

PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE COUNCIL

STANDING COMMITTEE ON
PARLIAMENTARY PRIVILEGE AND ETHICS

REPORT

ON

INQUIRY INTO THE
CONDUCT OF THE
HONOURABLE
FRANCA ARENA MLC

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according to Resolution of the House

REPORT NO. 6

JUNE 1998

VOL. 1 OF 3

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Foreword by the Chair

The current inquiry arose from a speech given by the Hon Franca Arena MLC in the Legislative Council on 17 September 1997 during debate on the Final Report of the Royal Commission into the NSW Police Service. The speech suggested that certain prominent persons, including the Premier of NSW and the Royal Commissioner, had been involved in meetings or agreements concerning an alleged “cover-up” of names of high-profile paedophiles. The Legislative Council resolved to authorise the Governor to establish a Special Commission of Inquiry to investigate Mrs Arena’s claims and the basis on which she had made them. The Special Commission concluded that Mrs Arena had no evidence to support those claims.

On 12 November 1997, as an amendment to a motion for the expulsion of Mrs Arena, the Legislative Council resolved that the Standing Committee on Parliamentary Privilege and Ethics investigate and report on what sanctions should be enforced in relation to Mrs Arena’s conduct in this matter. The investigation of this matter raised issues of considerable complexity and sensitivity which required detailed and careful consideration by the Committee. The Committee’s task was further complicated by the fact that in some cases the evidence received could not be publicly released, given the potential impact on police investigations or damage to reputations of persons named.

During the inquiry the Committee was mindful of the importance and seriousness of the issues at stake, including the nature of parliamentary freedom of speech, the need to protect the dignity and standing of the House, the importance of protecting individual reputations from unnecessary damage, the possible consequences for the Member concerned and, ultimately, for all Members of the House. In light of these various concerns the Committee took care to ensure that measures were adopted which afforded Mrs Arena procedural fairness during the inquiry. Further, given the importance and complexity of the matters involved, the Committee engaged legal advisers to ensure that procedural fairness was observed. Because of the sensitive nature of many of the issues under consideration, the Committee conducted all hearings *in camera* and only authorised those sections of the evidence to be made public which it felt would not cause unnecessary damage to the reputations of individuals, compromise ongoing investigations or prejudice any matters currently before the courts.

I hope that the release of the Committee’s Report will clarify the relevant issues for both Members and the community and contribute to an informed debate on this matter. The Report discusses the factual background to the inquiry (Chapter 1); the conduct of the inquiry (Chapter 2); the significant features of Mrs Arena’s speech (Chapter 3); parliamentary freedom of speech and the range of sanctions available to the House in this case (Chapter 4); the Committee’s conclusions concerning Mrs Arena’s conduct (Chapter 5); and the Committee’s conclusions and recommendations concerning sanctions (Chapter 6).

I would like to thank all Members of the Committee for their contributions to what has been a particularly demanding inquiry involving many issues of a highly contentious and complex nature. I would also like to place on record my sincere appreciation and that of the Committee for the work undertaken by the Clerk to the Committee and Deputy Clerk of the Legislative Council, Ms Lynn Lovelock, the Senior Project Officer, Ms Velia Mignacca, and the Committee Officer, Mr Daniel Noll, who had a very demanding role especially meeting tight deadlines and editing transcripts of evidence. I also thank the acting Senior Project Officer, Ms Vicki Mullen, the Legislative Council Project Officer, Ms Roza Lozusic, and the Hansard staff for their assistance in this inquiry. Finally, on behalf of the Committee I wish to thank the legal advisers to the Committee, Mr Bernard Gross QC and Mr Joe Catanzariti.

**HON DR MEREDITH BURGMANN MLC
CHAIR
STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS**

Background to the Committee

The Committee was first established as the Standing Committee Upon Parliamentary Privilege by resolution of the Legislative Council on 9 November 1988. It was re-established under the 50th Parliament on 16 October 1991. On 24 May 1995 at the commencement of the 51st Parliament the Committee was reconstituted as the Standing Committee on Parliamentary Privilege and Ethics.

The Committee has two main roles:

- (1) to consider and report on any matters relating to parliamentary privilege which may be referred to it by the House or the President; and
- (2) to carry out certain functions relating to ethical standards for Members of the Legislative Council under Part 7A of the *Independent Commission Against Corruption Act 1988 (NSW)*.

Terms of Reference

The terms of reference for this inquiry are contained in the following resolution of the Legislative Council, passed on Wednesday 12 November 1997:

1. That the following matters be referred to the Standing Committee on Parliamentary Privilege and Ethics for inquiry and report:
 - (a) the statements made by Mrs Arena in the Legislative Council on 17 September 1997 concerning the alleged suppression of names of individuals allegedly being investigated by the Royal Commission into the NSW Police Service; and
 - (b) the Report and Confidential Supplement of the Special Commission of Inquiry conducted by the Honourable John Nader QC concerning the claims by Mrs Arena.
2. That the Committee investigate and report on what sanctions should be enforced in relation to Mrs Arena's conduct in this matter.
3. That the resolution of the House of 21 October 1997, ordering the Commissioner of Police to report to this House as soon as practicable his assessment of the documents tabled by Mrs Arena on 21 October 1997, be varied to provide that:
 - (a) in conjunction with the assessment of the tabled documents, the Commissioner of Police is to examine any documents which are relevant to the documents tabled by Mrs Arena contained within former Special Branch files in his custody;
 - (b) the Commissioner is to lodge the report of his assessment of all these documents with the Clerk of the House as soon as is practicable; and
 - (c) the Clerk is to refer the Commissioner's report to the Standing Committee on Parliamentary Privilege and Ethics for consideration as part of its inquiry into the conduct of Mrs Arena.
4. That, following the referral of the Commissioner's report to the Committee, and according to the resolution of the House of 21 October 1997, the Clerk of the House is authorised to permit members of the Standing Committee on Parliamentary Privilege and Ethics to inspect the documents tabled by Mrs Arena on 21 October 1997.
5. That leave be given to Members of the Legislative Council to appear and give evidence to the Committee in relation to the inquiry.

(Minutes No. 15, Wednesday 12 November 1997, Entry No. 16)

Committee Membership

The Hon Dr Meredith Burgmann, MLC Chair	Australian Labor Party
The Hon Jenny Gardiner, MLC	National Party
The Hon Charlie Lynn, MLC	Liberal Party
The Hon John Johnson, MLC	Australian Labor Party
The Hon Richard Jones, MLC	Independent
The Hon Anthony Kelly, MLC	Australian Labor Party
The Hon Andrew Manson, MLC	Australian Labor Party
Revd the Hon Fred Nile, MLC ¹	Christian Democratic Party
The Hon Peter Primrose, MLC ²	Australian Labour Party

SECRETARIAT

Ms Lynn Lovelock	Clerk to the Committee
Ms Velia Mignacca	Senior Project Officer
Mr Daniel Noll	Committee Officer

Legal advisers for this inquiry:

Mr Bernard Gross QC

Mr Joe Catanzariti, Clayton Utz, Solicitors

¹ From 25 November 1997 (Legislative Council Minutes of Proceedings No. 20, 25 November 1997)

² From 25 November 1997 (Legislative Council Minutes of Proceedings No. 20, 25 November 1997)

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS
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Findings and Recommendations

FINDINGS

1. Mrs Arena in her speech on 17 September 1997 made allegations which involved the following imputations:
 - (a) on or shortly after Thursday 21 March 1996 the Premier, Mr Carr, and the Leader of the Opposition, Mr Collins, met together;
 - (b) late on Sunday 24 March 1996 Mr Carr, "the General Secretary of the ALP", Mr Della Bosca, and "ALP President", Mr Sheahan, and "other important figures in the ALP" met together;
 - (c) each of the participants of the above alleged meetings (ie between Mr Carr and Mr Collins; and between Mr Carr, Mr Della Bosca, Sheahan and "other important figures in the ALP") shared the purpose that in his conduct of the Paedophile segment of the Royal Commission into the New South Wales Police Service, Justice Wood would ensure that prominent persons in high political, judicial and social positions in the community would be protected from being identified and named as a result of the Royal Commission's investigations and hearings;
 - (d) shortly after these alleged meetings, Mr Carr and Justice Wood met and agreed that Justice Wood would influence the conduct of investigations and hearings of the Royal Commission so as to ensure that "people in high places" (ie prominent persons in high political, judicial and social positions in the community, and thus "untouchables") who were accused by alleged victims of being paedophiles, would not be named;
 - (e) this suppression of their identities constituted a "massive cover-up" on Justice Wood's part, as was intended by all of the participants of each of the three alleged meetings;
 - (f) the purpose of the meetings and the intention of the participants of those meetings, other than Justice Wood, was to prevent electoral damage arising from disclosure of the identity of prominent persons in the community who were allegedly engaged in paedophile activities.
 - (g) the purpose of each of the persons participating in the three alleged meetings was that Justice Wood, contrary to the duties of his public office as Royal Commissioner, would corruptly favour and protect alleged paedophiles from investigation, detection and identification, merely because they occupied high political, judicial or social positions in the community.

2. These imputations involved, in substance, the allegation of an illegal conspiracy, notwithstanding that Mrs Arena did not expressly describe such alleged conduct as either “illegal” or as involving a “conspiracy”.
3. The Committee finds that Mrs Arena's allegations as to the above conduct:
 - (a) were untrue;
 - (b) were made without any reasonable foundation upon facts known to her or reasonably capable of being checked by her;
 - (c) were extremely hurtful and damaging to the reputations of each of the persons referred to as participants in the three alleged meetings.
4. The Committee finds that the conduct of Mrs Arena, in making the relevant allegations in her speech on 17 September 1997, was conduct which fell below the standard the House is entitled to expect of a Member, and brought the House into disrepute.

Recommendation No. 1

1. **That Mrs Arena be called on to withdraw the allegations made in her speech on 17 September 1997 which involved imputations against:**
 - (a) **the Premier, Mr Carr.**
 - (b) **the Leader of the Opposition, Mr Collins.**
 - (c) **the Royal Commissioner, Mr Justice Wood.**
 - (d) **the General Secretary of the Australian Labor Party, Mr Della Bosca.**
 - (e) **the President of the Australian Labor Party, Mr Sheahan,**

of a criminal conspiracy to ensure that people in high places would not be named in the paedophile segment of the Report of the Royal Commission into the Police Service, and make a written apology to the House.

2. **That in the event of the failure of Mrs Arena to withdraw the imputations and make a written apology to the House within a specified time, Mrs Arena be suspended from the service of the House until the submission of a formal apology.**

Recommendation No 2.

That the House consider a Resolution in the following terms:

1. That this House, having regard to the findings of the Standing Committee on Parliamentary Privileges and Ethics in relation to its inquiry into the conduct of the Honourable Franca Arena, MLC:

- (a) considers that the conduct of Mrs Arena in making certain allegations in her speech on 17 September 1997, fell below the standards which the House is entitled to expect from its Members and brought the House into disrepute.**
- (b) calls on Mrs Arena to make a written apology to the House within 5 sitting days after the passing of this Resolution, and withdraw in writing the imputations against:**
 - (i) the Premier, Mr Carr.**
 - (ii) the Leader of the Opposition, Mr Collins.**
 - (iii) the Royal Commissioner, Mr Justice Wood.**
 - (iv) the General Secretary of the Australian Labor Party, Mr Della Bosca.**
 - (v) the President of the Australian Labor Party, Mr Sheahan,**

of a criminal conspiracy to ensure that people in high places would not be named in the paedophile segment of the Report of the Royal Commission into the Police Service.

2. That, in the event of Mrs Arena not submitting an apology and withdrawing the imputations by the time required in paragraph 1 (b), Mrs Arena is suspended from the service of the House until the submission of a formal apology and withdrawal of the imputations referred to in paragraph 1(b) (i) to (v).

3. That the apology be in the following terms:

I hereby withdraw the allegations made in my speech to the House on 17 September 1997, which involved imputations against Mr Carr, Mr Collins, Mr Justice Wood, Mr Della Bosca and Mr Sheahan, of a criminal conspiracy to ensure that people in high places would not be named in the paedophile segment of the Report of the Royal Commission into the Police Service.

I also hereby apologise to the House and to those people for making those imputations.

4. That the apology and withdrawal be read by Mrs Arena in the House and be also published in the Minutes of Proceedings.

Chapter One

1. BACKGROUND TO THE INQUIRY

To place the current inquiry in context it is necessary to examine certain events surrounding Mrs Arena's speech in Parliament on 17 September 1997. A brief chronology of relevant events is set out in this section.

1.1 Establishment of Wood Royal Commission

1.1.1 By Letters Patent issued on 13 May 1994, the Hon Justice James Wood was required to inquire into the operations of the New South Wales Police Force, with particular reference to certain matters itemised at paragraphs (a) to (e) of the Terms of Reference.³ These particular matters concerned, in summary:

- the nature and extent of corruption in the Police Service;
- the system of promotion in the Police Service; and
- the impartiality of the Police Service and other agencies in investigating and pursuing prosecutions including paedophile activity (paragraph (d)).

1.1.2 In December 1994 further Letters Patent were issued adding subparagraphs (d1), (d2) and (d3) to the Terms of Reference.⁴ The matters incorporated by the additional subparagraphs concerned in summary:

- police protection of paedophile activity; and
- the possible adverse effect of Police Service procedures on police investigations and prosecutions.

1.1.3 On 23 October 1996 the Royal Commission's Terms of Reference were further extended to include paragraphs (g), (h), (i), and (j).⁵ The new terms focussed on:

- the adequacy of existing laws prohibiting paedophilia and the penalties imposed by such laws;
- the effectiveness of processes for the protection of children in the care of Government agencies from sexual abuse; and

³ Royal Commission into the New South Wales Police Service, *Final Report, Vol. I: Corruption*, May 1997, p. 1. A consolidated version of the Terms of Reference to Commissioner Wood is included at Appendix 1 to this Report.

⁴ *ibid*, pp. 1-2.

⁵ *ibid*, p. 2.

- the effectiveness of Police Service investigatory procedures in dealing with allegations of paedophilia.

1.1.4 On 23 October 1996 the Leader of the Opposition, Mr Collins, moved a motion in the Legislative Assembly proposing that the Terms of Reference be further extended to require the Royal Commission to conduct a full investigation into allegations of paedophilia at large, without being limited to issues involving protection, corruption, or system failure.⁶ In support of the motion, Mr Collins argued that the additional terms announced by the Premier related largely to procedural matters and added little to the Royal Commission's powers to deal with the problem of paedophilia.⁷ Various arguments were advanced in the House against this motion, including the proposition that the appropriate body for investigating and prosecuting child sexual abuse is the Police Service,⁸ or the dedicated unit established for that purpose (the Child Protection Enforcement Agency), rather than the Royal Commission.⁹ At the conclusion of debate on the matter, a Government amendment supporting the additional terms of reference announced by the Premier was passed by a majority, with the result that Mr Collins' motion failed.¹⁰

1.1.5 On 31 October 1996 a cross-bench Member of the Legislative Council, Revd Mr Nile, moved the following motion in the Council:

That this House calls on the Government to add the following paragraphs to the terms of reference of the Royal Commission into the New South Wales Police Service:

1. That the Royal Commission be tasked with conducting criminal investigations, at large, into allegations of paedophilia or pederasty, that are unconnected with protection issues, arising either as a result of corruption, or as a result of system failure, or abuse of office by a public official.
2. That the Royal Commission fully investigate and report on paedophilia in New South Wales with particular reference to:
 - (a) any relationship between individual paedophiles and/or paedophile networks; and

⁶ *Parliamentary Debates*, Legislative Assembly, 23 October 1996, p. 5247.

⁷ *ibid.*

⁸ *ibid.*, p. 5249.

⁹ *ibid.*, p. 5250.

¹⁰ *Votes and Proceedings*, Legislative Assembly, No. 37, 23 October 1996, p. 508.

- (b) the relationship between paedophile networks in New South Wales with other individuals and organisations in Australia and overseas.¹¹

After some debate the motion was passed on 10 April 1997, with the support of the Opposition, the cross-benches, and Mrs Arena, who although still a Government Member crossed the floor for the vote.¹² However, despite this resolution by the Legislative Council, the Terms of Reference to Justice Wood for the paedophile segment of the Royal Commission were not further widened.¹³

1.2 Justice Yeldham mentioned in Parliament

- 1.2.1 On 31 October 1996, during debate in the Legislative Council on the motion to extend the Royal Commission's Terms of Reference, Mrs Arena referred to two persons, including a former Supreme Court judge, Justice Yeldham, in connection with the paedophile segment of the Royal Commission inquiry.¹⁴ Neither figure had been publicly identified by the Royal Commission at that stage. On 4 November 1996, after giving further evidence to the Royal Commission, Justice Yeldham took his own life.¹⁵

1.3 Mrs Arena's speech 17 September 1997

- 1.3.1 On 17 September 1997 the Final Report of the Royal Commission concerning the paedophile segment of the inquiry was tabled in the Legislative Council (*Final Report, Volumes IV-VI: The Paedophile Inquiry*).¹⁶ Later that day the Attorney General moved a motion in the Legislative Council that the House "take note" of the Report. During the ensuing debate Mrs Arena made a speech which suggested, among other things, that certain identified persons including the Premier, the Leader of the Opposition, and the Royal Commissioner, had been involved in meetings and/or agreements relating to the "cover-up" of names of high-profile paedophiles. The speech, which is the subject of this inquiry, is reproduced in full at Appendix 2.
- 1.3.2 On 18 September 1997 the Attorney General gave notice of a motion in the following

¹¹ *Parliamentary Debates*, Legislative Council, 31 October 1996, p. 5619.

¹² *ibid.*, 10 April 1997, p. 7349.

¹³ Royal Commission into the New South Wales Police Force, *Final Report, Vol. IV: The Paedophile Inquiry*, August 1997, p. 570.

¹⁴ *ibid.*, 31 October 1996, p. 5623.

¹⁵ Royal Commission into the New South Wales Police Service, *Final Report, Volumes IV: The Paedophile Inquiry*, August 1997, p. 807.

¹⁶ *Minutes of the Proceedings of the Legislative Council*, No. 2, Wednesday 17 September 1997, p. 34.

terms:

That this House censures the Honourable Franca Arena for making allegations in this House on 17 September 1997 which asserted a criminal conspiracy involving the Premier, the Leader of the Opposition in the Legislative Assembly, the Royal Commission and other persons, and condemns those allegations as baseless, irresponsible and an abuse of parliamentary privilege.¹⁷

The motion has not yet been moved and remains on the Notice Paper.

1.4 Establishment of Nader inquiry

- 1.4.1 In response to concerns over the possible impact of Mrs Arena's speech, on 24 September 1997 the Parliament passed the *Special Commissions of Inquiry Amendment Act 1997* (NSW), which amended the *Special Commissions of Inquiry Act 1983* (NSW). The effect of the amending Act was to enable either House, by resolution, to authorise the Governor to establish a Special Commission of Inquiry (similar to a royal commission) to investigate such matter relating to parliamentary proceedings as is specified in the resolution (s. 33B(1)). The Act also permitted the House to declare by resolution that parliamentary privilege is waived in connection with the inquiry (s. 33D(1)). Although it permitted a collective waiver of privilege by the House, the Act preserved the right of any *individual* Member to claim parliamentary privilege in relation to an inquiry (s. 33D(3)). The provisions inserted by the amending Act were specified to expire six months after their commencement date (s. 33H).¹⁸
- 1.4.2 On 25 September 1997, in the terms permitted by the Act, the Legislative Council authorised the establishment of a Special Commission of Inquiry to investigate Mrs Arena's claims and the basis on which she had made them.¹⁹ The resolution waived parliamentary privilege in connection with the inquiry. A Special Commissioner was duly appointed to conduct the inquiry, the Hon John Nader RFD QC. One of the first acts of the Special Commission was to issue a summons to Mrs Arena requiring her to give evidence and produce documents in support of her claims.
- 1.4.3 Mrs Arena promptly filed proceedings in the Supreme Court of New South Wales²⁰ and then in the Court of Appeal²¹ challenging the validity of the *Special Commissions*

¹⁷ *Notices of Motions and Orders of the Day*, Legislative Council, No. 3, Tuesday 23 September 1997, p. 30.

¹⁸ These provisions, contained in Part 4, expired on 24 March 1998.

¹⁹ *Minutes of the Proceedings of the Legislative Council*, No. 6, Thursday 25 September 1997, pp. 94-5.

²⁰ *Arena v Nader & Ors*, Supreme Court of NSW, unreported decision, 3 October 1997.

²¹ *Arena v Nader & Ors*, Court of Appeal, unreported decision, 10 October 1997.

of Inquiry Amendment Act. The grounds of invalidity asserted included breach of certain constitutional provisions and infringement of parliamentary freedom of speech prescribed by Article 9 of the Bill of Rights 1689. While Mrs Arena was successful in obtaining certain interlocutory orders which delayed the progress of the Special Commission, overall these challenges failed, as did a subsequent application for leave to appeal to the High Court of Australia against the Court of Appeal's decision.²²

1.4.4 When the Special Commission of Inquiry resumed on 16 October 1997, Mrs Arena exercised her right not to participate. However, all other witnesses gave evidence as required, including all of the alleged parties to the alleged "cover-up".

1.5 Documents tabled by Mrs Arena in the Legislative Council

1.5.1 On 21 October 1997 Mrs Arena moved a motion in the Legislative Council seeking leave of the House to table certain material relating to her claims on 17 September 1997 and certain material concerning allegations that prominent persons had engaged in paedophile activity.²³ Mrs Arena described the material as:

four folders of documents, the contents of which have led me to believe in good faith that the Wood royal commission omitted to investigate some high-profile paedophiles, people who have been called "untouchables".²⁴

1.5.2 Specifically, Mrs Arena identified the four volumes as follows:

Volumes 1 and 2 General information provided to Mrs Arena detailing allegations of paedophilia and child sexual assaults, including statutory declarations and other documentation.

Volume 3 Information and documents provided by W26 [codename of a witness before the Wood Royal Commission] and other related information concerning allegations of paedophilia.

Volume 4 Part A - material relating to allegations against lawyer X;
Part B - material concerning allegations of a paedophile house network; and

²² *Arena v Nader & Ors*, High Court of Australia, unreported decision, 15 October 1997.

²³ *Parliamentary Debates*, Legislative Council, 21 October 1997, p. 991.

²⁴ *ibid.*, p. 992.

Part C - documents relating to claims made by Mrs Arena on 17 September 1997.²⁵

1.5.3 Mrs Arena stated that the material in the four volumes had been selected from seven boxes of documents which she had gathered on this issue.²⁶

1.5.4 As proposed in Mrs Arena's motion, the Legislative Council resolved that Mrs Arena be granted leave for the material to be tabled but that the documents be retained in the custody of the Clerk of the House and not be published or copied without an order of the House.²⁷ Further, the House granted leave to the Clerk to provide a copy of the documents to the Special Commission of Inquiry investigating Mrs Arena's claims, and to the Commissioner of Police. Finally, the resolution required the Commissioner of Police to make an assessment of the documents and report that assessment to the House.

