They then inform the Premier that they need to have an inquiry and they have the powers for the inquiry. The Premier allocates them money out of the treasury for the inquiry and the three Commissioners appoint an Independent Counsel who then appoints all his own Investigators. It is not as if it is there every day - you walk in at 9 o'clock and you leave 5, you only call in the anti-corruption forces when there is a real serious and complex corruption.

Australia has no Serious Fraud Office, as in New Zealand and it has no public inquiry powers but it can bring you in and put you under oath to swear in private. That is an information technique as opposed to public inquiry.