1.6 Nader inquiry report

1.6.1 The Report of the Special Commission of Inquiry was released on 7 November 1997. A Confidential Supplement to the Report was also issued which contained an assessment of the documents tabled by Mrs Arena on 21 October 1997 so far as was relevant to the inquiry of the Special Commission. Both the Report and the Confidential Supplement were tabled in the Legislative Council by the Clerk on 11 November 1997 and ordered to be printed by resolution of the House.²⁸

1.6.2 The Report of the Special Commission examined the evidence obtained by the Commission concerning whether the meetings and agreements referred to in Mrs Arena's speech had occurred. It concluded that Mrs Arena's statements concerning these matters were "false in all respects".²⁹ It further stated that -

Mrs Arena has no evidence, sufficient or otherwise, to support these claims, or any part of them, which she made under parliamentary privilege; nor was there anything, not amounting to evidence in the strict sense, that could have

²⁵ *ibid.*, p. 997.

²⁶ *ibid.*, .992.

²⁷ *Minutes of Proceedings of the Legislative Council*, No. 11, Tuesday 21 October 1997, pp. 125/6.

²⁸ *Minutes of Proceedings of the Legislative Council*, No. 14, Tuesday 11 November 1997, p. 158.

²⁹ *Report of the Special Commission of Inquiry into Allegations Made in Parliament by the Honourable Franca Arena MLC*, the Hon John Nader RFD QC, 7 November 1997, p. 40.

provided any reasonable person acting in good faith any justification for these claims, or any part of them. The evidence strongly suggests Mrs Arena knew she had no such evidence.³⁰

1.6.3 The Confidential Supplement to the Report analysed the documents tabled by Mrs Arena and concluded that none of those documents supported the statements made by Mrs Arena on 17 September.

1.6.4 The day the Report of the Special Commission of Inquiry was released, Mrs Arena, then a Government backbencher, stated that she had tendered her resignation from the Australian Labor Party (ALP).

1.7 Motion to expel Mrs Arena

1.7.1 On 11 November 1997 the Attorney General moved a motion in the Legislative Council proposing that, in view of the findings of the Special Commission, Mrs Arena be adjudged “guilty of conduct unworthy of a Member of the Legislative Council” and be expelled from the House.³¹ However, the motion was amended by the Opposition with the support of the cross-benches in a form that, instead of expelling Mrs Arena, required this Committee to “investigate and report on what sanctions should be enforced in relation to Mrs Arena’s conduct in this matter”.³² The motion as amended was passed by the House on 12 November 1997.

1.7.2 In addition to referring the matter to this Committee, the resolution of the Legislative Council also:

- varied the resolution of the House of 21 October 1997 to require the Commissioner of Police to examine, in conjunction with the documents tabled by Mrs Arena, any relevant documents contained within former Special Branch files;
- required the Commissioner of Police to lodge the report of his assessment of the documents with the Clerk of the House, and required the Clerk to refer that report to this Committee for consideration as part of its inquiry;
- permitted Members of this Committee to inspect the documents tabled by Mrs Arena, once the report of the Commissioner of Police had been referred.

1.7.3 The complete terms of the resolution, which forms the terms of reference for this

³⁰ *ibid.*, pp. 40/1.

³¹ *Minutes of the Proceedings of the Legislative Council*, No. 14, Tuesday 11 November 1997, pp. 158/9.

³² *Minutes of the Proceedings of the Legislative Council*, No. 15, Wednesday 12 November 1997, pp. 169-173.

inquiry, are set out at p. (iv) of this Report.

1.7.4 On 20 November 1997 a cross-bench Member, Mrs Nile, moved a motion in the Legislative Council proposing that Revd Mr Nile be appointed as a member of this Committee.³³ Revd Mr Nile moved an amendment to the motion proposing that:

- Mr Primrose (a Government Member) be appointed to the Committee; and
- for the purposes of the inquiry into the conduct of Mrs Arena, the quorum is four Members, of whom three must be Government members and one must be a non-Government Member.³⁴

The motion, as amended, was passed by the House on 25 November 1997.³⁵

1.8 Report of Commissioner of Police

1.8.1 The Commissioner of Police lodged his report on the documents tabled by Mrs Arena and the other material referred by the House on 27 November 1997.³⁶ This Committee authorised publication of the Report under s. 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975 (NSW)* on 5 December 1997. The Report concluded that some of the material examined is worthy of further investigation and that a strike force would be established to investigate such matters.³⁷ However, it also stated that the Commissioner had discovered nothing in the documents which is contrary to the findings of the Special Commission of Inquiry.³⁸

³³ *ibid.*, No. 19, Thursday 20 November 1997, p. 214.

³⁴ *ibid.*

³⁵ *ibid.*, No. 20, Tuesday 25 November 1997, pp. 224/5.

³⁶ *Report to the Legislative Council on Papers tabled by Mrs Franca Arena MLC before the Council on Tuesday 21 October 1997*, P J Ryan, Commissioner of Police.

³⁷ *ibid.*, p. 4.

³⁸ *ibid.*

Chapter Two

2. CONDUCT OF THE INQUIRY

This Chapter contains a summary of the Committee's proceedings in this inquiry. The Minutes of the proceedings are reproduced at Appendix 6.

2.1 Legal assistance

Assistance for the Committee

- 2.1.1 Because the question of expulsion is a serious one and has wide ramifications beyond the particular case being considered in this inquiry, the Committee wanted to ensure that its actions conformed at all times with the requirements of due process and applicable laws. Accordingly, early in the inquiry the Committee engaged the services of Mr Bernard Gross QC, instructed by Mr Joseph Catanzariti of Clayton Utz, Solicitors, to provide legal assistance to the Committee in this matter. Mr Gross and Mr Catanzariti advised the Committee on a range of matters connected with the conduct of the inquiry, including the lawfulness of steps proposed to be taken by the Committee; the application of relevant principles of procedural fairness/natural justice; and the procedures which should be followed to ensure that the Committee's proceedings did not prejudice current investigations by courts and other bodies.

Assistance for Mrs Arena

- 2.1.2 In December 1997 Mrs Arena wrote to the Committee requesting financial assistance for legal representation in connection with her appearances before the Committee. In her submission to the Committee on this issue Mrs Arena argued that as the Committee had engaged lawyers, it was fair that she should have access to legal advice as well. The Committee sought approval for such assistance and approval for funding was granted by Treasury.
- 2.1.3 The Committee received procedural advice from the Clerk of the Parliaments as to the nature of the legal representation to which witnesses before Council committees such as Mrs Arena are entitled. The Clerk advised that according to parliamentary law and practice, a witness before a committee cannot be represented by counsel without the leave of the House. However, he advised that in the absence of leave from the House, witnesses may be *assisted* by legal representatives in the sense that they may consult their legal advisers during hearings and seek their lawyers' assistance in answering questions from the Committee. As leave of the House had not been obtained in this case and the House had risen for the summer recess, the Committee permitted Mrs Arena to be assisted by her advisers in the sense described by the Clerk. In addition, her lawyers were permitted to:

- submit written questions to be put to other witnesses by members of the Committee on Mrs Arena's behalf;
- make submissions in relation to the Committee's proposed editing of Mrs Arena's evidence prior to the public release of that evidence;³⁹ and
- make submissions in relation to Mrs Arena's conduct before the Committee commenced its final deliberations.

Assistance for other parties

2.1.4 The Committee also received requests for legal representation on behalf of the Premier, Mr Carr; the Leader of the Opposition, Mr Collins; and Justice Wood. It was submitted that such representation should be granted on the ground of procedural fairness as these parties were the subject of the principal claims made by Mrs Arena in her speech on 17 September 1997 and any evidence which the Committee considered in relation to those claims could have direct relevance to the parties' reputations. The Committee sought approval for legal assistance on behalf of the parties and funding was approved by Treasury.

2.1.5 The Committee permitted the legal advisers for the interested parties to be present during the *in camera* hearings of the Committee but not during any deliberative meetings. As was the case with the lawyers for Mrs Arena, the representatives of the interested parties were permitted to:

- submit written questions to be asked of witnesses by members of the Committee during hearings (although the Committee members themselves ultimately determined which questions were to be asked);
- view Mrs Arena's evidence and make written submissions in relation to its publication; and
- make written submissions in relation to Mrs Arena's conduct, when invited to do so by the Committee.

2.2 Witnesses and hearings

Witnesses called by the Committee

2.2.1 The following witnesses appeared and gave evidence before the Committee:

³⁹ The editing of evidence is discussed at paragraphs 2.2.4 - 2.2.6 below.

17 December 1997	Police Commissioner Peter Ryan	concerning clarification of certain matters contained in the Commissioner's <i>Report to the Legislative Council on Papers tabled by Mrs Franca Arena MLC before the Council on Tuesday 21 October 1997</i> , dated 27 November 1997
21 December 1997	Mr Alex Mitchell, Associate Editor, <i>The Sun-Herald</i> newspaper	concerning information reported in the <i>Sun-Herald</i> article referred to in Mrs Arena's speech on 17 September 1997
5 March 1998	Mrs Arena	
16 March 1998	Mrs Arena	
24 March 1998	Mrs Arena	
6 April 1998	Mrs Arena	
15 May 1998	Commander Clive Small	concerning clarification of certain matters relating to meetings with Mrs Arena
23 June 1998	Mr Philip Taylor	legal adviser to Mrs Arena

2.2.2 All hearings were conducted *in camera* in accordance with the Committee's resolution of 24 November 1997:

That all evidence in relation to the Committee's inquiry into the conduct of the Honourable Franca Arena, MLC be taken in camera, and that the Committee only authorise those sections of the evidence to be made public which it is satisfied will not cause unnecessary damage to the reputations of any individuals, compromise ongoing police investigations or prejudice any matters currently before the courts.

2.2.3 The Committee's reasons for requiring hearings to be held *in camera* are adverted to in the terms of this resolution. That is, the Committee felt that there was too great a risk that evidence given at public hearings could have caused unnecessary damage to the reputations of individuals, compromised ongoing police investigations, or prejudiced matters currently before the courts. The Committee also considered that no system of voluntary censorship or codenames adopted for the purpose of public hearings could have operated successfully, given the immediacy of oral communication and the complexity and breadth of the issues under discussion at the hearings.

- 2.2.4 While requiring the hearings to be in private, the Committee considered that it was in the public interest for the transcripts of the evidence to be publicly released as soon as possible after each hearing. Accordingly, each transcript was published as soon as the Committee had had an opportunity to edit the material in conformity with the principles adopted in its resolution. During the editing process the Committee sought to ensure that as much as possible of the material should be published and that only where strictly necessary should material be suppressed or codenames used. In each case, Mrs Arena and the legal representatives for the interested parties were invited to make written submissions concerning the editing proposed by the Committee. All submissions received were considered on their merits.
- 2.2.5 Before calling Mrs Arena to appear and give evidence, the Committee requested her to provide a full written statement of the evidence she proposed to put to the Committee in relation to the subject of the inquiry. In response to this request Mrs Arena supplied a lengthy written submission (57 pages) including 31 attachments⁴⁰ and later provided a supplementary submission (5 pages) with 11 further attachments.⁴¹ The same editing process was applied to this material as was applied to the transcripts and an edited version was published in April 1998.
- 2.2.6 During the inquiry Mrs Arena has made various claims in the media and in Committee hearings that the Committee was biased in its editing of the evidence, that it suppressed material if it was favourable to Mrs Arena or prejudicial to the Committee. In reality, the Committee took a conscientious and nonpartisan approach to the editing, and the vast majority of decisions as to the proposed editing of the evidence were approved by all Members of the Committee, with only a small number of divisions.
- 2.2.7 At various stages during the inquiry Mrs Arena nominated persons whom she considered should be called before the Committee to give evidence. The Committee considered each such suggestion and made an assessment of the relevance of the potential witness to the subject of the inquiry.

⁴⁰ Franca Arena, submission, 30 January 1998.

⁴¹ Franca Arena, supplementary submission, 16 February 1998.

Chapter Three

MRS ARENA'S SPEECH

3.1 Terms of Reference of the Committee's Inquiry

3.1.1 The Terms of Reference for the conduct of inquiry by the Committee refer to two matters to the Committee for inquiry and report:

- (a) the statements made by Mrs Arena in the Legislative Council on 17 September 1997 concerning the alleged suppression of names of individuals allegedly being investigated by the Royal Commission into the NSW Police Service; and
- (b) the Report and Confidential Supplement of the Special Commission of Inquiry conducted by the Honourable John Nader QC concerning the claims by Mrs Arena.

3.1.2 The Committee is also required by the Terms of Reference to "investigate and report on what sanctions should be enforced in relation to Mrs Arena's conduct in this matter."

3.1.3 Although it is necessary for the Committee to consider the entire speech made by Mrs Arena to the Legislative Council on 17 September 1997, it is necessary for the Committee to concentrate upon several passages which fall within the description in the Terms of Reference, namely:

The statements made by Mrs Arena in the Legislative Council on 17 September 1997 concerning the alleged suppression of names of individuals allegedly being investigated by the Royal Commission into the NSW Police Service.

3.2 Relevant passages in Mrs Arena's speech

3.2.1 Having referred to the Sun Herald article by Mr Alex Mitchell published on 17 March 1996 under the headline 'Prominent People to be Named - Paedophile Bombshell', Mrs Arena stated:

Did that not give us a lot of hope that things would change? But what happened? The next day Bob Carr's office denied that such a meeting was ever going to take place, but it is fair to assume that a meeting did indeed take place when the furore had died down. There was also another meeting which took place here at Parliament House late the following Sunday between Bob Carr; the General Secretary of the Australian Labor Party, John Della Bosca; party president, Terry Sheahan; and other important figures in the ALP. Are these people going to deny the meeting took place?

I had confirmation by security officers and other unable to talk about it publicly who could testify to it but are in fear of losing their jobs. I believe it was all to organise damage control. Following the meeting with Peter Collins and the late meeting at Parliament House, the Premier met with Justice Wood. What happened at the meeting between Justice Wood and Carr, I do not know. No information was leaked, but I am bold enough to presume that an agreement was reached to ensure that people in high places would not be named as it would have been too traumatic for the community to realise how many of its so-called upstanding citizens were involved in criminal activities.

The result was that the whole paedophilia inquiry went into another stage. Despite the continuation of public hearings, we never heard of a single high-profile paedophile being named or exposed. I believe that this is due to the fact that it was decided that it was too damaging for the community to have members of Parliament and judges exposed. And so the whole matter was swept under the carpet. The royal commission has failed the community by failing to ask for the prosecution of some of the high-profile paedophiles in our community on whom it had evidence and witnesses. If Justice Wood had said in his report, 'We diligently set up all sorts of covert and overt operations to catch paedophiles about whom we had received reliable information, but despite all our efforts we were unable to get any evidence that they were paedophiles and for this reason nobody has been named in the report', we could have accepted that, but the reality is that the commission did not even try.

I have no doubt that there has been a massive cover-up and the community is angry and distressed. The system is protecting itself. The commission unmasked corrupt policemen and paraded such corruption on a video to the community. We applauded its work. This is the reason the commission was established: to uncover the guilt in our midst. But for the untouchables in our society there is a different standard; no covert or overt surveillance for them, no hidden videos or secret microphones for them. I know that I will be strongly criticised for making these statements, but I believe it is my duty to put them on the parliamentary record. In the short term I will surely be criticised and even marginalised by my own party, but I know I will be eventually proved right.

It is imperative for me to discharge my responsibilities as an elected member of Parliament. I have my responsibilities to the community. There has always been a reluctance on the part of the powers that be to extend the royal commission's terms of reference in a way that was needed. We never understood why. Do not forget that this royal commission cost the community \$70 million, it employed more than 230 staff and during its operations it accumulated incredibly important evidence. It was a once-in-a-lifetime opportunity to look in depth at the question of paedophilia. However, this opportunity has been lost and we have seen a massive cover-up as far as important people in our community are concerned.⁴²

3.2.2 Mrs Arena then proceeded to "place on the parliamentary record the sequence of

⁴² *Parliamentary Debates*, Legislative Council, 17 September 1997, pp. 63-4.

events that took place",⁴³ commencing with a motion moved by her at the Australian Labor Party Caucus on 22 October 1996 seeking passage of a motion to amend the Terms of Reference of the Royal Commission, extend its duration and increase its investigative staff, which motion was passed. She then noted that on 22 October 1996, the Premier issued a Press Release announcing an extension to the Terms of Reference of the Royal Commission into the NSW Police Service. She further stated that on 23 October 1996 a further Caucus meeting took place at which Mrs Arena's motion to add two additional paragraphs to the Amended Terms of Reference announced in the Premier's Press Release was defeated. Having discussed these events, Mrs Arena then stated:

I will never know why the Premier did not want an extensive inquiry into all aspects of paedophilia. He claimed that Justice Wood was not prepared to hold such an extensive inquiry and, in effect, Justice Wood used the terms of reference issued by the Premier on 22 October as a shield every time the commission failed to uncover prominent paedophiles or shielded them. ... The royal commission proceeded with terms of reference acceptable to both the Premier and Justice Wood.

These terms of reference, I emphasise again, were not as extensive as the community wanted, and many members of Parliament on our side were angry because we felt that the royal commission was a unique opportunity to look at the issue of paedophilia and a unique opportunity to deal with it in depth. Why were the terms of reference not as extensive as we wanted them? Why was the issue of paedophilia not dealt with in depth by the Wood royal commission? When will the next royal commission on paedophilia be held in this State? Why was the lid kept on this important issue? We have never been given an answer. But let me say that many of us have a fair idea why.⁴⁴

3.2.3 Mrs Arena then referred to a subsequent motion in the Legislative Assembly on 23 October 1996, and stated:

However, all this was of no consequence as by the time the motion was passed in the Upper House the Wood royal commission had practically closed its doors and thus ignored the will of the Parliament. It is important for me to put all of this on the parliamentary record, because I feel that we have lost a golden opportunity. Who is responsible for the loss of this unique opportunity? I leave that for the community to judge. No matter how many positive things may happen in the near future regarding paedophilia, there are people who will have to answer to future generations as to why important people such as judges and members of Parliament were given protection.⁴⁵

⁴³ *ibid*, p. 64.

⁴⁴ *ibid*, p. 65.

⁴⁵ *ibid*.

3.3 The task required of the Committee by its Terms of Reference

- 3.3.1 The Terms of Reference by the Legislative Council to the Committee require it to inquire, investigate and report concerning the matter specified in the Terms of Reference, namely, *Mrs Arena's conduct in this matter*, being the statements made by her in the Legislative Council on 17 September 1997 concerning the alleged suppression of names of individuals allegedly being investigated by the Royal Commission into the NSW Police Service. Under the Terms of Reference to the Committee, the only specified person whose conduct the Legislative Council authorises inquiry, investigation and report by the Committee is Mrs Arena.
- 3.3.2 The Committee's obligation to adhere to the precise limits of the Terms of Reference of the Committee requires that the Committee acknowledge that it is not its appointed task to inquire into the manner in which the Royal Commission into the NSW Police Service conducted its investigations or otherwise performed the obligations imposed upon it by its own Terms of Reference.
- 3.3.3 Although the Committee's investigation necessarily involves consideration of what reasonable foundation, if any, Mrs Arena had as at 17 September 1997 for making allegations concerning the "suppression of names of individuals allegedly being investigated by the Royal Commission into the NSW Police Service",⁴⁶ the Terms of Reference do not authorise or require the Committee to embark upon a wider inquiry as to whether any individual, by reason of any complaints or allegations made or capable of being made against them, deserved, in retrospect, or in the light of what the Committee itself can discover and establish, to be investigated more extensively by the Royal Commission into the NSW Police Service, or to survive the period of operation of the Royal Commission without being prosecuted. Mrs Arena frequently during her evidence before the Committee stated that she is not a policeman.⁴⁷ However, neither is the Committee.
- 3.3.4 The Committee's role is necessarily a purely protective one confined to determination of whether the privileges of the Legislative Council have been improperly breached by Mrs Arena in her capacity as a Member of the Legislative Council. In short, the Committee is authorised to conduct its inquiry and make report for the sole purpose of informing the Legislative Council of its conclusions concerning the appropriate responses by the Legislative Council to the conduct of a particular member of the Legislative Council, namely Mrs Arena.

⁴⁶ *Minutes of the Proceedings of the Legislative Council*, No. 15, Wednesday 12 November 1997, p. 172.

⁴⁷ For example, Franca Arena, Evidence, 5 March 1998, *Transcripts*, pp. 46, 57, 59; Evidence, 16 March 1998, *Transcripts*, p. 163; Evidence 24 March 1998, *Transcripts*, pp. 233, 234; Evidence 6 April 1998, *Transcripts*, pp. 273, 285, 310.

- 3.3.5 Despite Mrs Arena's submissions to the contrary, the Committee rejects her attempts to induce the Committee to go beyond its powers, and embark on a wider inquiry into the adequacy of the Terms of Reference of the Royal Commission into the NSW Police Service,⁴⁸ the manner in which the Royal Commission performed its investigative task and reporting function,⁴⁹ or whether specified individuals were undeservedly fortunate in surviving scrutiny by the Royal Commission with their reputations intact and without being criminally prosecuted.⁵⁰
- 3.3.6 The Committee finds it unnecessary to determine whether Mrs Arena's frequent invitations to the Committee that it should, in effect, step outside the limits imposed by its Terms of Reference and undertake a more wide ranging inquiry, reflect not merely a genuine failure by her to understand the nature and limits of the Committee's task but instead a deliberate attempt to divert the attention of the Committee from her own conduct and to use the Inquiry to advance her own goal of achieving a further Royal Commission into paedophilia with wider powers to inquire into alleged paedophile behaviour.
- 3.3.7 The Committee considers that the Terms of Reference require it to establish whether the claims made by Mrs Arena in her speech were justified in the sense that she had reasonable foundations for the claims she made, at the time when she made them. However the Committee is not entitled under the Terms of Reference to investigate whether claims for which Mrs Arena had no reasonable foundations at the time of her speech can be demonstrated by additional investigation of the persons concerned to be accurate.
- 3.3.8 Further, the Committee has proceeded on the basis that the Terms of Reference do not enable the Committee to embark at large on a wider task of establishing and reporting upon whether persons not named in her speech on 17 September 1997 deserve to be more vigorously pursued by the Police in respect of allegations made against them that they are paedophiles.
- 3.3.9 Quite apart from the fact that such a wider inquiry would be beyond that authorised by the Terms of Reference, the Committee considers that the task of investigating allegations that specified individuals have breached the criminal law regarding paedophilic conduct can only properly and responsibly be performed by professional law enforcement bodies and most certainly not by the Committee. Indeed, on this very question, Mr Peter Ryan, Commissioner of Police, during his evidence before the

⁴⁸ Franca Arena, unpublished submission concerning conduct, 6 May 1998, pp. 28-30.

⁴⁹ *ibid.*

⁵⁰ *ibid.*

Committee, stated that it would be "inappropriate and damaging"⁵¹ for the Committee to hear evidence on allegations of paedophilia, and that any such evidence should not be placed before the Committee, but rather should be provided to the Strike Force set up by him to enable "proper criminal investigations into the allegations"⁵² and so that any evidence would not be compromised "as to its future value and use".⁵³

- 3.3.10 Commissioner Ryan emphasised the need for investigators to establish sufficient evidence, based on hard fact (and not speculation, innuendo and rumour) and preferably corroborated, which would stand up in Court.⁵⁴ He disapproved of the laying of a charge based upon insufficient evidence, and of the damage which any person charged, regardless of his position, would inevitably suffer in such circumstances.⁵⁵ The Child Protection Enforcement Agency, which was formed in 1996,⁵⁶ now has, as Commissioner Ryan explained, the responsibility throughout the State to investigate complaints of abuse towards children, whether that abuse be sexual, mental or physical abuse.⁵⁷

3.4 The Nader Inquiry and Report

- 3.4.1 The Report and Confidential Supplement of the Special Commission of Inquiry conducted by the Honourable John Nader QC concerning the claims by Mrs Arena were, along with the statements made by Mrs Arena to the Legislative Council on 17 September 1997, the "matters" referred to this Committee for inquiry and report.
- 3.4.2 On 7 November 1997 Mr Nader reported his conclusions in the following terms:

VI. CONCLUSIONS

Having inquired into the matters specified in the terms of reference of this Inquiry, and having regard to the relevant evidence, for the above stated reasons, I report as follows:

- (1) (i) The claim made by Mrs Arena in the Legislative Council on 17

⁵¹ Commissioner Ryan, Evidence, 17 December 1997, *Transcripts*, p. 6.

⁵² *ibid.*, p. 5.

⁵³ *ibid.*

⁵⁴ *ibid.*, p. 11.

⁵⁵ *ibid.*

⁵⁶ *ibid.*, p. 9.

⁵⁷ *ibid.*

September 1997 to the effect that a meeting took place between the Premier, Mr Bob Carr, and the Leader of the Opposition, Mr Peter Collins, to plan the suppression of names of individuals allegedly being investigated by the Royal Commission into the NSW Police Service was false in all respects.

- (ii) The claim made by Mrs Arena on the said occasion to the effect that the Premier and Justice Wood met and that "an agreement was reached to ensure that people in high places would not be named" was false in all respects.
- (iii) The claim made by Mrs Arena on the said occasion to the effect that a meeting took place between Premier Bob Carr, John Della Bosca and Terry Sheahan at Parliament House to plan the suppression of the names of individuals allegedly being investigated by the Royal Commission into the NSW Police Service was false in all respects.

- (2) Mrs Arena had no evidence, sufficient or otherwise, to support these claims, or any part of them, which she made under parliamentary privilege; nor was there anything, not amounting to evidence in the strict sense, that could have provided to any reasonable person acting in good faith any justification whatsoever for these claims, or any part of them. The evidence strongly suggests Mrs Arena knew she had no such evidence.⁵⁸

3.4.3 Mrs Arena in her submission dated 30 January 1998 alleges that the Terms of Reference for the Nader Inquiry were misleading in that they set out claims which she did not make in her speech. In particular, she states "My speech does not claim that Collins met to plan the suppression of names, nor does my speech claim that Mr Carr, Della Bosca and Sheahan met to plan the suppression of names".⁵⁹ Mrs Arena also in the same submission contends that both the Terms of Reference for the Nader Inquiry and the findings made by the Nader Inquiry Report itself "draw mistaken and unintended inferences from my speech",⁶⁰ and that for that reason "the findings of the Nader Inquiry are unhelpful, and irrelevant to the matter before this Committee".⁶¹ However it should be noted that by contending that her speech "does not claim that Collins met to plan the suppression of names",⁶² the omission of Mr Carr from this disclaimer of intention appears to reflect a continued willingness to maintain that Mr

⁵⁸ *Report of the Special Commission of Inquiry into Allegations made in Parliament by the Honourable Franca Arena MLC*, the Hon John Anthony Nader RFD QC, 7 November 1997, pp. 40-1.

⁵⁹ Franca Arena, submission, 30 January 1998, p. 37.

⁶⁰ *ibid.* p. 38.

⁶¹ *ibid.*

⁶² *ibid.*, p. 37.

Carr, in his meeting with Mr Collins, met with him "to plan the suppression of names" even if Mr Collins did not share that plan. The subsequent proposition "Nor does my speech claim that Mr Carr, Della Bosca and Sheahan met to plan the suppression of names"⁶³ appears to be directed only to the alleged meeting between them, and involves no withdrawal of such an imputation of Mr Carr's purpose in meeting with Mr Collins. However the Committee recognises that in this section of Mrs Arena's submission dated 30 January 1998 she maintained that:

- (a) her speech on 17 September 1997 contained no allegation by her that the purpose of the first two meetings (Carr/Collins, and Carr/Della Bosca/Sheahan) was "to plan the suppression of names allegedly being investigated by the Royal Commission into the NSW Police Service";
- (b) the Terms of Reference for the Nader Inquiry were therefore misleading, as they drew mistaken and unintended inferences from her speech;
- (c) the Committee should, therefore, ignore both the Terms of Reference of the Nader Inquiry and its report and draw its own conclusions concerning her speech, in the light of the explanations provided by her to the Committee.

3.4.4 Mrs Arena's contentions as to the inaccuracy of the Terms of Reference of the Nader Inquiry appear to be confined to what those Terms of Reference assert was the effect of the claims made by Mrs Arena as to:

- (a) an alleged meeting between the Premier, Mr Bob Carr, and the Leader of the Opposition, Mr Peter Collins; and
- (b) a subsequent alleged meeting between Premier Bob Carr, John Della Bosca and Terry Sheahan.

3.4.5 However it is significant that Mrs Arena does not appear to question the description in the Terms of Reference of the Nader Inquiry of the claim being made by her in respect of an alleged meeting between Mr Carr and Justice Wood, and in particular the description that "an agreement was reached to ensure that people in high places would not be named".⁶⁴

3.4.6 Mrs Arena further points out that in order to preserve her parliamentary privilege (which she maintains is a matter of importance not only for herself but "for all

⁶³ *ibid.*

⁶⁴ *Report of the Special Commission of Inquiry into Allegations made in Parliament by the Honourable Franca Arena MLC, the Hon John Anthony Nader RFD QC, 7 November 1997, Terms of Reference (introductory page).*

parliamentary democracies in the common law world")⁶⁵ she refrained from participating in the Nader Inquiry by either giving evidence before the Nader Inquiry, calling witnesses to give evidence in the Nader Inquiry, cross-examining any witnesses at the Nader Inquiry, or making any submissions to it.⁶⁶ Mrs Arena therefore contends that the report of the Nader Inquiry suffers from the defect that the Nader Inquiry did not have before it her own position and explanations, and that it is only this Committee which has had the benefit of her evidence, explanations and submissions.⁶⁷

3.4.7 Mrs Arena's decision not to participate in the Nader Inquiry deprived her of an available opportunity to put her position at an early stage. However it was her right as a Member of Parliament to decline to participate in the Nader Inquiry. The Committee accepts that as Mrs Arena declined the opportunity to participate in the Nader Inquiry on stated grounds of principle relating to Parliamentary privilege,⁶⁸ the Committee should not draw any adverse inference against her from her failure to participate in the Nader Inquiry.

3.4.8 The Committee has received from Mrs Arena lengthy evidence⁶⁹ and detailed submissions⁷⁰ concerning her speech on 17 September 1997. The Nader Inquiry did not have the benefit of this evidence and these submissions by Mrs Arena. Therefore, as the Nader Inquiry lacked the advantage which the Committee has of having received evidence and submissions from Mrs Arena, the Committee has independently reached its own conclusions in reporting to the Legislative Council, without any regard to the conclusions of the Nader Inquiry.

3.5 Media reports concerning Mrs Arena's speech

3.5.1 Mrs Arena's speech on 17 September 1997 was reported upon very prominently in the various media, and a considerable public discussion of her speech, as reported by the media, then ensued.

3.5.2 Mrs Arena challenges the accuracy of the terms in which the media, particularly the printed media, reported her speech, asserting that "For one reason or another the

⁶⁵ Franca Arena, unpublished submission concerning conduct, 6 May 1998, p. 1.

⁶⁶ *ibid.* p. 13.

⁶⁷ *ibid.*

⁶⁸ Franca Arena, unpublished submission on conduct, 6 May 1998, p. 12.

⁶⁹ See record of evidence, *Transcripts*.

⁷⁰ See list of submissions at Appendix 3.

media initially sought to promote an extreme interpretation."⁷¹

3.5.3 The Committee considers that it would not be appropriate either to review the terms in which Mrs Arena's speech was reported in the media or to assess the extent to which any attempted summaries of her speech in the media accurately reported or fairly summarised the contents or thrust of the critical parts of her speech. The Terms of Reference of the Committee require that it concentrate upon what Mrs Arena actually said, as distinct from how the media heard, understood or reported upon the wording, intent or effect of her speech.

3.5.4 Mrs Arena's speech provoked vigorous controversy, and although the Committee believes it is unnecessary to take account of either the initial media reporting or the ensuing public discussion of her speech, the Committee concludes that undoubtedly Mrs Arena anticipated and intended that the allegations made in her speech would achieve widespread publicity within the community, and that she substantially achieved this aim.

3.6 Mrs Arena's intention to express herself in the particular language used by her

3.6.1 Mrs Arena in her submission to the Committee, her oral evidence and final submission to the Committee raised the possibility that because her command of the English language was "less than perfect",⁷² English not being her "mother tongue",⁷³ this factor may have caused her to incorrectly express herself in her speech in language which inadequately and clumsily conveyed some meanings different from those which she intended.

3.6.2 The Committee does not believe that Mrs Arena's non-English speaking background provides any basis for exculpating her from the consequences of the natural meaning of the wording of her speech. She gave evidence before the Committee that she spent considerable time planning her speech, that she wrote it out completely beforehand, and that she gave it exactly as she intended.⁷⁴ During her speech, there were no objections, interjections or other interruptions which may have served to disturb her concentration or to cause her to respond spontaneously or hastily. She plainly gave much consideration to the wording of the speech, and in the Committee's view, the critical parts of her speech cannot be excused or discounted by any belief that the language she used to convey her beliefs and allegations was hastily but erroneously composed in the heat of the occasion, but subsequently, upon mature reconsideration,

⁷¹ Franca Arena, unpublished submission concerning conduct, 6 May 1998, p. 35.

⁷² *ibid.* p. 38.

⁷³ *ibid.* p. 37.

⁷⁴ Franca Arena, Evidence, 5 March 1998, *Transcripts*, p. 132.

regretted. Indeed Mrs Arena has at no stage expressed any regret or apology for any part of her speech, or for the manner in which the speech was subsequently reported or understood. She has not withdrawn any claim made in her speech or apologised for any part of it. Mrs Arena during her evidence before the Committee has strenuously defended and firmly stood by the statements made by her in her speech.

- 3.6.3 Further, although in her written submission to the Committee Mrs Arena conceded she may, having reflected further upon her speech, have chosen different words,⁷⁵ she did nothing to add content to this possibility in that when offered the chance by the Committee to withdraw any particular words, or indicate how certain words would be changed if she were to give her speech again, she did not take up on the opportunity.⁷⁶ Moreover, when the Committee asked explicitly whether she was recanting what in the Committee's view is the most serious allegation made by her in the speech, she declined to do so.⁷⁷ The relevant allegation in her speech which she declined to recant on this occasion was that which she made against the Premier, Mr Carr, and the Royal Commissioner, Justice Wood, as follows:

I am bold enough to presume that an agreement was reached to ensure that people in high places would not be named as it would have been too traumatic for the community to realise how many of its so-called upstanding citizens were involved in criminal activity⁷⁸.

Her unwillingness, in her written submission and evidence before the Committee, to recant from the propositions in this passage of her speech necessarily casts doubt on the significance which can now be given to any subsequent concessions she makes in her submission dated 6 May 1998 concerning any possible inappropriateness of the particular language used by her in the speech.

- 3.6.4 Following conclusion of her evidence, Mrs Arena's final submission to the Committee referred to "two matters that I would make clear in my speech if I were to redo it."⁷⁹ One such matter is that she now accepts that despite her assumption that Mr Carr and Mr Collins met to discuss the paedophile segment of the Royal Commission, "Carr did not ultimately meet with Collins."⁸⁰ The other matter conceded in her final submission is that where she said concerning Justice Wood and Mr Carr that "An agreement was

⁷⁵ Franca Arena, Evidence, 24 March 1998, *Transcripts*, p. 247.

⁷⁶ *ibid.* p.248.

⁷⁷ *ibid.* p. 243.

⁷⁸ *Parliamentary Debates*, Legislative Council, 17 September 1997, pp. 63-4.

⁷⁹ Franca Arena, unpublished submission concerning conduct, 6 May 1998, p. 4.

⁸⁰ *ibid.* p. 5.

reached to ensure that people in high places would not be named"⁸¹ (as quoted herein in the preceding paragraph) she would amend the words "to ensure" to read "which had the effect of ensuring".⁸²

3.6.5 The Committee notes Mrs Arena's contention that "Parliamentary practice requires the Committee to construe my speech in the light of the explanation I have given".⁸³ However this more recently expressed expression of willingness in the light of subsequent events, to concede the desirability of amending this passage of her speech does not alter the proper construction of her speech on 17 September 1997, or the manner in which her speech would have been reasonably understood at the time it was made. This belated concession concerning Justice Wood and Mr Carr may merely represent a convenient expedient to mitigate any possible damage to her position caused by her refusal during her oral evidence before the Committee to recant the most serious allegation, as quoted above, when specifically asked whether she wished to do so.

3.6.6 Moreover, the weight to be given to this recently proffered concession appears to depend upon whether the Committee accepts the central part of Mrs Arena's justification of her speech before the Committee, as explained in her written submission to the Committee⁸⁴ that the protection of high-profile paedophiles was not the intention behind an alleged agreement reached at a meeting between Justice Wood and Mr Carr, but rather the outcome of acceptance by Justice Wood in October 1996 of restricted Terms of Reference proposed by Mr Carr for the paedophile segment of the Royal Commission.

3.7 Mrs Arena's conduct before the Committee

3.7.1 The Committee is obliged to record that the performance of its investigative task was not assisted by the manner in which Mrs Arena, during the hearing before the Committee, dealt with the Committee's questions and procedural rulings:

⁸¹ *Parliamentary Debates*, Legislative Council, 17 September 1997, p. 63.

⁸² Franca Arena, unpublished submission concerning conduct, 6 May 1998, p. 21.

⁸³ *ibid.* p. 3.

⁸⁴ Franca Arena, submission, 30 January 1998, p. 30.

- (a) Mrs Arena's demeanour at many stages at the hearing was emotional and confrontational, often taunting and abusing Committee members⁸⁵ whose questioning was not to her liking.
- (b) She frequently evaded questions,⁸⁶ refused to answer questions,⁸⁷ or ignored questions,⁸⁸ with the Committee being obliged on a number of occasions (indeed, on fewer occasions than her continued evasiveness warranted) to record that her answers were non-responsive.⁸⁹
- (c) Despite specific requests from the Committee Chair that she answer questions,⁹⁰ Mrs Arena often persisted with time-wasting reading on to the recorded transcript of lengthy passages from her written submission to the Committee, regardless of the question which was being asked of her,⁹¹ or else making irrelevant objections, quite unrelated to the question she was being asked, to prior decisions of the Committee as to the editing of transcripts for publication.⁹² Mrs Arena engaged in this course of action at a stage when her written submission dated 30 January 1998 had not been released for publication after necessary editing, but the transcript of her evidence, as edited, had been published.⁹³ However, Mrs Arena continued to do so, even after the Committee assured her that the submission, as edited, would be released for publication.⁹⁴

⁸⁵ For example: Franca Arena, Evidence, 16 March 1998, *Transcripts*, pp. 163, 183-4.; Franca Arena, Evidence, 6 April 1998, *Transcripts*, p. 270.

⁸⁶ For example: Franca Arena, Evidence, 5 March 1998, *Transcripts*, pp. 55-56.

⁸⁷ For example: Franca Arena, Evidence, 16 March 1998, *Transcripts*, p. 185.; Franca Arena, Evidence, 24 March 1998, *Transcripts*, pp. 207, 243.

⁸⁸ Franca Arena, Evidence, 6 April 1998, *Transcripts*, pp. 271, 312.

⁸⁹ For example: Franca Arena, Evidence, 6 April 1998, *Transcripts*, pp. 271, 312.

⁹⁰ For example: Franca Arena, Evidence, 24 March 1998, *Transcripts*, p. 208.

⁹¹ *ibid.*

⁹² Because previously these applications incorporated quotation from parts of the evidence the Committee had decided should not be published, these application do not appear in published transcripts.

⁹³ Franca Arena, Evidence, 24 March 1998, *Transcripts*, pp. 202-205.

⁹⁴ *ibid.* pp. 205-206

- (d) She frequently refused to acknowledge the authority of the Chair, and to accept or comply with procedural rulings made by the Chair, even where she was made aware of the fact that the particular procedural ruling was one with which the entire Committee agreed.⁹⁵

3.7.2 The difficulties which the Committee was faced with in dealing with Mrs Arena's evidence, as detailed above, reflected the position taken by Mrs Arena throughout the inquiry in which she accused various members of the Committee of bias,⁹⁶ and vigorously objected to the Committee's requests for compliance with its rulings⁹⁷ on the basis that she was not being given procedural fairness in decisions which the Committee was making, particularly as to the editing of the evidence for the purposes of publication.⁹⁸ Mrs Arena's overly vigorous and extremely suspicious responses to procedural decisions made by the Committee reflected in many instances, an unwillingness to acknowledge the correctness of the decisions made by the Committee in the performance of observing its own Resolution dated 24 November 1997:

That all evidence in relation to the Committee's inquiry into the conduct of the Honourable Franca Arena, MLC, be taken in camera, and that the Committee only authorise those sections of the evidence to be made public which it is satisfied will not cause unnecessary damage to the reputations of any individuals, compromise ongoing police investigations or prejudice any matters currently before the courts.⁹⁹

3.7.3 Mrs Arena, in respect of a large number of persons upon whose information she purported to rely in her written submissions and evidence, refused to identify the persons concerned, on the basis of the need to protect the confidentiality of her alleged sources.¹⁰⁰ The large number of persons whose identity she refused to name on purported confidentiality grounds,¹⁰¹ and in a number of cases, the difficulty of formulating any plausible basis for either Mrs Arena or the alleged informant claiming protection from disclosure, gave rise at times to the suspicion on the part of some Committee members that her persistent refusal to name many persons whose

⁹⁵ *ibid.* p. 239.

⁹⁶ For example: Franca Arena, Evidence, 24 March 1998, *Transcripts*, pp. 192, 226.

⁹⁷ For example: Franca Arena, Evidence, 24 March 1998, *Transcripts*, p. 215.

⁹⁸ For example: Franca Arena, Evidence, 24 March 1998, *Transcripts*, p. 189, 239.

⁹⁹ Minutes of the Committee, Appendix 6, p. 2.

¹⁰⁰ Franca Arena, Evidence, 24 March 1998, *Transcripts*, p. 144, 148, 149, 150, 215, 218.

¹⁰¹ For example: Franca Arena, Evidence, 5 March 1998, *Transcripts*, pp. 112, 114, 116, 117, 120.

information she contended that she had relied upon, may have been an obstructive tactic to prevent the Committee from examining whether some of the more significant allegations made by her were based upon bare conjecture, rather than credible information supplied by others.

3.7.4 However Mrs Arena, in her submission dated 6 May 1998, contends that her conduct before the Committee, as distinct from her speech on 17 September 1997, falls outside the Terms of Reference of the Committee, and accordingly is not a matter warranting any adverse inference against her or justifying any recommendation in this Report by the Committee.¹⁰²

3.7.5 There are grounds for considering that Mrs Arena's obstructiveness, disobedience and hostile behaviour during her appearance before it constituted a potential contempt of the Committee. However the Committee recognises that under the Committee's Terms of Reference, it is Mrs Arena's speech in the Legislative Council and not her behaviour before the Committee which is the conduct presently in question. Accordingly any provisional views the Committee may have formed concerning the inappropriateness of her behaviour during the Committee's hearings cannot be permitted, and has not been permitted, to influence in any way the Committee's conclusions and recommendations concerning her conduct in making the speech on 17 September 1997.

3.8 Mrs Arena's allegations in her speech as to meetings and an agreement

3.8.1 The manner in which Mrs Arena's speech can be seen to be structured as to topics provides assistance in the task of determining whether her subsequent explanations and interpretations are either plausible or warrant acceptance.

3.8.2 Mrs Arena's speech commenced with general observations concerning the problem of paedophilia, and some disturbing revelations in the Royal Commission of paedophile behaviour in the community.

3.8.3 Mrs Arena then made brief, passing reference to an article in that day's Sydney Morning Herald by Ben Hills, before returning to the subject of the Royal Commission, twice stating that she wanted to put on the public record matters (which she described as "important matters")¹⁰³ concerning the Royal Commission. She stated that it was "important" that those who read the parliamentary record in the future could "know how the whole issue was perceived by me and by others".¹⁰⁴

¹⁰² Franca Arena, unpublished submission concerning conduct, 6 May 1998, p. 14.

¹⁰³ *Parliamentary Debates*, Legislative Council, 17 September 1997, p. 63.

¹⁰⁴ *ibid.*

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- 3.8.4 The fact that Mrs Arena's introduction heralded the recording of her perceptions as to the "whole issue" of the manner in which the Royal Commission dealt with the paedophile reference casts doubt on her asserted position before the Committee that when making allegations concerning an agreement at a meeting between Mr Carr and Justice Wood, she was only referring to a particular event in October 1996, *late* in the history of the Royal Commission investigations into paedophilia, being the "agreement" between Mr Carr and Justice Wood constituted by Justice Wood agreeing to the amended Terms of Reference for the Royal Commission's paedophile segment.¹⁰⁵
- 3.8.5 Mrs Arena then stated "Readers of this record will make up their own minds if I have been wrong or if other people have been wrong"¹⁰⁶ before stating "there are important matters that I want to put on the record",¹⁰⁷ and then proceeding to refer to, and read aloud, the article by Alex Mitchell published in the Sun Herald on 17 March 1996. The choice which Mrs Arena here acknowledged was one between Mrs Arena being "wrong" in the allegation she was about to make in her speech, and others, who were about to be identified in her speech, being "wrong" in their conduct which influenced the manner in which the paedophile segment of the Royal Commission was conducted.
- 3.8.6 The Committee observes that if, as Mrs Arena now asserts before the Committee, the only agreement between Mr Carr and Justice Wood which she alleged in her speech was an agreement as to the wording of the amended Terms of Reference to the Royal Commission in its paedophilia reference, it makes little sense to preface the making of her allegations of wrongful conduct by others by posing the choice for subsequent readers of the parliamentary record as being whether she had been "wrong" or others had been "wrong". The acceptance by Justice Wood of the amended Terms of Reference proposed by Mr Carr in October 1996 was a matter of undisputable fact and public knowledge, and scarcely a contentious matter upon which she could conceivably be "wrong", or upon which subsequent readers of the public record could be in any doubt. The Committee considers that these introductory words, which immediately precede her lengthy quotation of the Alex Mitchell article, contradict Mrs Arena's more "innocent" explanations of the meaning and purpose of the allegations in her speech concerning agreement being reached at a meeting between Mr Carr and Justice Wood, and indicate strongly an impending allegation in her speech of a very contentious and extremely serious matter, namely significant wrongdoing by Mr Carr, Justice Wood and others in deliberately scuttling the paedophile reference of the Royal Commission, for corrupt reasons.
- 3.8.7 Next, Mrs Arena quoted in full onto the parliamentary record the Alex Mitchell article,

¹⁰⁵ Franca Arena, submission, 30 January 1998, pp. 28- 30, 41.

¹⁰⁶ *Parliamentary Debates*, Legislative Council, 17 September 1997, p. 63.

¹⁰⁷ *ibid.*

published in the Sun Herald on 17 March 1996. The Committee observes that if Mrs Arena was merely leading up to a non-contentious allegation that Mr Carr and Justice Wood agreed upon amended Terms of Reference in October 1996, there was little point in devoting considerable time and energy to reading aloud an entire article published the day before the commencement of the paedophile segment of the Royal Commission, some seven months before, particularly where that article had nothing to say on the subject of either the Terms of Reference of the Royal Commission or of the amending of the Terms of Reference, which did not occur until seven months later.

- 3.8.8 The Sun Herald article by Alex Mitchell on 17 March 1996 reported that the Royal Commission's paedophile inquiry was "starting tomorrow".¹⁰⁸ It both described and predicted an urgent flurry of activity by "an increasingly panicky Parliament"¹⁰⁹ in organising rapid "damage control"¹¹⁰ in the face of a perceived emergency caused by what Mr Mitchell reported were imminent revelations of a shocking nature at the Royal Commission hearings which were to commence the next day.
- 3.8.9 The Committee considers that the full quotation by Mrs Arena of the Sun Herald article reporting rapid and urgent responses by the New South Wales Parliament only makes sense if it was being highlighted by Mrs Arena to justify the serious allegations to which she then moved in the next paragraph of her speech. The use of the Sun Herald article as a preface to her speech was plainly intended to convey that the relevant response by the named politicians and party officials to the particular crisis was to secure quickly an agreement between Mr Carr and Justice Wood, in consequence of three inter-related meetings, involving them and at earlier stages, others, concerning which she makes specific allegations in her speech.
- 3.8.10 The Alex Mitchell article dated 17 March 1996 was predicting, and Mrs Arena in her speech was plainly describing, "damage control" activities which were being activated immediately, rather than embarked upon at a leisurely pace over the following seven months leading up to the amended Terms of Reference being announced in October 1996. However the significant difference was that Alex Mitchell was describing perfectly legitimate steps being taken to limit the political damage which could follow upon shocking revelations being made in the Royal Commission concerning any member of Parliament, whereas Mrs Arena was alleging a different response, namely resort to covert meetings involving Mr Carr, Mr Collins, Mr Della Bosca, Mr Sheahan, other Labor Party figures and ultimately Justice Wood, involving a corrupt agreement whereby Justice Wood in conducting the Royal Commission, would protect high level paedophiles from detection, interception, revelation and punishment of their activities.

¹⁰⁸ *ibid.*, p. 63.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

3.8.11 The meetings alleged by Mrs Arena to have occurred were (a) between Mr Carr and Mr Collins, (b) between Mr Carr, Mr Della Bosca and Mr Sheahan, and (c) between Mr Carr and Justice Wood. Although Mrs Arena later conceded in her speech that the date of the appointed meeting between Mr Carr and Mr Collins may have been shifted, the obvious thrust of her allegations concerning Mr Carr and Mr Collins was that a meeting in fact took place at either at the originally appointed time or shortly thereafter, to plan political damage control in the face of impending revelations in the Royal Commission. The reference by Mrs Arena to "assume"¹¹¹ goes only to the possibility of the changing of the date of the meeting, but nonetheless a meeting which did in fact occur. This is demonstrated by Mrs Arena's reference in the same paragraph to "*another* meeting which took place"¹¹² (at Parliament House between Mr Carr, Mr Della Bosca and Mr Sheahan), which clearly takes as its reference point a first meeting, that is, between Mr Carr and Mr Collins. Moreover, in the next paragraph of her speech, Mrs Arena states "Following *the meeting with Peter Collins* and the late meeting at Parliament House, the Premier met with Justice Wood."¹¹³ This passage leaves in no doubt that Mrs Arena was alleging in her speech the meeting between Mr Carr and Mr Collins took place, this being one of three meetings between the described persons, all with the same purpose, namely, the achievement of the agreement which she then alleges was reached between Mr Carr and Justice Wood "to ensure that people in high places would not be named".¹¹⁴

3.9 Mrs Arena's allegations concerning a meeting between Mr Carr and Mr Collins to discuss the Royal Commission

3.9.1 The Sun Herald article by Alex Mitchell on 17 March 1996, as quoted by Mrs Arena in her speech, asserts that Mr Carr, who was "believed to have received confidential information last week about the explosive new stage of commissioner James Wood's inquiry, had 'invited Opposition Leader Peter Collins to a private meeting in his office on Thursday at 4pm to discuss the Royal Commission'".¹¹⁵ The article then quotes Mr Collins as being "certainly interested to hear what he (ie Mr Carr) has to say".¹¹⁶

3.9.2 Mrs Arena in her speech then stated that:

But what happened? The next day Bob Carr's office denied that such a meeting

¹¹¹ *ibid.* p.63.

¹¹² *ibid.*

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

was ever going to take place, but it is fair to assume that a meeting did indeed take place when the furore had died down.¹¹⁷

- 3.9.3 Having then made allegations about a meeting being held at Parliament House on the following Sunday night between Mr Carr, Mr Della Bosca, Mr Sheahan, and "other important figures in the ALP", Mrs Arena stated:

Following the meeting with Peter Collins and the late meeting at Parliament House, the Premier met with Justice Wood.¹¹⁸

- 3.9.4 Mr Mitchell in his evidence before the Committee, says that he told Mrs Arena on two occasions before she made her speech on 17 September 1997 that a meeting between the Premier and Mr Collins had not taken place.¹¹⁹

- 3.9.5 Mrs Arena however, in her submission dated 30 January 1998 contends that in the first telephone conversation with Mr Mitchell, he said he did not know if the meeting between Mr Collins and Mr Carr took place and would have to "get back to my informer".¹²⁰ She says that she told him during the first telephone conversation that it was "very important to me" that she know if the meeting between Mr Collins and Mr Carr took place, stating "I am doing a speech in Parliament and it is very important that I get the facts right".¹²¹ She further contends that in a second telephone conversation four or five days later he told her that he had not been able to "get back to" his informer, and that when she advised him that it was very important for her to know, he told her he would see what he could do and that if he got the information he would ring her.¹²²

- 3.9.6 In support of her stated belief that Mr Carr and Mr Collins had the meeting, and that such belief was both genuine and reasonable, Mrs Arena has pointed¹²³ to evidence, which she did not have at the time of her speech but which has since emerged, that:

- (a) a meeting was organised as a result of a letter of invitation by Mr Carr and a

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*

¹¹⁹ Mr Alex Mitchell, Evidence, 21 December 1997, *Transcripts*, p. 33.

¹²⁰ Franca Arena, submission, 30 January 1998, p. 25.

¹²¹ *ibid.*

¹²² *ibid.*

¹²³ Franca Arena, unpublished submission concerning conduct, 6 May 1998, p. 10.

letter of acceptance by Mr Collins;¹²⁴

- (b) a draft letter of agenda was prepared which referred to the paedophilia reference;¹²⁵ and
- (c) a meeting did take place although Mr Carr did not attend and paedophilia was not discussed.¹²⁶

3.9.7 There is considerable conflict, which it is unnecessary to resolve, between Mrs Arena's account of her conversations with Mr Mitchell and those which Mr Mitchell maintains in his evidence before this Committee. Nevertheless, it is common ground between Mr Mitchell and Mrs Arena, that Mr Mitchell did **not** confirm to her that a meeting had taken place in March 1996 between Mr Carr and Mr Collins, notwithstanding that she twice said to him that she needed to have further information on the subject as she was about to make a speech in Parliament, and that there were no further conversations between them which gave her any basis for believing that according to information received by Mr Mitchell, the meeting between Mr Carr and Mr Collins had actually occurred. Moreover Mrs Arena does not appear to have made any other inquiries as to whether such a meeting had taken place, and did not raise the matter with either Mr Carr or Mr Collins for clarification before making the speech.

3.9.8 Mrs Arena in her submission dated 6 May 1998 admits that although she assumed that Mr Collins met with Mr Carr effectively to discuss the paedophile segment, she now accepts the evidence that Mr Carr did not ultimately meet with Mr Collins.¹²⁷ She points out that she did not know at the time of her speech that they had not met, basing her "fair assumption" as to such a meeting upon the fact that there was a proposed meeting between Mr Carr and Mr Collins which had been agreed, in correspondence, to be held.¹²⁸

3.9.9 The Committee found it unnecessary to determine whether or not Mrs Arena was telling the Committee the truth as to her recollections of the telephone conversations with Mr Mitchell. Even if the Committee concluded that her evidence concerning these telephone conversations was untruthful, the Committee recognises that its tasks under the Terms of Reference require that it concentrate upon the particular conduct constituted by her speech on 17 September 1997, and not to treat her evidence before

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ *ibid.*

¹²⁷ Franca Arena, unpublished submission concerning conduct, p. 5.

¹²⁸ *ibid.*

the Committee as further conduct in respect of which in this Report the Committee is required to report its conclusions.

3.9.10 The Committee agrees with Mrs Arena's contention that the proper discharge of her Parliamentary responsibilities did not require that she check with either Mr Carr or Mr Collins prior to making allegations in her speech as to a meeting being held between the two of them. However, the seriousness of the allegations she was about to make would ordinarily have required more substantiation than she sought or obtained.

3.10 Mrs Arena's allegations as to the meeting between Mr Carr, Mr Della Bosca, Mr Sheahan and "Other Important Figures in the ALP"

3.10.1 Having placed on the parliamentary record the full text of Mr Mitchell's article in the Sun Herald on 17 March 1996, and made allegations concerning a meeting taking place between Mr Carr and Mr Collins, Mrs Arena stated:

There was also another meeting which took place here at Parliament House late the following Sunday between Bob Carr; the General Secretary of the Australian Labor Party, John Della Bosca; party president, Terry Sheahan; and other important figures in the ALP. Are these people going to deny the meeting took place?

I had confirmation by security officers and others unable to talk about it publicly who could testify to it but are in danger of losing their jobs. I believe it was all to organise damage control. Following the meeting with Peter Collins and the late meeting at Parliament House, the Premier met with Justice Wood.¹²⁹

3.10.2 The immediately following passage in Mrs Arena's speech involved assertions that an "agreement was reached to ensure that people in high places would not be named".¹³⁰

3.10.3 Shortly afterwards in the speech, Mrs Arena expressed her belief that the fact that there was not a single high-profile paedophile named or exposed in the public hearings of the paedophilia inquiry was "due to the fact that it was decided that it was

¹²⁹ *Parliamentary Debates*, Legislative Council, 17 September 1997, p. 63.

¹³⁰ *ibid.*

too damaging for the community to have members of Parliament and judges exposed."¹³¹ Subsequently Mrs Arena twice makes reference to "a massive cover-up".¹³²

3.10.4 The Committee has separately discussed in this report the issues of the nature of the agreement alleged, and of the identities of the persons against whom Mrs Arena can fairly be regarded as making allegations as to their involvement in reaching the agreement. However, the threshold question to be examined is Mrs Arena's particular allegation that Mr Carr, Mr Della Bosca and Mr Sheahan, together with other important figures in the ALP, held a meeting at Parliament House "late the following Sunday",¹³³ that being a matter disputed by the alleged participants. The Committee's larger concern as to this part of Mrs Arena's speech relates to whether Mrs Arena was alleging that the meeting had a particular purpose as distinct from whether the alleged meeting did take place between the named participants at Parliament House late on Sunday 24 March 1996. However the immediate, yet less important, question of whether Mrs Arena had any proper basis for alleging as a fact that the meeting did take place requires separate examination.

3.10.5 Mr Carr, Mr Della Bosca and Mr Sheahan, in their evidence before the Nader Inquiry, (and which was received as evidence before the Committee) have each denied both the holding of the meeting and the occurrence of any attempt or agreement in any way to seek to influence Justice Wood to avoid the naming of high-profile persons who might be exposed as paedophiles in evidence at the Royal Commission hearings.¹³⁴ Further, the records produced by the Deputy Clerk of the Legislative Council to the Nader Inquiry concerning entries, exits and meetings of Mr Carr, Mr Della Bosca and Mr Sheahan did not disclose any entry to Parliament House by them on Sunday 24 March 1996.¹³⁵ Mr Beverstock, Security Manager in charge of security at Parliament House, gave evidence before the Nader Inquiry that Mrs Arena had not spoken to him either before or after 17 September 1997 about meetings at Parliament House involving the Premier and others, nor so far as he was aware had she spoken to any of his security officers.¹³⁶ Indeed each of the security officers on duty on the evening of Sunday 24 March 1996 gave evidence to the Nader Inquiry that they were not aware of any meeting in Parliament House on 24 March 1996 between Mr Carr, Mr Della Bosca

¹³¹ *ibid.* p. 64.

¹³² *ibid.*

¹³³ *ibid.* p. 63.

¹³⁴ *Report of the Special Commission of Inquiry into Allegations Made in Parliament by the Honourable Franca Arena MLC*, the Hon John Nader RFD QC, 7 November 1997, pp. 30-32.

¹³⁵ *ibid.* p. 33.

¹³⁶ *ibid.* pp. 33-34.

and Mr Sheahan and that they had not been approached by Mrs Arena for information or confirmation concerning the occurrence of such alleged meeting.¹³⁷

- 3.10.6 Mrs Arena's explanation to the Committee of the absence of corroboration by security officers and others concerning the holding of the meeting was that, as stated in her speech, "I had confirmation by security officers and others unable to talk about it publicly who could testify to it but are in fear of losing their jobs."¹³⁸ Moreover Mrs Arena, in her submission to the Committee says "I was also informed by my Labor colleagues that a meeting had taken place between Carr, Della Bosca, Terry Sheahan and some party officials to see what could be done to avert the impending crisis".¹³⁹ Mrs Arena also relies upon a conversation with a "former Member of Parliament", who told her he had been informed that the meeting took place.¹⁴⁰ Mrs Arena also alleges in her submission that a member of security services to whom she spoke in April 1996 confirmed to her that he had seen two cars coming in on Sunday night and had recognised the Premier in one of them.¹⁴¹ However she says that this security guard told her in late August or early September 1997 that it was not he who had seen the two cars coming in but rather a colleague who had seen the cars and then told him.¹⁴²
- 3.10.7 The Committee's attempts to check Mrs Arena's alleged sources of information were blocked by her resolute refusal to give the Committee the names of the persons in question. Mrs Arena declined to divulge the names of either the "security guard"¹⁴³ or "my Labor colleagues"¹⁴⁴ or "the former member of Parliament"¹⁴⁵ upon whom she had relied, on the basis that she had undertaken to them to keep their identities confidential. Mrs Arena, in her evidence before the Committee, concedes that the information relied on from her "Labor colleagues" and "the former member of

¹³⁷ *ibid.* pp. 34-35.

¹³⁸ *Parliamentary Debates*, Legislative Council, 17 September 1997, p. 63.

¹³⁹ Franca Arena, submission, 30 January 1998, p. 3.

¹⁴⁰ *ibid.* p. 27.

¹⁴¹ *ibid.* p. 3.

¹⁴² *ibid.* p. 4.

¹⁴³ Franca Arena, Evidence, 5 March 1998, *Transcripts*, p. 116.

¹⁴⁴ Franca Arena, Evidence, 5 March 1998, *Transcripts*, p. 112.

¹⁴⁵ *ibid.* p. 120.

Parliament" depended upon information relayed to those persons by others.¹⁴⁶ She admits that she had no evidence beyond what she had been told.¹⁴⁷

- 3.10.8 The evidence given to the Nader Inquiry by the Parliamentary security staff is consistent with their Security Log Book and the computerised MIL key records and documents that were contemporaneously created in respect of movements into and out of Parliament House at the time in question.¹⁴⁸ Mrs Arena, in her submission to the Committee, has modified her assertion as to the location and time of any meeting between Mr Carr, Mr Della Bosca and Mr Sheahan by saying that they met "on about 24/3/96"¹⁴⁹ and recognising that the location of the meeting may have been elsewhere than Parliament House.¹⁵⁰ She says that if her information was wrong about the date of the meeting or the persons present, "so be it".¹⁵¹ However she maintains her evidence as to what she had been told by a security officer,¹⁵² the former Member of Parliament,¹⁵³ as well as other Labor colleagues.¹⁵⁴
- 3.10.9 The Committee is therefore confronted with conflicting evidence, which for the most part establishes that no meeting was held at the time and place alleged by Mrs Arena, but which falls short of establishing that Mrs Arena in making allegations as to the occurrence of the relevant meeting was not acting upon information which, however inaccurate, was genuinely believed by her to be reliable.
- 3.10.10 The Committee does not consider that Mrs Arena was obliged, prior to making any allegations concerning the holding of the meeting to check with security staff and available records in order to attempt to corroborate any information she says she relied upon in contending that the meeting took place at the particular place and time

¹⁴⁶ Franca Arena, Evidence, 16 March 1998, *Transcripts*, p. 116.

¹⁴⁷ *ibid.*

¹⁴⁸ *Report of the Special Commission of Inquiry into Allegations Made in Parliament by the Honourable Franca Arena MLC*, the Hon John Nader RFD QC, 7 November 1997, p. 33.

¹⁴⁹ Franca Arena, unpublished submission concerning conduct, 6 May 1998, p. 6.

¹⁵⁰ Franca Arena, submission, 30 January 1998, pp. 3, 4, 27.

¹⁵¹ Franca Arena, unpublished submission concerning conduct, 6 May 1998, p 56.

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*

nominated by her, namely "here at Parliament House late the following Sunday".¹⁵⁵ However the gravity of the matters being alleged by her required more strenuous efforts on her part to check her facts than in fact occurred.

- 3.10.11 The Committee considers that the essential thrust of Mrs Arena's speech concerns not the place and time of the alleged meeting, but rather the nature of the agreement alleged by her, and the purpose in reaching that agreement which she attributed to specified persons who she says attended the particular meeting, regardless of its exact date and location.
- 3.10.12 Mrs Arena in her speech asserted as to the meeting between Mr Carr, Mr Della Bosca, Mr Sheahan and other important figures in the ALP: "I believe it was all to organise damage control."¹⁵⁶ The question of the particular purpose of this alleged meeting, and of the succession of meetings which Mrs Arena alleges, lies at the heart of examination of the Committee's examination of Mrs Arena's conduct, and is separately discussed hereunder.

3.11 Mrs Arena's allegations concerning the meeting between Mr Carr and Justice Wood

- 3.11.1 Mrs Arena, in her speech, expressly alleged "Following the meeting with Peter Collins and the late meeting at Parliament House, the Premier met with Justice Wood."¹⁵⁷ She further stated "What happened at the meeting between Justice Wood and Mr Carr I do not know ... but I am bold enough to presume that an agreement was reached to ensure that people in high places would not be named."¹⁵⁸ The motive attributed to Mr Carr and Justice Wood for reaching such an agreement was "as it would have been too traumatic for the community to realise that many of its so-called upstanding citizens were involved in criminal activities".¹⁵⁹ The "result" is described as being that "the whole paedophilia inquiry went into another stage".¹⁶⁰ She referred to the fact that, despite the continuation of public hearings, "we never heard of a single high-profile paedophile being named or exposed"¹⁶¹ and stated her belief that "this is due to the fact

¹⁵⁵ *Parliamentary Debates*, Legislative Council, 17 September 1997, p. 63.

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.* p. 64.

¹⁶¹ *ibid.*

that it was decided that it was too damaging for the community to have members of Parliament and judges exposed. And so the whole matter was swept under the carpet."¹⁶²

- 3.11.2 Mrs Arena, on the face of her speech, appears to be alleging the meeting between Mr Carr and Justice Wood took place within the same close time frame as the other meetings earlier referred to, as part of a concert of action aimed at advancing a specific goal.
- 3.11.3 Mrs Arena was alleging, in her speech, a meeting between Mr Carr and Justice Wood in respect of which the agreement reached was one which she had to "presume"¹⁶³ as she conceded she did not know what happened at the meeting, because no "information" was "leaked".¹⁶⁴ Indeed, the general impression conveyed by this language in her speech is of a meeting where what occurred and in particular what was agreed at the meeting was deliberately kept secret by those attending the meeting or otherwise responsible for the meeting being held. The alleged meeting between Mr Carr and Justice Wood was most certainly not being put forward by Mrs Arena as one where the meeting itself, and the agreement to which it gave rise, were a matter of either official record or public knowledge, or so intended by its participants.
- 3.11.4 Mrs Arena's contention in her speech concerning the existence of the particular agreement between Mr Carr and Justice Wood was introduced by the words "I am bold enough to presume that".¹⁶⁵ The reason plainly given for expressing herself in the language of presumption rather than conclusion was that she did not know what happened at the meeting as no information was leaked. However the preceding submissions as to a lack of information which was available either generally or to her do not dilute the force of the allegations she was making. The assertion that "I am bold enough to presume" was not merely a bland description of the tentative or provisional state of her thinking on the subject, but rather a definite and dramatic proposition which required her to be "bold", and involved a conclusion which ought be taken as true, until contrary proof emerged. The balance of the speech was expressed as positive conclusions of fact, rather than the mere raising of possibilities. Indeed her reference to the "result"¹⁶⁶ and to "the fact that it was decided"¹⁶⁷ left no room for doubt that she

¹⁶² *ibid.*

¹⁶³ *ibid.* p. 63.

¹⁶⁴ *ibid.*

¹⁶⁵ *Parliamentary Debates*, Legislative Council, 17 September 1997, p. 63.

¹⁶⁶ *ibid.* p. 64.

¹⁶⁷ *ibid.*

intended her speech to be understood by the media and the community as laying down for posterity what she wanted recorded as being the derailing of the Royal Commission in consequence of actual agreements reached at meetings which she firmly believed were held. The meeting between Mr Carr and Justice Wood was an alleged fact, and so also was the agreement to which she referred; with the language of presumption scarcely diluting its intended, or probable impact.

3.12 Mrs Arena's allegations as to the purposes behind the meetings and any agreement

3.12.1 Mrs Arena's allegations that the meetings took place and agreements were reached followed immediately after her quotation from Mr Mitchell's article of 17 March 1996. The concluding passages of the quoted article state that after a small group of policemen who were actively involved in paedophile networks were discovered by the Wood Royal Commission and were forced to "roll over", the Wood Royal Commission made "ground-breaking headway into the world of one of Australia's most shameful secrets".¹⁶⁸

3.12.2 Mrs Arena's answer to her own question as to "what happened"¹⁶⁹ was clearly intended by her to be understood as meaning that the Wood Royal Commission was prevented from performing its function properly as a consequence of three meetings which produced an agreement between Mr Carr and Justice Wood "to ensure that people in high places would not be named". Moreover Mrs Arena made clear in her speech that because of the existence of this agreement no members of Parliament or judges were exposed,¹⁷⁰ the Royal Commission did not ask for the prosecution of high-profile paedophiles on whom it had evidence and witnesses,¹⁷¹ and the Royal Commission did not even try to get any evidence of those persons who were paedophiles.¹⁷² The "massive cover-up"¹⁷³ to which reference was made was described as being one where "important people in our community",¹⁷⁴ who are "the untouchables in our society"¹⁷⁵ were given special and favoured treatment by the Royal Commission in the conduct of

¹⁶⁸ *ibid.* p. 63.

¹⁶⁹ *ibid.*

¹⁷⁰ *Parliamentary Debates*, Legislative Council, 17 September 1997, p. 63.

¹⁷¹ *ibid.*

¹⁷² *ibid.*

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

its investigation and public hearings, so that not a single high-profile paedophile from that favoured group was named or exposed.¹⁷⁶

- 3.12.3 Mrs Arena's speech cannot sensibly be understood as conveying anything other than very serious allegations that:
- (a) Justice Wood failed to perform his public duty as Royal Commissioner;
 - (b) arising out of a succession of meetings which Mr Carr had with others (including Mr Collins, Mr Della Bosca and Mr Sheahan), Mr Carr and Justice Wood agreed to confer favoured treatment on persons of social, political or judicial prominence in the community by ensuring that they would be protected from investigation, detection, exposure or punishment; and
 - (c) all participants at the three meetings intended that this result would be achieved by virtue of Justice Wood's capacity to control the manner in which the Royal Commission performed its investigative hearing and reporting tasks.

3.13 The purposes attributed by Mrs Arena to the participants at the three alleged meetings

- 3.13.1 The Committee observes that Mrs Arena's speech left as a matter of inference the purposes of and agreements reached by, the participants in the two earlier meetings, namely the meeting between Mr Carr and Mr Collins, and the subsequent meeting between Mr Carr, Mr Della Bosca, Mr Sheahan "and other important figures in the ALP".
- 3.13.2 The expression by Mrs Arena of her belief that the meeting at Parliament House "was all to organise damage control"¹⁷⁷ may, on one view, be taken as a reference to the type of "pro-active damage control"¹⁷⁸ referred to in Mr Mitchell's article, which consisted of preventive steps being taken to mitigate potential electoral damage from a member of Parliament being adversely named by the Royal Commission. The article itself refers to steps taken by the Carr Government to increase benefits to rural communities, and improve relationships with independent members.¹⁷⁹

¹⁷⁶ *ibid.*

¹⁷⁷ *Parliamentary Debates*, Legislative Council, 17 September 1997, p. 63.

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid.*

- 3.13.3 However the Committee considers this approach to be unrealistic given the various indications in her speech that she was alleging that each of the persons named shared a common purpose of securing agreement to ensure that people in high places would not be named as paedophiles in the Royal Commission.
- 3.13.4 Firstly, Mrs Arena's descriptions of the three meetings all convey the same elements of secrecy and covert behaviour: the meeting between Mr Carr and Mr Collins is described as one where the meeting was shifted to an unknown date because of the existing furore,¹⁸⁰ and the meeting at Parliament House is portrayed as an urgent late night meeting where anyone who later talked publicly about it or testified concerning it could lose their jobs.¹⁸¹
- 3.13.5 Secondly, the meeting between Mr Carr and Justice Wood is alleged as the third meeting,¹⁸² where the indicated sequence of meetings was put forward not merely in chronological order but also as a logical outcome of the two preceding meetings.
- 3.13.6 Thirdly, where Mrs Arena then made reference to decisions being made¹⁸³ and massive cover-ups,¹⁸⁴ there was no attempt to discriminate between the activities and the purposes of any of the persons whom she alleges attended the three meetings. The later contention that "there are people who have to answer to future generations as to why important people such as judges and members of Parliament were given protection"¹⁸⁵ involved no suggestion that she was leaving out of this particular group of "people" any of the persons whom she had alleged attended the three meetings.
- 3.13.7 Fourthly, the unlikelihood that Mr Collins was being left out of the alleged ring of wrongdoers can be inferred from the fact that just as Mr Mitchell's article referred to a flurry of protective activity in both Government and Opposition ranks,¹⁸⁶ Mrs Arena nowhere suggested that the politicians whose protection from exposure was being sought came only from the Government ranks and not from the Opposition ranks.

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*

¹⁸² *ibid.*

¹⁸³ *ibid.*

¹⁸⁴ *ibid.*

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*

- 3.13.8 Fifthly, there appears to be little sense in Mrs Arena referring to Mr Collins' meeting with Mr Carr if that meeting was not intended by Mrs Arena to serve to explain what Mrs Arena was contending was the deliberate derailing of the Royal Commission so that politicians and other important figures in the community were given undeserved protection.
- 3.13.9 The Committee therefore concludes that Mrs Arena's speech would be reasonably understood by the media and the community to mean not only that Mr Carr and Justice Wood met and that "an agreement was reached to ensure that people in high places would not be named"¹⁸⁷ but also that two earlier meetings took place, one between Mr Carr and Mr Collins, and the other between Mr Carr, Mr Della Bosca and Mr Sheahan, to plan the suppression of names of individuals allegedly being investigated by the Royal Commission into the NSW Police Service. Despite Mrs Arena's submissions to the contrary,¹⁸⁸ the Committee concludes that the Terms of Reference for the Nader Inquiry¹⁸⁹ correctly conveyed the natural effect of the claims made by Mrs Arena in her speech on 17 September 1997. However, as previously stated, the Committee considers that for the reasons already given, it should wholly disregard the findings made by the Nader Inquiry, and reach its own independent conclusions and recommendations concerning Mrs Arena's conduct, constituted by her speech on 17 September 1997.¹⁹⁰

3.14 Mrs Arena's explanations of her speech

- 3.14.1 Mrs Arena says she made no allegations in her speech concerning the making of agreements between Mr Carr and Mr Collins, or between Mr Carr, Mr Della Bosca and Mr Sheahan.¹⁹¹ She contends that the terms of reference for the Nader Inquiry were misleading in that they refer to claims which she did not make.¹⁹² She says "My speech does not claim that Collins met to plan the suppression of names, nor does my speech claim that Mr Carr, Mr Della Bosca and Sheahan met to plan the suppression of names."¹⁹³

¹⁸⁷ *ibid.*

¹⁸⁸ Franca Arena, submission, 30 January 1998, p. 36.

¹⁸⁹ *Report of the Special Commission of Inquiry into Allegations Made in Parliament by the Honourable Franca Arena MLC*, the Hon John Nader RFD QC, 7 November 1997, p. 33.

¹⁹⁰ See paragraph 3.4.8.

¹⁹¹ Franca Arena, submission, 30 January 1998, pp. 36, 40.

¹⁹² *ibid.* pp. 36, 57.

¹⁹³ *ibid.* p. 36.

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- 3.14.2 Mrs Arena contends that she was not alleging any "serious criminal conduct"¹⁹⁴ on the part of the persons referred to in her speech of 17 September 1997 as attending the particular meetings. She contends that she did not speak of criminal offences,¹⁹⁵ and in particular, made no allegation of the existence of a conspiracy or of any criminal, unlawful or corrupt agreement by the named persons.¹⁹⁶ She contends that she did not allege a breach of the law,¹⁹⁷ or a conspiracy to break the law or pervert justice,¹⁹⁸ and repeats on a number of occasions in her written submissions and oral evidence that no conspiracy was alleged by her.¹⁹⁹
- 3.14.3 Mrs Arena further explains that in referring in her speech to a "massive cover-up"²⁰⁰ she was merely contending that Justice Wood did not have the type of expanded Terms of Reference which she thought was necessary to investigate all aspects of paedophilia, and that in consequence, Justice Wood, by adhering to the limits imposed by the Terms of Reference, as he was obliged to do, refrained from investigation and inquiry into paedophile conduct by individuals in the community.²⁰¹ According to Mrs Arena's explanations both in her submission and evidence, the purpose of limiting the Terms of Reference was to prevent the public from becoming disturbed by revelations of paedophile conduct by important people, and to avoid potential electoral damage arising from revelations of paedophile conduct amongst members of Parliament.²⁰²
- 3.14.4 Further, Mrs Arena says that there was nothing sinister about Mr Carr and Justice Wood discussing the Terms of Reference regarding paedophilia in October 1996.²⁰³ However she complains that as the result of such meeting, including any preceding meetings between them, an agreement was reached by them to have narrow Terms of Reference for the paedophile segment of the Royal Commission, and that this agreement ensured that no inquiry into all aspects of paedophilia would occur and, thus no high profile

¹⁹⁴ *ibid.* pp. 36, 37, 39.

¹⁹⁵ *ibid.* p. 37.

¹⁹⁶ *ibid.* p. 43.

¹⁹⁷ *ibid.*

¹⁹⁸ *ibid.*

¹⁹⁹ *ibid.* p. 44.; Franca Arena, submission, 6 May 1998, p. 3.

²⁰⁰ *Parliamentary Debates*, Legislative Council, 17 September 1997, p. 64.

²⁰¹ Franca Arena, unpublished submission concerning conduct, 6 May 1998, p. 55.

²⁰² Franca Arena, submission, 30 January 1998, pp. 30-31.

²⁰³ *ibid.* p.47.

paedophiles would be named.²⁰⁴ Mrs Arena has explained that where she stated concerning Mr Carr and Justice Wood that "an agreement was reached to ensure that the people in high places", she would on further reflection, prefer to make her originally intended meaning clearer by amending the words "to ensure" to read "which had the effect of ensuring".²⁰⁵ She says that such an amendment would clarify her position that she was not alleging that the sole purpose of the agreement was to protect high-profile paedophiles from disclosure and that what she really meant to convey was that the purpose of the agreement (ultimately reached by Mr Carr and Justice Wood in October 1996), was to have limited Terms of Reference preventing an inquiry into all aspects of paedophilia, with the result that high profile paedophiles would not be investigated or named.²⁰⁶

3.15 The date of the alleged agreement between Mr Carr and Justice Wood

- 3.15.1 Mrs Arena particularly emphasises that when speaking of the meeting and agreement between Mr Carr and Justice Wood, she was not referring to events in March 1996 shortly after the Sun Herald article by Mr Alex Mitchell, but rather to the fact that in October 1996 Mr Carr secured the agreement of Justice Wood as to the content of amended Terms of Reference for the paedophile segment of the Royal Commission into the Police Service²⁰⁷. In short, Mrs Arena contends that she was engaging in legitimate political criticism²⁰⁸ of the limited Terms of Reference governing the paedophilia reference of the Wood Royal Commission, as determined by Mr Carr and agreed to by Justice Wood in October 1996.
- 3.15.2 There is considerable evidence that Mrs Arena intended to convey in her speech that Mr Carr and Justice Wood reached a covert agreement in about March 1996, rather than an agreement which was a matter of undisputed record in October 1996.
- 3.15.3 The Committee's initial difficulty with accepting Mrs Arena's explanation that she was merely referring to a perfectly legal, yet politically improper, decision as to the scope of the event of Terms of Reference in October 1996, is that such an interpretation does not naturally arise from the terms in which she made her speech. In her speech, the agreement reached between Mr Carr and Justice Wood was one which occurred at a

²⁰⁴ *ibid.* p. 57.

²⁰⁵ *ibid.*

²⁰⁶ *ibid.*

²⁰⁷ Franca Arena, submission, 30 January 1998, pp. 28-29.

²⁰⁸ Franca Arena, unpublished submission concerning conduct, 6 May 1998, p. 7.

meeting where because "no information was leaked"²⁰⁹ she does not know "what happened"²¹⁰ and has to "presume" the agreement which was reached.²¹¹ This does not fit in with her explanation to the Committee that the agreement referred to was merely the agreement by Justice Wood to the Terms of Reference proposed by Mr Carr in October 1996 in respect of which there was a public announcement by means of an official press release.²¹²

- 3.15.4 Moreover, the context in which Mrs Arena refers in her speech to a succession of three meetings, would appear to suggest a time frame close to 17 March 1996 when the Sun Herald article was published and 18 March 1996 when the Royal Commission was due to commence hearings on its paedophile reference. The agreement which Mrs Arena alleges appears to have been put forward to explain why during the entire currency of the paedophile inquiry not a single high-profile paedophile was named or exposed,²¹³ and why the Royal Commission "did not even try" to get evidence to catch some of the high-profile paedophiles in the community,²¹⁴ and "the whole matter was swept under the carpet".²¹⁵ Although Mrs Arena makes subsequent reference to the amended Terms of Reference issued by Mr Carr on 22 October 1996, her speech does not simply proffer those Terms of Reference as being the explanation for what she sees to be the limited activities by the Royal Commission. The three meetings that she alleges at the start of her speech are plainly held out by her as being the reason why the Royal Commission failed to achieve any effect in terms of identifying and exposing paedophiles.
- 3.15.5 The Committee's conclusion that Mrs Arena, in discussing this alleged agreement between Mr Carr and Justice Wood, was referring to a covert meeting in about March 1996 rather than a position publicly arrived at in October 1996 was fortified by evidence which is discussed hereunder, from Commander Clive Small as to what Mrs Arena alleged to him on 19 March 1997, as to an agreement reached by Mr Carr and Justice Wood.²¹⁶ The Committee recognises that although Commander Small's evidence

²⁰⁹ *Parliamentary Debates*, Legislative Council, 17 September 1997, p. 64.

²¹⁰ *ibid.*

²¹¹ *ibid.*

²¹² Franca Arena, submission, 30 January 1998, pp. 28-29, 41.

²¹³ *Parliamentary Debates*, Legislative Council, 17 September 1997, p. 64.

²¹⁴ *ibid.*

²¹⁵ *ibid.*

²¹⁶ Clive Small, Evidence, 15 May 1998, *Transcripts*, pp. 331-349.

bears upon Mrs Arena's intentions and beliefs at the time when she made the speech on 17 September 1997, his evidence is incapable of altering the manner in which that speech would have been understood by the community at the time when it was made.

3.16 Allegations made by Mrs Arena to Commander Small on 19 March 1997

- 3.16.1 On 19 March 1997 Mrs Arena met with Commander Clive Small of the NSW Police Service at the Sydney Police Centre. Commander Small took handwritten notes of the meeting, and produced those notes to the Committee.²¹⁷ According to Commander Small's recollection, and as confirmed by his handwritten notes, Mrs Arena told him following publication of a Sun Herald article in September 1996 "which described how the Royal Commission was about to call prominent people",²¹⁸ there was a meeting between Mr Carr, Mr Della Bosca, Mr Sheahan and other party officials to discuss the story, and that subsequent to that meeting Mr Carr "went to see Justice Wood and the Royal Commission then did not follow-up on the paedophile inquiry".²¹⁹ Mrs Arena expressed to Commander Small her "theory" that Mr Carr had put to Justice Wood "If you don't mention members of Parliament we won't mention judges".²²⁰ Mrs Arena further contended that "they were going to close the Royal Commission and then when the Yeldham matter was mentioned the paedophile inquiry opened and proceeded".²²¹
- 3.16.2 On 21 March 1997, some two days after his meeting with Mrs Arena, Commander Small had a meeting with Senior Counsel assisting the Royal Commission into the Police Service, Mr Gary Crooke QC, Junior Counsel assisting the Royal Commission, Paddy Bergin, and Senior Counsel representing the NSW Police Service, Michael Finnane QC and related to them what Mrs Arena had told him on 19 March 1997. The Committee has seen a note kept by Ms Bergin of that meeting.²²² According to paragraph 5 of her note of what Commander Small had reported at the meeting on 21 March 1997 he was told by Mrs Arena on 19 March 1997:

Arena put a chronology to him about a Sydney Morning Herald article in September 1996 which said that the Commission was going to do certain things in respect of Judges and MPs. There was then a meeting of the Labor Party group including Mr Carr and Mr Della Bosca. She alleges that later that week Carr met with Wood and that there was an agreement in the following terms: Carr says If you don't name the

²¹⁷ *ibid.* pp. 332-3.

²¹⁸ *ibid.* p. 334.

²¹⁹ *ibid.*

²²⁰ *ibid.*

²²¹ *ibid.*

²²² Paddy Bergin, unpublished file note entitled "PAB File Note", dated 21 March 1997.

politicians, we won't name the Judges. After that there were articles about the Commission closing down. Franca also claimed all credit for anything that has happened in the last three months in the Royal Commission.²²³

- 3.16.3 Mr Small obtained the impression from speaking with Mrs Arena that she was referring to the meeting between Mr Carr and Justice Wood and the preceding meeting between Mr Carr and Mr Della Bosca as both occurring within "a very short timeframe".²²⁴ Although the note by Ms Bergin does not refer to Mrs Arena's allegation as to the agreement between Mr Carr and Justice Wood as being a "theory", Commander Small stated that he used the expression "theory" in reporting at the meeting concerning his conversation with Mrs Arena two days earlier, even if the word "theory" was not duplicated in the note of the meeting on 21 March 1997.²²⁵

3.17 The effect of Commander Small's evidence upon Mrs Arena's explanation as to the date of the agreement between Mr Carr and Justice Wood

- 3.17.1 The Committee has already, for the reasons given above, concluded that Mrs Arena's speech, where it referred to an agreement being reached between Mr Carr and Justice Wood "to ensure that people in high places would not be named"²²⁶ was not merely referring to the amended Terms of Reference proposed by Mr Carr and agreed to by Justice Wood in October 1996, but to a covert agreement reached between Mr Carr and Justice Wood as the culmination of a series of meetings between Mr Carr and other persons for the same purpose in March 1996.²²⁷
- 3.17.2 The Committee is fortified in this view by Commander Small's evidence that when Mrs Arena met with him on 19 March 1997, he placed the meeting between Mr Carr, Mr Della Bosca and Mr Sheahan and the meeting between Mr Carr and Justice Wood within the same very short timeframe. The Committee concludes that the 7 month gap between March 1996 and October 1996 makes it extremely unlikely that Mrs Arena's present explanation of her intentions coincided with her beliefs when she spoke to Mr Small or when she gave the speech on 17 September 1997. The Committee concludes that the very short timeframe for the two meetings coincides with that which is conveyed by the sense of what Mrs Arena actually said on the subject in her speech on 17 September 1997.

²²³ *ibid.*

²²⁴ Clive Small, Evidence, 15 May 1998, *Transcripts*, p. 335.

²²⁵ *ibid.* pp. 334, 338.

²²⁶ *Parliamentary Debates*, Legislative Council, 17 September 1997, p. 64.

²²⁷ See paragraphs 3.15.1-3.15.5.

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- 3.17.3 The Committee also notes that the above conclusions are consistent with the manner in which Mrs Arena in various passages of her evidence conveyed the belief that at the time when the meetings and agreement took place as alleged in her speech, the Government majority was only one seat. The Government won the Clarence by-election on 25 May 1996, which meant that the relevant meeting between Mr Carr and Justice Wood cannot sensibly be understood as having occurred in October 1996, because by that stage the Government had a majority of three seats. The fact that Mrs Arena contends that she believed that Mr Carr's motive for reaching the relevant agreement was "to protect his Parliamentary majority"²²⁸ is more consistent with Mrs Arena at the time of her speech believing or intending to convey that the meeting between Mr Carr and Justice Wood took place while the Government's majority was one seat only, as it was before the Clarence by-election on 25 May 1996.
- 3.17.4 Further the allegations made by Mrs Arena as to the holding of all three meetings follow immediately upon her lengthy quotation from Mr Mitchell's article in the Sun Herald on 17 March 1996, in which it was reported that "If any of the named child sex practitioners are from the Labor side, it has the potential to oust the Carr Government which is in office by a majority of *just one seat*".²²⁹ The speech by Mrs Arena in the Committee's view would have been reasonably understood to convey that the three meetings referred to and the consequent agreement, occurred immediately after the date of the article on 17 March 1996, and at a time when the Carr Government had a majority of just one seat. Since the Carr Government, by virtue of the Clarence by-election on 25 May 1996, had a majority of three seats, it is quite unlikely that the community would understand, or Mrs Arena would intend the speech to convey, that the relevant agreement between Mr Carr and Justice Wood occurred in October 1996 when the amended Terms of Reference were decided upon.
- 3.17.5 The Committee rejects Mrs Arena's evidence and her submissions that when referring to a meeting between Mr Carr and Justice Wood and an agreement being reached between them at such meeting, she was merely referring to events in October 1996 when the amended Terms of Reference of the Royal Commission were agreed upon. The Committee considers it to be indisputable that her allegations as to a meeting and agreement between Mr Carr and Justice Wood related to an entirely different type of agreement of an improper kind, reached in about March 1996.

²²⁸ Franca Arena, submission, 30 January 1998, p. 63.

²²⁹ *Parliamentary Debates*, Legislative Council, 17 September 1997, pp. 63-64.

Chapter Four

PRIVILEGE AND SANCTIONS

FREEDOM OF SPEECH

4.1 Bill of Rights 1689

- 4.1.1 The privilege of freedom of speech is fundamental to the work performed by Members of Parliament. The privilege has its origin in Article 9 of the Bill of Rights 1689 (Imp), which states:

That the freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place outside of Parliament.²³⁰

- 4.1.2 The privilege of freedom of speech in the Westminster system is considered to be an absolute privilege, and in the absence of express statutory waiver, protects parliamentary speech from interference and scrutiny by the judicial and executive arms of government.
- 4.1.3 According to *May*: “[s]ubject to the rules of order in debate, a Member may state whatever he thinks fit in debate, however offensive it may be to the feelings, or injurious to the character, of individuals; and he is protected by his privilege from any action for libel, as well as from any other question or molestation.”²³¹ The importance of the privilege of freedom of speech has been described by Professor Enid Campbell in the following terms:

Freedom of speech and debate in parliament is one of the most cherished of all parliamentary privileges, without which parliaments probably would degenerate into polite but ineffectual debating societies. Freedom of speech and the associated powers of the Houses to determine their own order and subjects of debate, the English parliamentarians of the sixteenth and seventeenth century believed was the key to parliamentary supremacy - supremacy over the Crown and its ministers.²³²

4.2 Limitations

- 4.2.1 However, while article 9 provides absolute freedom from outside interference, debate in the House is still subject to the rules which Parliament itself imposes. In the Legislative Council, for example, the rules of order in debate preclude the use of

²³⁰ Article 9 applies in New South Wales by virtue of section 6 and schedule 2 of the Imperial Acts Application Act 1969 (NSW).

²³¹ Erskine May, *Parliamentary Practice*, 22nd edition, Butterworths, London: 1997, p. 83.

²³² Campbell, E, *Parliamentary Privilege in Australia*, MUP, Melbourne:1966, p. 28.

offensive language (SO 80), irreverent reference to the Queen or her representative (SO 79), reflection upon votes of the House (SO 78), and the imputation of improper motives and personal reflections upon Members of either House (SO 81). Rulings from the Chair have also precluded irreverent reference and personal reflections upon judges, and have limited debate on matters deemed sub judice. In addition, a Member's conduct both within and outside the House is subject to the House's powers to deal with contempt, such as its powers to impose sanctions where a Member is adjudged guilty of "conduct unworthy of a Member" of the House.

- 4.2.2 When a Member does breach the rules of debate or engages in "unworthy" conduct the House is able to take action to protect itself. As *May* states "article IX preserves the authority of both Houses [of the British Parliament] to restrain and even punish their Members who, by their conduct, offend the House."²³³ Members of the British Parliament have been frequently called to account and punished by the House for offensive words spoken before the House. Some have been admonished, others imprisoned, and in the Commons some have even been expelled. The right of the House of Lords to commit a peer for words spoken in the House was recognised by the Court of Kings Bench in Shaftesbury's case. However, as *May* indicates, in recent years "the disciplinary powers of privilege are not normally resorted to" since offensive words are dealt with summarily under the Standing Orders.²³⁴

SANCTIONS IN THE LEGISLATIVE COUNCIL

4.3 Powers of the House

- 4.3.1 The NSW Parliament, unlike other parliaments in Australia, has not yet legislated comprehensively for its privileges. In the absence of legislation, the NSW Houses of Parliament must rely on their inherent powers. The inherent powers of the Parliament of New South Wales have been given judicial recognition in the following terms:

...there exist well-recognized overriding common-law principles which enlarge Parliamentary power...the first or primary essentials may be stated thus: in the absence of express grant the Legislative Council possesses such powers and privileges as are implied by reason of necessity; the necessity which occasions the implication of a particular power or privilege is such as is necessary to the existence of the Council or to the due and orderly exercise of its functions.²³⁵

- 4.3.2 The Courts have held that those powers which are "necessary" to the existence of the House or to the due exercise of its functions are protective and self defensive only, and

²³³ Erskine May, *Parliamentary Practice*, 22nd edition, Butterworths, London: 1997, p. 83

²³⁴ *ibid.*

²³⁵ *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 391.

not punitive.²³⁶ In this regard, the powers of formerly subordinate legislatures such as the Parliament of NSW differ from those of the House of Commons, where the power to punish for contempt has been clearly established.

- 4.3.3 In view of the limited powers of the House, any action on behalf of the House, whether against a member of the public or against a Member of the House, must be demonstrably to protect the House and its dignity, and not seek to impose punishment or retribution. Whether a sanction is ultimately self-protective or punitive can depend on a number of factors, and there is no clearly established rule. As Enid Campbell states:

Since *Kielley v Carson*, the courts have consistently held that the inherent self-protective powers of the houses of colonial legislatures do not extend to punishment for breach of privilege, contempt, or for any other cause. What constitutes punishment in this context is not altogether clear. It includes imprisonment and probably fines, but it has also been held to include suspension of a member for an indefinite period of time, arrest of a member after he has left the chamber so that he might be brought back, and exclusion of a validly suspended member from a lodge set aside for use by country members.²³⁷

4.4 Types of sanctions available

- 4.4.1 Subject to the limitations on the Parliament's inherent powers outlined above, the House has a number of sanctions available to it where it considers that a contempt has been committed. These include reprimand and admonishment; apology and withdrawal of words spoken; censure; suspension, either for a stated period of time or until the submission of an apology; and expulsion.

Reprimand and admonishment

- 4.4.2 The House has the power to order a member of the public to attend at the Bar of the House to be reprimanded or admonished by the President in the name and by the authority of the House. Any such reprimand or admonishment is entered into the Minutes. Members of the House may similarly be reprimanded or admonished while standing in their place. Recently in the House of Commons, Members have been formally reprimanded and suspended,²³⁸ with loss of salary for the period of suspension.

Apology and withdrawal of words spoken

- 4.4.3 In debate, when a Member uses offensive language (SO 80) or imputes improper

²³⁶ See *Barton v. Taylor* (1886) 11 AC 197, *Willis and Christie v. Perry* (1912) 13 CLR 592, *Armstrong v. Budd* (1969) 71 SR (NSW) 386.

²³⁷ Campbell, E, 'Expulsion of Members of Parliament', (1971) *University of Toronto Law Journal*, p. 24.

²³⁸ May, *op. cit.*, p. 140

motives (SO 81) it is normal practice for a point of order to be taken at the time that the Member offends. If the President rules that the words spoken are offensive or impute improper motives, then the Member is required to withdraw them immediately. Failure to do so can result in suspension of the Member concerned. If the words spoken are considered to be so grave that their simple withdrawal is deemed insufficient, the House is within its power to order the Member not only to withdraw them but to make a formal apology as well. The form of the apology would depend on the nature of the words spoken, and could conceivably include the requirement to apologise to particular individuals, if such was considered necessary.

Censure

- 4.4.4 A ‘vote of censure’ is usually a motion expressing lack of confidence in the Government or a particular Minister. However, there is nothing which prevents such a motion being moved against a private Member, and there have been recent examples of motions of censure against private Members in both the Council²³⁹ and the Senate, although in the Council none has proceeded beyond the giving of notice.²⁴⁰ A censure motion against a private Member has no constitutional or legal consequences, but can have a significant political impact.

Suspension

- 4.4.5 Suspension and expulsion are the more severe forms of disciplinary action which can be taken by the House against its Members. Suspension from the House usually results from disregarding the authority of the Chair or abusing the rules of the House and is carried out under Standing Orders 259 and 260²⁴¹. However, under its inherent or implied powers, the House may suspend a Member for matters other than “a wilful or

²³⁹ On 4 April 1990, the Leader of the Government sought leave to suspended Standing Orders to move a motion of censure against the Deputy Leader of the Opposition. Leave was not granted. [(1990-91) 181 *Leg. Council Journal* p. 79.] On 23 May 1990, the Leader of the Government gave a Notice of Motion censuring an Opposition Member for misleading the House regarding the status of certain documents. [(1990-91) 181 *Leg. Council Notices* p. 222.] The motion was never moved, and the Notice withdrawn on 15 August 1990. [(1990-91) 181 *Leg. Council Journal* p. 345.]

²⁴⁰ Odgers, *Australian Senate Practice*, 8th edition, AGPS, Canberra:1997, p. 447.

²⁴¹ Standing Order 259: A Member named by the President or reported by the Chairman as having been named by him in Committee of the Whole House as guilty of a wilful or vexatious breach of any Standing Rules and Orders, or as interrupting the orderly conduct of the business of the House, may be adjudged by the House on motion, without notice, guilty of contempt, no debate being allowed on such Motion except an explanation by the Member named.

Standing Order 260: A Member adjudged by the House, for any of the causes herein before mentioned, guilty of contempt, may be suspended form the service of the House for such time as the House shall by resolution declare.

vexatious breach of ... the Standing Rules and Orders”.²⁴² For example, Members have been suspended from the House of Commons in respect of the terms of a letter addressed by a Member to the Speaker and of his conduct in the House on preceding days; for publishing a letter reflecting on the Speaker’s conduct in the Chair; for damaging the mace (after the House had risen) and conduct towards the Chair on a preceding day; and for conduct falling below the standards the House was entitled to expect.

4.4.6 The most recent instance of a Member of the House of Commons being found guilty of conduct “below the standards which the House is entitled to expect” in 1994. In its First Report for the Session 1994-95, the House of Commons Committee of Privileges found that the conduct of two Members, in accepting cash to the amount of £1000 in return for tabling a question in Parliament, while not amounting to bribery, was nonetheless “dishonourable and damaging to the standing and reputation of Parliament.”²⁴³ In reaching this conclusion the Committee relied on the Clerk’s submission that “there is a general obligation upon Members not to allow their conduct to fall below the standards which the House is entitled to expect of them and acts relating to conduct which materially damage the standing and reputation of the House are a contempt, and as such are breaches of its privileges.”²⁴⁴ The Members concerned were eventually suspended from the service of the House, with corresponding suspension of salary, one for a period of 10 days and the other for a period of 20 days.²⁴⁵ Unlike the House of Commons, the Council has no power to suspend the salary of a Member for the term of their suspension.

4.4.7 The nature of the suspension may be a critical factor that the Courts would take into consideration if any issue arose as to whether the suspension was self-protection or punishment. While suspension for a fixed period could reasonably be deemed as protective and self-protective, a long term suspension could be seen as a punishment. Suspension for an indefinite time was found by the Privy Council in *Barton v. Taylor* to be beyond the powers of the NSW Legislative Assembly since unconditional suspension is not necessary to the existence of the House nor to the exercise of its functions.²⁴⁶ Suspension until compliance with a specific order of the House, such as withdrawal of specific words or an apology, regardless of the length of time involved, could constitute

²⁴² May, *op. cit.*, p. 140.

²⁴³ HC 351 (1994-95), First Report of the Privileges Committee on *Complaint Concerning an Article in the ‘Sunday Times’ of 10 July 1994 relating to the conduct of Members.*

²⁴⁴ *ibid.*, p. 11.

²⁴⁵ CJ (1994-95) 286. The difference in the severity of punishment was based on the fact that one of the Members mitigated his punishment by accepting responsibility, pleaded guilty immediately and apologised for the trouble caused. [HC Debates, (1994-95) vol. 258, cc358-9]

²⁴⁶ *Barton v. Taylor* (1886) 11 AC 197.

a reasonable and self-protective action rather than a punishment since the length of the suspension is at the discretion of the Member concerned rather than the House.

- 4.4.8 Recent examples of suspension of Members from the Legislative Council include both Ms Bignold (18 October 1989) and Ms Kirkby (14 November 1994),²⁴⁷ for refusing to withdraw words when directed to by the Chair, and Mr Egan (2 May 1996), for failing to table papers when directed to by motion of the House.²⁴⁸ Ms Bignold and Ms Kirkby were suspended under the authority of the Standing Orders, whereas Mr Egan was suspended by the House acting under its implied and inherent common law powers.

Expulsion

- 4.4.9 The British House of Commons has claimed the power to expel members since at least the sixteenth century and *May* lists a wide variety of causes for which Members have been expelled.²⁴⁹ While expulsion is still regarded by the House of Commons as a method of punishment at their disposal, it is rarely used nowadays.²⁵⁰ As noted above, in recent years the House of Commons has reprimanded and suspended Members with loss of salary.²⁵¹
- 4.4.10 The only case of expulsion in the NSW Legislative Council is that of Mr Alexander Ewan Armstrong, who was expelled in 1969 for “conduct unworthy of a Member”.²⁵² The conduct which led to Mr Armstrong’s expulsion included giving evidence in court proceedings that he would consider bribing a judge and procure false evidence in a divorce trial.²⁵³ Subsequently, Mr Armstrong unsuccessfully challenged the validity of

²⁴⁷ Both were suspended for the remainder of the sitting day.

²⁴⁸ However, in the latter case, the action of the House in suspending the Member, while upheld in the Supreme Court, is currently under appeal in the High Court of Australia.

²⁴⁹ *May, op. cit.*, pp. 141-2.

²⁵⁰ There have been three cases of expulsion this century. Mr Bottomley was expelled in 1922, after being convicted of fraudulent conversion of property and sentenced to seven years’ imprisonment. Mr Allingham was expelled in 1947 for lying to a committee and a gross contempt of the House after publication of an article accusing Members of insobriety and of taking fees or bribes for the supply of information. Mr Baker was expelled in 1954 after being sentenced to seven years’ imprisonment for forgery.

²⁵¹ In 1990 a Member was suspended for 20 days, with suspension of salary, for failure to declare a pecuniary interest in the Register of Members’ Interests. [HC Deb (1989-90) 168, c 973] In 1995 two Members were formally reprimanded and suspended for 10 and 20 days respectively, with suspension of salary, for accepting £1000 in return for tabling a question in Parliament. [CJ (1994-95) 286].

²⁵² *Legislative Council Journal* (1968-69) v. 156, pp. 318-320; P.D.v.78 p. 3858.

²⁵³ *Armstrong v. Budd*, (1969) 71 SR (NSW) 386 at 391.

the House's actions in the NSW Court of Appeal.²⁵⁴

- 4.4.11 In upholding the validity of the expulsion, the Court of Appeal held that the powers which are “necessary” to the existence of the House and the proper exercise of its functions include:

...in a proper case a power of expulsion for reasonable cause... provided the circumstances are special and its exercise is not a cloak for punishment of the offender.²⁵⁵

- 4.4.12 The important factor which led the Court to uphold the inherent power of expulsion in that particular case was the need to protect:

the integrity of those who participate therein which is essential to mutual trust and confidence amongst the members.²⁵⁶

- 4.4.13 There have been three cases of expulsion in the Legislative Assembly: Mr RA Baker in 1881, Mr William Patrick Crick in 1890, and Mr Richard Atkinson Price in 1917.

4.5 ‘Conduct Unworthy’

- 4.5.1 There can be no doubt that the House has the power to expel a Member for ‘conduct unworthy’. However, what constitutes unworthy conduct is much less clear. In support of the validity of the House’s resolution to expel Mr Armstrong (for conduct committed outside the House), the Solicitor-General based his argument on the following criteria:

The Houses of the legislature of New South Wales have inherent or implied power to exclude temporarily or permanently by suspension or exclusion members whose conduct is resolved to be such:

- (1) As to render them unfit to perform their high responsibilities and functions in the Council as members.
- (2) As would prevent the Council and other members thereof from conducting its deliberations and exercising its functions with mutual respect, trust and candour.
- (3) As would cause to be suspect its honour and the good faith of its deliberations.

²⁵⁴ *ibid.*

²⁵⁵ *ibid.*, per Herron C.J. at 396.

²⁵⁶ *ibid.*, per Sugerman J.A. at 409.

- (4) As would tend to bring the Council into disrepute and would lower its authority and dignity unless it was so preserved and maintained.²⁵⁷

4.5.2 Sugerman JA, in his judgement in *Armstrong v. Budd* held that:

...the proper discharge of the legislative function by the Council demands an orderly conduct of its business is undoubted. That it demands honesty and probity of its members should be equally undoubted. Indeed, the need for removal and replacement of a dishonest member may be more imperative as a matter of self-preservation, than that of an unruly member. ...

The proceedings of a House of Parliament must be more than merely orderly in this sense. They require, as do the proceedings of a court of law, the existence of a mutual trust and confidence between those who are concerned therein which cannot exist if there is amongst the members one whose conduct has demonstrated that he is unworthy of such trust and confidence. The removal from membership of the House of such a member is not, as I have earlier said, an act of punishment of him for his misconduct such as would lie beyond the doctrine of necessity. It is... 'entirely protective'.

...the continued presence of an unworthy member is inconsistent with the honor and dignity of the House and thus inimical to its authority and standing and the respect in which it should be held by the community. But the cardinal principle is that the implied grant of powers on the ground of necessity, in whichever of the foregoing ways that necessity be stated, comprehends not only the orderly conduct of deliberations in the sense of freedom from disturbance and unseemly conduct but also the integrity of those who participate therein which is essential to mutual trust and confidence amongst the members.²⁵⁸

4.5.3 The undue and gratuitous abuse of the freedom of speech that Members of Parliament enjoy has been held to damage the standing and dignity of the House. As the Report from the House of Commons Select Committee on Parliamentary Privilege of 1967 indicates:

In considering contempt Your Committee have so far referred primarily to contempts by strangers. They do not overlook the fact, however, that contempt may (and has been held to) include the conduct of a Member or Officer, whether within or outside the Chamber or the precincts, which is so improper or disorderly as to amount to an abuse of the Member's or Officer's position. An example of such misconduct would be gross abuse by a Member of his rights and immunities, for example by maliciously making under cover of the absolute privilege afforded by the Bill of Rights a gross defamatory attack upon a stranger or upon another Member of the House. The House has power, by the exercise of its penal jurisdiction, to control such abuse. If conduct of this kind is committed in the Chamber itself in sight or hearing of Mr Speaker, he

²⁵⁷ *ibid.*, at 396.

²⁵⁸ *ibid.*, at 408.

has power to take immediate notice of it and to act against the offending Member in the name of the house. In this respect no distinction can be drawn between an abuse consisting of an assault, unparliamentary language, a refusal to withdraw improper imputation and a malicious and grossly defamatory accusation. Each could be treated equally as a contempt of the House.²⁵⁹

- 4.5.4 If a Member's conduct is found to fall within any of the above categories, the House is within its power to move for their expulsion, providing such action is clearly self protective and not punitive. While it can be argued that "expulsion is a matter which concerns the House itself and its composition, and amounts to no more than an expression of opinion that the person expelled is unfit to be a member of the House. . .",²⁶⁰ it is true that the House of Commons has used expulsion as a sanction where it has clearly been for punitive purposes:

Since the House [of Commons] is recognized to have power to punish breaches of privilege and contempt of parliament, it has apparently never been found necessary to consider whether the power to expel is limited in any way, and it is clear that expulsion has in fact been used as a sanction in circumstances in which a house possessing only self-protective powers would be powerless to act.²⁶¹

- 4.5.5 Expulsion, while vacating the seat of a Member, does not create any disability to serve again in the House, if re-elected. However unlike the House of Commons and even the NSW Legislative Assembly, where the expelled Member is at liberty to contest their own vacancy in a by-election, a vacancy arising from the expulsion of a Member from the NSW Legislative Council would be filled according to the provisions of the NSW Constitution Act 1902, which effectively disbar the expelled Member from contesting their own vacancy.

4.6 1989 case - Conduct of Revd Mr Nile, MLC

- 4.6.1 In 1989 the then Standing Committee Upon Parliamentary Privilege considered a reference from the Council (following debate and division) concerning a possible contempt arising from statements contained in a letter circulated by Revd Mr Nile, a Member of the House, to co-ordinators of the Call to Australia Citizens' Movement.²⁶²

²⁵⁹ *Report from the Select Committee on Parliamentary Privilege*, HC 34, 1967, p. XX, para 60.

²⁶⁰ Anson, *The Law and Custom of the Constitution*, vol. 1 (Oxford, 4th ed., 1909) p. 178.

²⁶¹ Campbell, E, 'Expulsion of Members of Parliament', (1971) *op. cit.*, at 20.

²⁶² *Report of the Standing Committee Upon Parliamentary Privilege together with the Proceedings of the Committee: Documents Issued by the Reverend the Honourable F J Nile MLC*, NSW Parliament, Legislative Council, Session 1988-89-90.

The letter claimed that a Select Committee of the House,²⁶³ under its Chairman, was conducting a “witch-hunt” with the aim of discrediting a Government Minister and gaining electoral advantage for the Australian Labor Party (then in opposition).

4.6.2 In its report, the Privileges Committee considered the practice in the House of Commons where speeches and writings reflecting on the House and reflections on Members have been treated as contempt. However, the Committee also took note of an analogous case where the Commons Committee of Privileges had found that although some of the language used by the Member concerned might have reflected on Members of the House, the statements in question could not properly have been considered to damage or obstruct the work of the House and so to amount to a contempt. The Council Committee concluded that similar considerations apply in this case.²⁶⁴ It took the view that although Revd Mr Nile may have been “intemperate and unwise” in his actions and may have reflected on the motives of Members of the Select Committee, the language used could not reasonably be understood as obstructing or impeding the Select Committee or its Members in the discharge of their duty, and the Member’s actions did not therefore constitute a contempt.²⁶⁵ The Committee endorsed the practice approved by the House of Commons in 1978 that the House exercise its jurisdiction as sparingly as possible.²⁶⁶

4.6.3 In reaching these conclusions the Committee commented:

Whilst recognising it is the duty of the House to intervene in cases which tend, or may tend to undermine public confidence in and respect for the House itself and of the institution of Parliament, [the] Committee believe that the law of parliamentary privilege should not, except in the clearest case, be invoked in such a way as to inhibit or discourage the free expression of opinion or criticism, outside the House by Members equally with other persons, however prejudiced, uninformed or exaggerated it may be.²⁶⁷

4.6.4 A factor taken into account by the Committee in this case was that the letter was intended to have been a confidential communication between Revd Mr Nile and his coordinators and therefore of limited circulation. The Committee endorsed

²⁶³ The Select Committee on the Police Regulation (Allegations of Misconduct) Amendment Bill 1988.

²⁶⁴ *Report of the Standing Committee Upon Parliamentary Privilege together with the Proceedings of the Committee: Documents Issued by the Reverend the Honourable F J Nile MLC*, NSW Parliament, Legislative Council, Session 1988-89-90., pp. 26-7.

²⁶⁵ *ibid.*, p. 30.

²⁶⁶ *ibid.*, p. 28.

²⁶⁷ *ibid.*, pp. 28-9.

recommendations of a Commons Committee in 1976-7²⁶⁸ to the effect that the mode and extent of publication of a contempt should be taken into account when complaints of contempt are being considered.²⁶⁹

- 4.6.5 Although not expressly referred to in the Committee’s reasoning, the factual account of the matter set out in the Committee’s Report indicates that Revd Mr Nile had written to the Chairman of the Select Committee apologising for “any unnecessary hurt or embarrassment” which the letter may have caused.²⁷⁰ He had also made a personal explanation in the House apologising and withdrawing “any possible imputations of improper motives and all personal reflections on Members of the House or on this House or any select committee which may be stated or implied...” in the letter.²⁷¹ Furthermore, in evidence to the Privileges Committee he expressed regret at the language used.²⁷²

SANCTIONS IN OTHER JURISDICTIONS

4.7 Legislative Assembly of NSW

- 4.7.1 In addition to the inherent powers, the powers of the NSW Parliament are governed by the Standing Orders of each House. As with the Legislative Council, the Assembly Standing Orders regulate the rules of debate, and any Member offending against these rules is subject to the same sanctions as in the Council. Members of the Assembly have been censured, required to withdraw words and to apologise to the House, suspended, and expelled.
- 4.7.2 Under Legislative Assembly Standing Order 288, if a Member is called to order by the Speaker or Chairman of Committees more than three times in any one sitting for any gross breach of the rules, the Speaker or Chairman may direct that the Member be removed from the Chamber for the remainder of that sitting. More serious cases of disorder are dealt with under Standing Order 289. This states that a Member may be “named” by the Speaker or Chairman for certain types of conduct, including “persistently and wilfully obstructing the business of the House”, “using offensive words

²⁶⁸ Third Report from the Committee of Privileges, *Recommendations of the Select Committee on Parliamentary Privilege*, HC 417 (1976-77).

²⁶⁹ *Report of the Standing Committee Upon Parliamentary Privilege together with the Proceedings of the Committee: Documents Issued by the Reverend the Honourable F J Nile MLC*, NSW Parliament, Legislative Council, Session 1988-89-90, p. 29.

²⁷⁰ *ibid.*, p. 5.

²⁷¹ *ibid.*

²⁷² *ibid.*, p. 12.

and refusing to withdraw them” and being guilty of disorderly conduct. Once a Member has been “named”, a Minister moves forthwith “That the Member be suspended from the service of the House” (Standing Order 290). No debate is allowed on the motion, but the Member concerned may make an explanation limited to five minutes. The duration of a suspension is two sitting days for the first time a Member is suspended in a session, four days for the second time and eight days for each subsequent time (Standing Order 292). On several occasions when an intimation has been conveyed to the Speaker by the Serjeant-at-Arms that the Member removed from the Chamber was prepared to apologise, the Member has been readmitted.²⁷³

- 4.7.3 While the Standing Orders of the Legislative Council are silent on the power of the House to expel a member for conduct unworthy, Standing Order 294 of the Legislative Assembly provides that:

A Member adjudged guilty of conduct unworthy of a Member of Parliament may be expelled by vote of the House, and the seat declared vacant.

- 4.7.4 Mr Ezekiel Alexander Baker was expelled from the Legislative Assembly on 9 November 1881 for “conduct unworthy of a Member and seriously reflecting upon the honor and dignity of Parliament.”²⁷⁴ Having been granted a mineral lease near Cowra on land which had already been sold by the Crown, Baker was found by a Royal Commission to have received money in compensation “under circumstances of concealment and false statement, evidencing a consciousness on [his] part, that such appropriation was unauthorised and unjustifiable.”²⁷⁵ In April 1883 Baker petitioned for the rescission of the censure motion passed against him on 8 November 1881, the day prior to his expulsion. After lengthy debate, on 1 May 1883 the Assembly agreed by 23 votes to 21 to rescind the censure motion of 1881, on the ground that Baker was actually entitled to the money he had received.²⁷⁶
- 4.7.5 On 12 November 1890 Mr William Patrick Crick was expelled when, having been reported by the Chairman for disregarding and defying the ruling of the Chairman in Committee of the Whole, he violently resisted the Serjeant-at-Arms when the Serjeant was directed by the Speaker to remove him, and generally causing a great disorder and scandal.²⁷⁷ Although Crick forwarded his resignation to the Speaker while debate on the motion for his expulsion was still in progress, the motion was nonetheless proceeded

²⁷³ Votes and Proceedings, 1929-30, pp. 54, 210, 387.

²⁷⁴ *Parliamentary Debates*, Legislative Assembly, 8 November 1881, p. 1861.

²⁷⁵ Nairn, B. & Serle, G., *Australian Dictionary of Biography*, 1851-1890 (A-C), MUP: 1969, p. 74.

²⁷⁶ *ibid.*, p. 75.

²⁷⁷ *Parliamentary Debates*, Legislative Assembly, vol. 49, pp. 5188-5203.

with and carried.

- 4.7.6 The most recent case of expulsion in the Assembly occurred on 17 October 1917 when Mr Richard Atkinson Price was expelled by resolution of the House for conduct unworthy of a Member of Parliament and seriously reflecting on the dignity of the House. The conduct for which Price was expelled involved allegations which he had made in the Legislative Assembly on 13 December 1916 and 5 September 1917 against the Minister for Lands and Forests, the Hon William George Ashford. A Royal Commission was appointed to investigate the allegations and concluded that the allegations had been made ‘wantonly and recklessly and without any foundation whatsoever.’ It was on the basis of this conclusion that the motion for Price’s expulsion was moved.
- 4.7.7 On 10 November 1917, less than a month after his expulsion, Price was re-elected at a by-election for the seat of Gloucester.

4.8 Federal Parliament

- 4.8.1 Section 49 of the Federal *Constitution* provides that:

The powers, privileges and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

In 1987 the Federal Parliament legislated for its privileges.²⁷⁸

- 4.8.2 Disorder in the House is dealt with under the Standing Orders, and both Senators and Members have been suspended for offences committed in the House. The term of the suspension in the first instance is for the remainder of the day in the case of a Senator and for 24 hours in the case of a Member of the House of Representatives. Subsequent suspensions are for longer periods, and both Houses retain the right to impose a greater penalty if that course is considered appropriate. Suspension of a Senator for disorder is now very rare in the Senate. Suspension of a Member of the House of Representatives is more common, where suspensions have included suspension from the service of the House until a Member returned and apologised to the Speaker, and

²⁷⁸

for the remainder of the Session unless the Member sooner unreservedly retracted words spoken outside the House reflecting on the Speaker, and apologised to the House.²⁷⁹

- 4.8.3 As indicated in the 1984 report of the Joint Committee on Privilege, both the Senate and the House of Representatives have the undoubted capacity to investigate and deal with any Member who is judged to have abused the privilege of freedom of speech.²⁸⁰ Each House also has the power to declare an act to be a contempt and impose some form of corresponding punishment, even where there is no precedent for such an act previously being judged and punished.²⁸¹ The rationale of the power to punish contempts is that the two Houses should be able to protect themselves from acts which directly or indirectly impede them in the performance of their functions.
- 4.8.4 The Parliamentary Privileges Act 1987 (Cth) codified the powers of both Houses to impose penalties. In addition to the general sanctions available, such as reprimand and suspension, section 7 of the Act allows either House to impose fixed terms of imprisonment and fines for contempts of Parliament.
- 4.8.5 The Senate has imposed a penalty for a contempt only once, in 1971, when the editor and publisher of certain newspaper were reprimanded before the Bar of the Senate for publishing a draft committee report without authorisation.²⁸² In other cases, the Senate has found that contempts have been committed, but has taken no further action. The only case of a penalty of imprisonment being imposed in the federal Parliament occurred in 1955, when the House of Representatives imprisoned two persons for attempting to intimidate a Member. The action was examined and upheld in the High Court (*R. v. Richards: ex parte Fitzpatrick and Browne* 1955 92 CLR 157).²⁸³
- 4.8.6 Before the enactment of the *Parliamentary Privileges Act 1987* (Cth), the Federal Parliament had the power, by virtue of section 49, to expel members for punitive purposes. However, under section 8 of the *Parliamentary Privileges Act 1987* (Cth) that power has been removed, and neither the Senate nor the House of Representatives now have the power to expel a Member from membership of the House.’

²⁷⁹ Barlin, LM (Ed.), *House of Representatives Practice*, AGPS, Canberra:1997, pp. 326-7.

²⁸⁰ The Parliament of the Commonwealth of Australia, *Final Report of the Joint Select Committee on Parliamentary Privilege*, October 1984, p. 53.

²⁸¹ Odger’s, *op. cit.*, p. 53

²⁸² Senate Committee of Privileges, *Committee of Privileges 1966-1996: History, Practice and Procedure*, 62nd Report, June 1996, pp. 4-5. In its report, the Committee asserted that the Senate had the power to commit to prison, to fine, to reprimand or admonish or to otherwise withdraw facilities held by courtesy of the Senate in and around its precincts.

²⁸³ *ibid.*, p. 63

- 4.8.7 Prior to the 1987 Act, only one member of the Commonwealth Parliament had been expelled. On 7 November 1920, Mr Hugh Mahon, an ‘Irish-Catholic patriot’, was expelled following a public address at an Irish Ireland League meeting in Melbourne in which he attacked British policy. A resolution calling for the establishment of an Australian republic was also passed at the meeting.²⁸⁴
- 4.8.8 On 11 November 1920, a motion was moved in the House of Representatives judging Mr Mahon “guilty of conduct unfitting him to remain as a Member of this House and inconsistent with the oath of allegiance” and expelling him from the House. The motion was carried the next day and Mr Mahon’s seat declared vacant.
- 4.8.9 There has been considerable concern since that Mr Mahon’s expulsion constituted an abuse of the power of the House. In October 1984, the Joint Select Committee on Parliamentary Privilege released its Final Report in which it recommended that ‘the power of the Houses to expel members be abolished.’²⁸⁵ The Committee considered that the disqualification provisions under the *Constitution Act* were sufficient, but also recognised the inherent dangers of the abuse of the expulsion power by a partisan vote.

This danger can never be eradicated and the fact that the only case in federal history when the power to expel was exercised is a case when, we think, the power was demonstrably misused is a compelling argument for its abolition. But the argument for abolition of the power to expel does not depend simply on the great potential for abuse and the harm such abuse can occasion. There are other considerations. Firstly, there are the detailed provisions in the Constitution. In short, we already have something approaching a statutory code of disqualification. Secondly, it is the electors in a constituency or in a State who decide on representation. In principle, we think it wrong that the institution to which the person has been elected should be able to reverse the decision of his constituents. If expelled he may stand for re-election but, as we have said, the damage occasioned by his expulsion may render his prospects of re-election negligible. Thirdly, the Houses still retain the wide powers to discipline Members. Members guilty of a breach of privilege or other contempt may be committed, or fined... . These sanctions seem drastic enough. They may also be suspended or censured by their Houses.²⁸⁶

4.9 New Zealand House of Representatives

- 4.9.1 The New Zealand House of Representatives acquired the powers of the House of Commons in 1865, under the *Parliamentary Privileges Act 1865*. As such, it has the power to impose punishment. However, the House’s power to impose fines as a

²⁸⁴ Nairn, B & Serle, G (General Editors), *Australian Dictionary of Biography*, Volume 10, 1986, p 380.

²⁸⁵ The Parliament of the Commonwealth of Australia, *Final Report of the Joint Select Committee on Parliamentary Privilege*, October 1984, Recommendation 25, p 8.

²⁸⁶ *ibid.*, p 126.

punishment for contempt was later questioned on the grounds that it had fallen into disuse as a power of the House of Commons by the time the Parliamentary Privileges Act 1865 was enacted and therefore could not be considered to have been transmitted to the House as a power it could exercise.²⁸⁷

- 4.9.2 In maintaining order in the House, the Speaker is able to require a Member to withdraw unparliamentary expressions and, if considered necessary, to apologise for having made the expressions. If a Member's conduct warrants it, the Speaker can also order a Member to withdraw from the Chamber for a period of up to the remainder of the day's sitting, and in more serious cases, can "name" the Member, thereby requiring the House to pass judgment on the Member's conduct. A Member ordered to withdraw cannot re-enter the Chamber during the period of suspension, but is not suspended from the service of the House, and can carry out other duties as a Member, including voting in divisions. Suspension following "naming" results in a suspension for twenty-four hours on the first occasion, seven days on the second occasion, and twenty-eight days on subsequent occasions, and the Member is suspended from service of the House, which includes voting in divisions and attending committee meetings.²⁸⁸
- 4.9.3 There has been no case of expulsion of a Member occurring in New Zealand. Prior to the passing of the Parliamentary Privileges Act in 1865, there was an attempt to move an expulsion motion against a Member, but the House refrained from proceeding with the motion on the ground that it was doubtful whether the House possessed the power to expel. Following the passing of the Privileges Act the legal situation changed, and it was generally accepted that the House had the power to expel. Nonetheless, in 1877 the Speaker denied the power of the House to declare the seat of a Member to be vacant, claiming that suspension was the ultimate sanction available to the House.²⁸⁹
- 4.9.4 The Standing Orders Committee considered the issue of expulsion in its 1989 Report on the Law of Privilege and Related Matters, and in line with the position adopted in the Australian Parliament, recommended that any power to expel be abolished in New Zealand.²⁹⁰ To date, the New Zealand Parliament retains the right to expel a Member.

²⁸⁷ 1987-90 *AJHR*, 1.18B, para. 30.

²⁸⁸ McGee, D, *Parliamentary Practice in New Zealand*, Second Edition, Government Printers, Wellington: 1994, pp. 163-164.

²⁸⁹ McGee, D, *Parliamentary Practice in New Zealand*, Second Edition, Government Printers, Wellington: 1994, pp. 509-510.

²⁹⁰ 1987-90 *AJHR*, 1.18B, para. 31.

4.10 House of Commons

- 4.10.1 Both the House of Commons and the House of Lords have the power to punish Members and non-Members for disorderly and disrespectful conduct. Where the Lords maintains its right to both imprison and impose fines for contempts, the Commons now accepts that it is without the power to commit beyond the end of a Session, and has not levied fines in the modern period.²⁹¹
- 4.10.2 As indicated above, Members have been called to order for offensive words spoken in the House, and been reprimanded or admonished, censured, suspended, imprisoned and even expelled. In recent times, Members have been admonished or reprimanded by resolution to that effect, and not subsequently censured standing in their place.
- 4.10.3 The Speaker has the authority to suspend a Member for the remainder of the day's sitting for "grossly disorderly" conduct.²⁹² If the Speaker considers it necessary, she can "name" a Member, thereby requiring the House to pass judgment on the conduct of the Member. The majority of suspensions in the Commons are carried out for disorderly conduct in debate following "naming" by the Chair. Suspension in this case results in suspension for five sitting days on the first occasion, twenty sitting days on the second occasion, and as determined by the House for any subsequent occasions.²⁹³ If the Member refuses to withdraw, and resists removal by the Serjeant at Arms, suspension for the remainder of the Session ensues.
- 4.10.4 The House of Commons clearly not only has the power to expel members, but can also expel members for punitive purposes.
- 4.10.5 The procedure for expulsion is that a motion is moved, generally by the Leader of the House, "*that ... be expelled from this House*". It is customary, depending on the circumstances, that a Member be ordered to attend to offer an explanation. However, if it is apparent that no possible excuse could be given, then the order to attend is not made. Should the Member be already in prison for the offence, then the prison governor may be ordered to bring the Member before the House: however in the case of Mr Baker (see below) no order for attendance was made.
- 4.10.6 An expelled Member may seek re-election to the House, even within the term of the same Parliament that elected him, a principle established in 1782 as a result of the case of John Wilkes, who was expelled three times and once had his return amended in favour of his defeated opponent.

²⁹¹ May, *op.cit.*, pp. 131-132.

²⁹² House of Commons Standing Order No. 43

²⁹³ House of Commons Standing Order No. 44

4.10.7 There have been three instances this century of expulsion:

- Horatio Bottomley (Independent, South Hackney), was expelled in August 1922, after being convicted of fraudulent conversion of property and sentenced to seven years' imprisonment.
- Garry Allighan (Labour, Gravesend) was expelled on 30 October 1947, for lying to a committee and for gross contempt of the House after publication of an article in the *World's Press News* accusing Members of insobriety and of taking fees or bribes for the supply of information.
- Peter Baker (Conservative, South Norfolk) was expelled on 16 December 1954, after being sentenced to seven years' imprisonment for forgery. In this instance, the motion for expulsion need not have been moved: under the provisions then still in force of the Forfeiture Act 1870, he would have been automatically disqualified. These provisions were amended by the Criminal Law Act 1967.²⁹⁴

4.11 United States Congress

4.11.1 Section 5 of Article 1 of the United States *Constitution* provides, among other things, that:

Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member.

4.11.2 The power to discipline has been used sparingly by the Congress. Only fifteen Senators (including one later rescinded) and four Members of the House have been expelled.²⁹⁵ Even the power to censure has been limited (9 Senators, 22 Representatives and one territorial delegate), although lesser punishments have been meted out. Typically, censure proceedings in the Senate are carried out with a degree of moderation, while in the House offenders are treated more harshly. In the House offending Members are often denied the privilege of defending themselves, and in most cases a censured Member is treated like a felon.²⁹⁶ Grounds for censure have included assault on a fellow Member, insult to the Speaker, treasonable utterances, as well as other offenses.

²⁹⁴ House of Commons Factsheet No. 62: *Disciplinary and Penal Powers of the House of Commons*, as at July 1997.

²⁹⁵ Of the 15 Senators expelled, one was in 1797 and fourteen during the civil war for joining the Confederates. There have been nine motions for expulsion since the Civil War but all have been unsuccessful. Of the four Representatives expelled, three were in 1861 and one in 1980. In both Houses, embattled members have resigned rather than risk expulsion or other punishment.

²⁹⁶ *Congressional Quarterly's Guide to Congress*, Congressional Quarterly Inc., 4th edition, Washington DC: 1991, p. 771.

- 4.11.3 The Congress's power to punish its Members was upheld by the Supreme Court in its 1880-81 term, when several Members of the House were involved in a financial scandal.

In its judgment in the case, *Kilbourn v. Thompson*,²⁹⁷ the Court went beyond its ruling in relation to the private citizens involved, stating that:

The Constitution expressly empowers each House to punish its own members for disorderly behaviour. We see no reason to doubt that this punishment may in a proper case be imprisonment.

Each House is by the Constitution made the judge of the election and qualifications of its members.

- 4.11.4 In a later case, *In re Chapman*,²⁹⁸ decided in 1897, the Court defined the circumstances in which either chamber might expel one of its members:

The right to expel extends to all cases where the offense is such as in the judgment of the Senate [the member's conduct] is inconsistent with the trust and duty of a member."²⁹⁹

- 4.11.5 The Supreme Court in 1969 acknowledged that a chamber could expel a member for misconduct.³⁰⁰

- 4.11.6 The requirement for a two-thirds majority for expulsions was successfully inserted by James Madison at the Constitutional Convention of 1787, on the grounds that the right of expulsion was "too important to be exercised by a bare majority of a quorum, and in emergencies [one] faction might be dangerously abused".

- 4.11.7 Until 1980, all expulsions in the US Congress had been on the grounds of conspiracy against a foreign country (the 1797 case in the Senate) and support of a rebellion (the Civil War cases of fourteen Senators and three Representatives). The 1980 expulsion

²⁹⁷ 103 U.S. 168. (1880)

²⁹⁸ 166 U.S. 66. (1897)

²⁹⁹ The reference to expulsion in the Court's opinion of 1897 was supplemented in an opinion handed down in 1906 interpreting an act of Congress approved 11 June 1864. [*Burton v. United States*, 202 US 344].

³⁰⁰ *Powell v McCormack*, 395 U.S. 486 (1969).

of a Representative was the first successful expulsion on the ground of corruption, although there have been other, unsuccessful, attempts to remove Members for corruption.³⁰¹

- 4.11.8 The issue of expulsion is not justiciable in America. The House is the final arbiter of the expulsion of one of its Members, and it is not open to the courts to control, direct, supervise or forbid the exercise by either House of the power to expel a Member.³⁰²

4.12 United States - State Legislatures

- 4.12.1 Whatever is spoken in the House is subject to the censure of the House. Offences of this kind have been punished by calling the Member to the Bar to make submission, committing them to prison and even expelling them. The House also has the power to compel a Member to attend, and it is within the rights of the House to compel attendance by arresting the Member. The House also has the power to suspend a Member from the service of the House for a given period, to censure a Member and to impose a pecuniary penalty if the House so determines.³⁰³

- 4.12.2 Most state constitutions provide that each House, with the concurrence of two-thirds of all the Members elected, may expel a Member. In a proceeding to expel a Member, the House has the power to adopt any procedure, and to change it without notice, and there is no constitutional provision giving persons who have been expelled the right to have a trial and opportunity to be heard in the House. As the issue of expulsion is not justiciable in the courts, the only safeguard against an unjust and causeless expulsion is the oath of each individual Member, and the Member's duty under it to act conscientiously for the general good.³⁰⁴

4.13 Parliament of Canada

- 4.13.1 Section 4 of the *Parliament of Canada Act* provides:

The Senate and the House of Commons, respectively, and the members thereof hold, enjoy and exercise:

- (a) such and the like privileges, immunities and powers as, at the time of the passing of the Constitution Act, 1867, were held, enjoyed and exercised by

³⁰¹ The information in this section has been drawn largely from *Congressional Quarterly's Guide to Congress*, Congressional Quarterly Inc., 4th edition, Washington DC: 1991, pp.759-783.

³⁰² *Mason's Manual of Legislative Procedure*, The American Society of Legislative Clerks & Secretaries, St. Paul, Minn:1989, p. 394.

³⁰³ *ibid.*, p. 390.

³⁰⁴ *ibid.*, pp. 393-394.

the Commons House of Parliament of the United Kingdom and by the members thereof, in so far as is consistent with that Act; and

- (b) such privileges, immunities and powers as are defined by Act of the Parliament of Canada, not exceeding those, at the time of the passing of the Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by members thereof.³⁰⁵

- 4.12.2 As such, both the House of Commons and the Senate in Canada have the power to discipline Members for punitive purposes. The mildest form of punishment is a simple declaration that an act is a breach of privilege. Such a declaration is usually delivered to the offending Member (or non-Member) at the Bar of the House. Censure of the Member is frequently attached to any conclusion that the privilege of the House has been offended. Occasionally the Member is given the opportunity to purge the contempt and promise better conduct in the future.³⁰⁶
- 4.12.3 For more serious contempts the House takes further action. Imprisonment has been used on only one occasion, in 1913, when a witness before a Committee, having refused to answer questions before the Public Accounts Committee and been reported to the House, persisted in his refusal when summoned before the Bar of the House. He was committed to prison until prorogation or until the House decided otherwise.³⁰⁷ Apart from committing a member to prison, the House of Commons may suspend or expel a member. Further, the power to expel is not confined to offences committed by a Member as a Member, or during a session of Parliament, but extends to all cases where the offence is such as, in the judgment of the House, renders the Member unfit for parliamentary duties.
- 4.12.4 Since Confederation in 1867, there have been three expulsions from the House of Commons. Louis Riel was expelled twice as being a fugitive from justice, and an outlaw, in 1874 and 1875, and Fred Rose was expelled for having been sentenced to six years imprisonment in 1946, for conspiracy to give unauthorized information to the USSR.³⁰⁸

³⁰⁵ These Canadian legislative provisions have been sourced from the World Law Link on the Australasian Legal Information Institute website (<http://www.austlii.edu.au>). See also Maingot QC, J, *Parliamentary Privilege in Canada*, Butterworths, 1982, p. 11.

³⁰⁶ Beauchesne's *Parliamentary Rules and Forms*, 6th edition, The Caswell Co. Ltd, Toronto: 1989, p. 30.

³⁰⁷ *ibid.*

³⁰⁸ Maingot QC, J, *Parliamentary Privilege in Canada*, Butterworths, 1982, pp. 180-181.

Chapter Five

FINDINGS ON CONDUCT

- 5.1.1 Following extensive review of the material and evidence before it, and long deliberations, the Committee has reached the conclusions set out below.
- 5.1.2 The Committee has concluded that Mrs Arena in her speech on 17 September 1997 made allegations which involved the following imputations:
- (a) on or shortly after Thursday 21 March 1996 the Premier, Mr Carr, and the Leader of the Opposition, Mr Collins, met together;
 - (b) late on Sunday 24 March 1996 Mr Carr, "the General Secretary of the ALP", Mr Della Bosca, and "ALP President", Mr Sheahan, and "other important figures in the ALP" met together;
 - (c) each of the participants of the above alleged meetings (ie between Mr Carr and Mr Collins; and between Mr Carr, Mr Della Bosca, Mr Sheahan and "other important figures in the ALP") shared the purpose that in his conduct of the Paedophile segment of the Royal Commission into the New South Wales Police Service, Justice Wood would ensure that prominent persons in high political, judicial and social positions in the community would be protected from being identified and named as a result of the Royal Commission's investigations and hearings;
 - (d) shortly after these alleged meetings, Mr Carr and Justice Wood met and agreed that Justice Wood would influence the conduct of investigations and hearings of the Royal Commission so as to ensure that "people in high places" (ie prominent persons in high political, judicial and social positions in the community, and thus "untouchables") who were accused by alleged victims of being paedophiles, would not be named;
 - (e) this suppression of their identities constituted a "massive cover-up" on Justice Wood's part, as was intended by all of the participants of each of the three alleged meetings;
 - (f) the purpose of the meetings and the intention of the participants of those meetings, other than Justice Wood, was to prevent electoral damage arising from disclosure of the identity of prominent persons in the community who were allegedly engaged in paedophile activities.

- (g) the purpose of each of the persons participating in the three alleged meetings was that Justice Wood, contrary to the duties of his public office as Royal Commissioner, would corruptly favour and protect alleged paedophiles from investigation, detection and identification, merely because they occupied high political, judicial or social positions in the community.
- 5.1.3 The Committee finds that these imputations involved, in substance, the allegation of an illegal conspiracy, notwithstanding that Mrs Arena did not expressly describe such alleged conduct as either "illegal" or as involving a "conspiracy".
- 5.1.4 The Committee finds that Mrs Arena's allegations as to the above conduct:
- (a) were untrue;
 - (b) were made without any reasonable foundation upon facts known to her or reasonably capable of being checked by her;
 - (c) were extremely hurtful and damaging to the reputations of each of the persons referred to as participants in the three alleged meetings.
- 5.1.5 The Committee has concluded that in Mrs Arena's allegations as to an "agreement" between Mr Carr and Justice Wood:
- (a) the force and effect of her allegations was not removed by the fact that her conclusion as to the existence of the particular agreement was one which she stated she was "bold enough to presume", as distinct from one which she knew to exist;
 - (b) the date of the meeting was indicated as being within a close timeframe of the two alleged preceding meetings (between Mr Carr and Mr Collins; and between Mr Carr, Mr Della Bosca, Mr Sheahan and "other important figures in the ALP"), which both occurred in March 1996 or very shortly thereafter;
 - (c) the subject "agreement" was not intended by her to be understood as meaning an agreement reached some seven months later in October 1996, whereby Justice Wood agreed to accept the amended Terms of Reference for the Paedophile segment of the Royal Commission into the Police Service as proposed or required by Mr Carr.
- 5.1.6 The Committee finds that the conduct of Mrs Arena, in making the relevant allegations in her speech on 17 September 1997, was conduct which fell below the standard the House is entitled to expect of a Member, and brought the House into disrepute.

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- 5.1.7 Mrs Arena, in her submission dated 6 May 1998, urges that the Committee make a decision which upholds "the freedom of speech which our Parliaments both enjoy and depend upon".³⁰⁹ She submits that the Committee should "disregard transitory political expediency",³¹⁰ "decide what is in the long term best interests of this State and country",³¹¹ and refrain from "causing real harm to the parliamentary institutions of our country".³¹²
- 5.1.8 The Committee's finding that Mrs Arena's conduct fell below the standard the House is entitled to expect of a Member, and brought the House into disrepute, reflects its conclusion that Mrs Arena, by making serious allegations, imputing criminal misconduct against persons both inside and outside Parliament, without any reasonable foundation upon facts known to her or reasonably capable of being checked by her, abused her privilege of freedom of speech, damaged the reputations of those persons, and undermined public confidence in the integrity of the Legislative Council.
- 5.1.9 The Committee considers that the protection of the House as a parliamentary institution requires that the abuse of the privilege of freedom of speech in the House which occurred in the present case, must be curbed by appropriate protective measures.
- 5.1.10 The fact that the Committee's findings and conclusions are based upon careful consideration of what is necessary for the protection of the House, and not upon what Mrs Arena describes as "transitory political expediency"³¹³ is confirmed by the fact that those findings are unanimous.
- 5.1.11 Mrs Arena has submitted that her speech of 17 September 1997, when its true meaning is assessed, should be seen as involving political criticism, and not allegations of criminal misconduct.³¹⁴ "Cover up", she says, is not a term connoting criminality. She emphasised that she did not allege criminal conduct or unlawful conspiracies, and

³⁰⁹ Franca Arena, unpublished submission concerning conduct, 6 May 1998, p. 1.

³¹⁰ *ibid.*

³¹¹ *ibid.*

³¹² *ibid.*

³¹³ *ibid.* p. 9.

³¹⁴ *ibid.*

³¹⁵ *ibid.*

that after her speech, she acted quickly to correct misconceptions that this was what she was alleging.³¹⁶ For example, Mrs Arena pointed out that in September 1997 she instructed her solicitors to write to the Sydney Morning Herald denying any claim of a "high level criminal conspiracy".

5.1.12 The Committee acknowledges that the expression "cover up" does not necessarily allege criminal conduct, and depends for its meaning and effect upon the particular context in which it is being used. Moreover, it is true that Mrs Arena did not expressly describe the relevant conduct in respect of which she made allegations in her speech, as being "criminal" or as constituting a "conspiracy". However, despite the absence of these precise terms of "criminal" or "conspiracy" from her speech, the Committee has concluded that her allegations were, in substance, that a criminal conspiracy had been reached and given effect to, involving the common purpose that Justice Wood would perform his public office as Royal Commissioner corruptly, by improperly favouring high-profile citizens and protecting them from the investigation and disclosure which his duties and their conduct required, and thus misuse the public funds made available for the conduct of the Royal Commission.

5.1.13 Mrs Arena, through her Counsel, submitted that:³¹⁷

- (A) even if the Committee decided that in her speech she alleged "an agreement to ensure that people in high places would not be named", this does not constitute, in law, an allegation of a criminal conspiracy;
- (B) an agreement between Mr Carr and Justice Wood that Justice Wood would not investigate allegations that people in high places had engaged in paedophile conduct, could not constitute a conspiracy, unless Justice Wood, under the Terms of Reference which he then had, was obliged to conduct such investigations;
- (C) Justice Wood regarded his extended Terms of Reference into paedophilia as requiring him to investigate paedophilia so far as it concerned police corruption and public officials, but not to investigate paedophilia in high places;
- (D) there could, in law, be no allegation of a criminal conspiracy unless what was imputed was that Justice Wood, by acting in accordance with an "agreement" to protect high profile paedophiles from being investigated and named by the Royal Commission, was failing to perform an existing duty, as defined by the extended Terms of Reference.

³¹⁶ *ibid.* p. 5.

³¹⁷ Evidence, Philip Taylor, 23 June 1998, *Transcripts*, p. 357.

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- 5.1.14 The Committee did not accept these submissions on Mrs Arena's behalf. The decided cases establish clearly that it is a criminal offence at common law for a public official, entrusted with powers and duties for the public benefit, to act from a dishonest, oppressive or corrupt motive.³¹⁸ A public official has committed misconduct in public office and breach of trust in the honest and impartial exercise of his powers and duties, if he prefers a particular individual or class of individuals for a reason which is extraneous to the object of his powers.³¹⁹ A criminal conspiracy exists in such circumstances where there is an agreement between two persons that one of them will exercise his powers or duties with unwarranted favouritism to a particular person or class of persons.³²⁰
- 5.1.15 Justice Wood, in his dual public offices as Supreme Court Judge and Royal Commissioner, was required to act honestly and without favouritism not merely in performing the tasks set by the Terms of Reference. He had also to apply his mind conscientiously to the question whether, in the public interest, changes in the existing Terms of Reference were desirable or necessary, and so report those conclusions to the Government and the community, so they could obtain the optimum use of the investigative resources and public funding with which he had been given. The alleged agreement that he would not so act, was necessarily a conspiracy whereby he would not perform his overall public duty.
- 5.1.16 Indeed, Mrs Arena's speech does not communicate any concession by her that Justice Wood had complied with his public duty, or that such duty was relevantly limited by the Terms of Reference. She stated in the speech that the Royal Commission "has failed the community by failing to ask for the prosecution of some of the high profile paedophiles in our community on whom it had evidence and witnesses";³²¹ "the reality is that the Commission did not even try";³²² and "the community was entitled to see [the Royal Commission] try harder".³²³
- 5.1.17 Mrs Arena also submitted that if her speech called into question the conduct of a member of either House of Parliament, or a Judge of a superior court, "a point of order

³¹⁸ Finn, "Public Officers: Some Personal Liabilities" (1977) 51 ALJ 313; Finn, "Official Misconduct" (1978) 2 Crim LJ 307.

³¹⁹ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 160-161.

³²⁰ *Greiner*, at 161.

³²¹ *Parliamentary Debates*, Legislative Council, 17 September 1997, p. 64.

³²² *ibid.*

³²³ *ibid.*, p. 67.

could have been taken, since such matters can only be raised by a substantive motion".³²⁴ No such point of order was taken. Similarly, Mrs Arena points out that Standing Order 80 provides that a Member may not use offensive words against any Member, and that Standing Order 81 deems disorderly all imputations of improper motives and personal reflections against Members.³²⁵ Because a point of order was not taken based upon either the absence of a substantive motion or under Standing Orders, Mrs Arena contends that she had no opportunity at an appropriate early stage to offer an explanation of her allegations and motives.³²⁶

- 5.1.18 The Committee considers that the fact no point of order was taken at the time does not excuse Mrs Arena's conduct. However, the fact that no point of order was taken and that Mrs Arena thereby lost an early opportunity to explain her position, and if thought necessary by her, to qualify some of the allegations in her speech, are matters that the Committee has considered in recommending what sanctions should be enforced in relation to Mrs Arena's conduct.

³²⁴ Franca Arena, unpublished submission concerning conduct, 6 May 1998, p.2.

³²⁵ *ibid.*

³²⁶ *ibid.* p. 2-3.

Chapter Six

6. FINDINGS ON SANCTIONS

6.1 Mrs Arena's submissions as to sanctions

- 6.1.1 The Committee, having made findings concerning the conduct of Mrs Arena and advised Mrs Arena of these findings, invited submissions from Mrs Arena as to what sanction, if any, was appropriate for the Committee to recommend in the light of its draft findings.
- 6.1.2 The Committee advised Mrs Arena that it has, in general terms, the power to impose, or to refrain from imposing, such of a range of possible sanctions as was regarded as necessary by the House for its protection. In particular the Committee advised Mrs Arena that the range of possible responses by the House to the decision that a Member engaged in conduct which fell below the standard which the House is entitled to expect of a Member and brought the House into disrepute, includes expulsion; suspension, either for a stated period of time or until the submission of an apology; apology and withdrawal of words spoken; censure; reprimand and admonishment; and no sanction at all.
- 6.1.3 Mrs Arena, in response to the Committee's invitation, made detailed written submissions on 9 June 1998 which both challenged the Committee's draft findings concerning her conduct, and addressed the question of possible sanctions.
- 6.1.4 Although the Committee had previously, by letter of 4 June 1998, notified Mrs Arena of its draft findings, the Committee took the view that Mrs Arena should be given full opportunity to make, through her Counsel, oral submissions as to the correctness of those draft findings. The Committee at Mrs Arena's request, permitted her Counsel, Mr Philip Taylor, to appear as a witness before the Committee on 23 June 1998 in order to orally expand upon, and where necessary, explain Mrs Arena's written submissions. Having done so, the Committee has, with minor amendments, substantially confirmed its draft findings, and expresses its final findings as set out in this Report.
- 6.1.5 Mrs Arena's main arguments in her written and oral submissions concerning sanctions can be summarised as follows:
- (1) The power to impose sanctions for the conduct of a Member is protective and defensive only, and not punitive.³²⁷

- (2) There has been no substantial interference with the performance of the functions of Parliament which makes it essential that the House impose sanctions for its protection.³²⁸
- (3) There is no material justifying a conclusion Mrs Arena is likely to commit further contempts of the House.³²⁹
- (4) The law of parliamentary privilege should not, except in the clearest case, be invoked so as to impose sanctions which may inhibit or discourage the free expression of opinion or criticism by Members, especially on matters of political controversy, no matter how prejudiced, uninformed or exaggerated it may be.³³⁰
- (5) Sanctions should not be imposed merely to protect the sensitivity of Members.³³¹
- (6) Because no point of order was taken during the making of her speech, she lost the opportunity this would have provided to explain at an early stage the true meaning of her allegations, thereby removing any ambiguity in her speech and mitigating any harm which might otherwise have occurred.³³²
- (7) In the speech, she did not allege the occurrence of criminal conduct or the existence of an illegal conspiracy on the party of any of the named persons, and since making the speech, has repeatedly disavowed before the Committee, to the media, and in private conversations, any past, present or future intention to do so.³³³
- (8) Her motives in making the speech involved a genuine concern on her part for the welfare of sexually abused children, and a legitimate complaint that the Terms of Reference of the Royal Commission's paedophile segment were an insufficient response to the paedophile problem.³³⁴

³²⁸ *ibid.* p. 6

³²⁹ *ibid.* p. 7

³³⁰ *ibid.* p. 5

³³¹ *ibid.*

³³² Franca Arena, unpublished submission concerning conduct, 6 May 1998, p. 3; Franca Arena, unpublished supplementary submission concerning conduct, 22 May, p. 9

³³³ Franca Arena, unpublished submission concerning conduct, 6 May 1998, p. 3; Franca Arena, unpublished supplementary submission concerning conduct, 22 May, p. 13

³³⁴ Franca Arena, unpublished submission concerning conduct, 6 May 1998, p. 40.

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- (9) The allegations in her speech should be judged by reference to what she actually said, and not by whether her thoughts, beliefs or concerns at the time were unreasonable.³³⁵
- (10) She has been vindicated by the fact that after the NSW Police Service began to investigate the documents tabled by her in the House, she was advised by a Senior Police Officer that certain unnamed persons whose conduct was being investigated, based on the material she had provided, may face prosecution.³³⁶
- (11) The publicity created by her speech on 17 September 1997, and the subsequent tabling of documents, has encouraged more alleged victims to make complaints, and provided the impetus for increased criminal investigations, and ultimately prosecutions to be undertaken.³³⁷
- (12) She had already suffered extreme emotional distress and significant financial expense in the aftermath of her speech.³³⁸

6.2 Applicable principles concerning sanctions

- 6.2.1 The Committee emphasises that in making recommendations as to what sanction, if any, should be imposed on Mrs Arena for her conduct, the Committee has not regarded itself as bound to regard any particular type of sanction as appropriate merely because resort to earlier precedents reveals that such sanction has in the past been imposed by the House, or any House of Parliament, for other conduct which was described in the same conclusory terms.
- 6.2.2 Therefore in determining the appropriate sanction, it is wrong to adopt the mechanical expedient of simply enquiring what sanctions have, as a matter of recorded parliamentary history, been imposed by legislatures in Australia and overseas, for conduct which was found to fall below the relevant standard expected of a Member, and to bring a House of Parliament into disrepute. The task of determining whether a sanction should be imposed, and if so, what that sanction should be, is a completely discretionary one involving the application of established principles, as stated below, to the particular conduct, but taking into account any mitigating circumstances.

³³⁵ Franca Arena, unpublished submission concerning conduct, 6 May 1998, p. 7-8, 59.

³³⁶ *ibid.* p. 30.

³³⁷ Franca Arena, unpublished supplementary submission concerning conduct, 22 May 1998, p. 12.; Franca Arena, unpublished submission concerning conduct, 6 May 1998, p. 29.

³³⁸ Franca Arena, unpublished submission on sanctions, 9 June 1998, pp. 29-30.; Phillip Taylor, Evidence, 23 June 1998, *Transcripts*, p. 365.

6.2.3 The Committee, in making recommendations concerning the appropriate sanctions in respect of Mrs Arena's conduct in the matter, is conscious of the need to apply the following principles:

- (1) The purpose of the House imposing sanctions upon a Member is not to impose punishment or retribution, but rather to protect the House and its Members by preserving the dignity and honour of the House, and maintaining the proper conduct and exercise of its powers and duties.³³⁹
- (2) The proper exercise of this protective and self-defensive function requires determination by the House of what is reasonably necessary to uphold the authority and standing of the House (so that the community maintains its respect for the House itself and the institution of Parliament), and to preserve the due and orderly exercise of its functions (so that Members are able to discharge their responsibilities with mutual respect, trust and candour).³⁴⁰
- (3) The importance of preserving freedom of speech in matters of political controversy requires that the House exercise as sparingly as possible its jurisdiction to sanction conduct by Members.³⁴¹ This principle requires that the House impose sanctions only in cases of substantial interference with the performance of the functions of Parliament, and by confining its sanctions to those which are reasonably necessary for the protection of the House and its Members.

6.3 Recommendations concerning sanctions

6.3.1 The Committee has not accepted Mrs Arena's submission that in her speech on 17 September 1997 she did not allege the occurrence of "criminal" conduct or the existence of an illegal "conspiracy" on the part of any of the named persons. The Committee found that although Mrs Arena did not expressly state that the alleged conduct was "criminal" or involved a "conspiracy", her allegations amounted in substance, both in law and in the reasonable view of members of the public, to an illegal conspiracy. Mrs Arena described as "untenable" the "theory that I alleged criminal conduct,"³⁴² but then added:

³³⁹ *Armstrong v Budd* (1969) 71 SR (NSW) 386

³⁴⁰ *ibid.*

³⁴¹ *Report of the Special Commission of Inquiry into Allegations Made in Parliament by the Honourable Franca Arena MLC*, the Hon John Nader RFD QC, 7 November 1997, p. 28

³⁴² Franca Arena, unpublished submission on sanctions, 9 June 1998, p. 14.

I would, however, not dispute that an allegation of criminal conduct, made without any proper basis, could be conduct falling below the standard which the House is entitled to expect of a Member.³⁴³

- 6.3.2 The relevant conduct by Mrs Arena consisted of her making, without any reasonable foundation upon facts known to her or reasonably capable of being checked by her, false allegations in her speech involving serious imputations of corrupt motives and criminal conduct against the Premier, the Leader of the Opposition, the Royal Commissioner, and others outside Parliament. This involved abuse of the privilege which Mrs Arena enjoyed, and so damaged the standing and dignity of the House by undermining public confidence in, and respect for, the House itself as an institution.
- 6.3.3 The Committee has already found that the conduct of Mrs Arena, in making the relevant allegations in her speech on 17 September 1997, was conduct which fell below the standard the House is entitled to expect of a Member, and brought the House into disrepute.³⁴⁴ Mrs Arena was in contempt of the House, and breached the privileges of the House, because she did not comply with the general obligation of Members of the House not to allow their conduct to fall below the standard which the House is entitled to expect of them. Moreover, in making the relevant allegations, she damaged the reputation of the House, because her conduct in making those allegations under the protection of parliamentary privilege probably had the effect within some parts of the community of arousing unjustified suspicions as to the honour and good faith of the deliberations of the House, diminishing the authority of the House, and undermining public confidence in and respect for the House itself and the institution of Parliament.
- 6.3.4 If Members, without proper foundation but under cover of privilege, make unfounded accusations in the House of criminal conduct against persons inside or outside Parliament, there is a real danger that increasing numbers of citizens will exert pressure to limit the privilege of Members, because they view Parliament as a "coward's castle" where Members defame others with excessive immunity. The best means of limiting this danger is that the House demonstrate in such circumstances that the exercise by Members of their privilege of free speech in the House is subject to the House's capacity to deal effectively with any abuses of that privilege.
- 6.3.5 The Committee concluded that determination of the appropriate sanction should not be influenced by the possibility, upon which Mrs Arena places great reliance³⁴⁵, that more prosecutions will ensue as a result of the investigations undertaken by the Task Force set up by Commissioner Ryan to investigate her allegations. The subsequent

³⁴³ *ibid.*

³⁴⁴ See paragraph 5.1.6

³⁴⁵ Franca Arena, unpublished supplementary submission concerning conduct, 22 May 1998, p. 12; Franca Arena, unpublished submission on sanctions, 9 June 1998, p. 29.

investigative activities by the Task Force provide no excuse or mitigation for the seriously damaging allegations which Mrs Arena made in her speech. If Mrs Arena had not made the particular allegations containing the offending imputations, but instead had simply complied with her duty as a citizen to pass on the alleged victims' allegations to the Police, the same outcome by way of victims' complaints, police investigations and criminal prosecutions remained achievable.

- 6.3.6 The Committee considered that no link can be demonstrated between the offending elements in Mrs Arena's allegations and any increase in reliable complaints or successful prosecutions. The ultimate result of the particular investigative activities generated by Mrs Arena's allegations in her speech and the tabling of documents is difficult to predict or quantify at this stage, and whether more convictions of the guilty will result from the documents tabled.
- 6.3.7 Although the Committee accepts that Mrs Arena has for some time expressed a significant concern for the welfare of children and for the plight of sexually abused children, the Committee finds that this factor carries little weight on the issue of sanctions, particularly as any sanctions are necessarily confined to what is protective of the House, rather than punitive towards the Member. The Members of the Committee share Mrs Arena's concerns that children receive the high level of protection which the law and the community expect. The fact that Mrs Arena has taken a high public profile on this issue confers upon her no dispensation from the obligations of Members to avoid causing unnecessary damage to the standing and reputation of the House. Mrs Arena, like all other Members, is obliged to comply with standards of responsible conduct when choosing the manner and language in which she gives expression in the House to her concerns on this issue.
- 6.3.8 Mrs Arena's fundamental position before the Committee is that the language used by her in making the relevant allegations in her speech has been misinterpreted, and was not intended by her to impute, as the Committee has found, the existence of conspiratorial conduct on the part of the persons named, with the common purpose that Justice Wood, as Royal Commissioner, would corruptly, and contrary to the duties of his public office, protect paedophiles who had prominent positions in the community, from investigation, report and prosecution. Mrs Arena in her various submissions, oral evidence and submissions has sought vigorously and repeatedly to deny that these imputations were intended by her, or reasonably arose from the relevant allegations in her speech. The fact that she has done so aids the Committee in determining whether or not the most extreme sanction of expulsion is necessary.

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- 6.3.9 The Committee has given careful consideration to Mrs Arena's submission that there is no material in the speech of 17 September 1997 or in the evidence placed before the Committee justifying a conclusion that she is likely to commit further contempts of the House.³⁴⁶ Mrs Arena's submission to the Committee dated 30 January 1998 and her supplementary submission dated 16 February 1998 both referred to and annexed documents containing very serious allegations made to her that various persons who occupy, or have previously occupied, high positions in public life have engaged in sexual misconduct towards children. Those allegations made to her which the Committee investigated have been demonstrated to be totally without foundation. The Committee having questioned Mrs Arena at length concerning these documents, upon which she originally appeared to place much emphasis in her submissions to the Committee, ultimately concluded that it should accept Mrs Arena's submission that these allegations were made **to her** as distinct from being ones made or adopted **by her**³⁴⁷, and that in any event, they were in no way relied upon by her in making a speech.³⁴⁸ Moreover, the Committee recognises the validity of Mrs Arena's related submission that her allegations in her speech should be judged by reference to what she actually said in the speech on 17 September 1997, and not by whether her thoughts, beliefs or concerns at that time, or later when preparing her submissions or giving evidence to the Committee, were unreasonable.
- 6.3.10 The Committee concludes that the most extreme sanction of expulsion would not be appropriate in the circumstances. There are insufficient grounds at this stage for inferring that Mrs Arena's conduct in making the particular allegations in her speech represents a chronic problem, which is likely to recur. No doubt the House will be more alert in the future to any breaches by Mrs Arena of the requisite standards of conduct expected as a Member, and act with appropriate vigour if future breaches occur. However, it would not be proper for the Committee or the House to report or act adversely at this stage on the basis of mere predictions as to the future.
- 6.3.11 Nevertheless the damage done by the relevant allegations in her speech is both significant and continuing, and requires a sanction which limits any continuing damage and mitigates that which has occurred. Accordingly, the Committee considers that the most appropriate sanction is that which requires Mrs Arena to be first given an opportunity to withdraw the offending imputations contained in the words spoken and make an apology to the House. In the event that Mrs Arena fails to withdraw and apologise within a reasonable time, the Committee considers that the most appropriate sanction is that Mrs Arena should be suspended from the House, until she has made a formal apology to the House. This process is analogous to the available sanctions for

³⁴⁶ Franca Arena, unpublished supplementary submission concerning conduct, 22 May 1998, p. 7.

³⁴⁷ Franca Arena, unpublished submission concerning conduct, 6 May 1998, p. 64

³⁴⁸ *ibid.*

a breach of Standing Orders 80 and 81 in cases where a Member uses offensive words against another Member, makes imputations of improper motives or personally reflects on another Member. In these instances if Members fail to withdraw, and in appropriate cases, apologise, they may be suspended from the House under the Standing Orders for disorderly conduct. However, the powers of the House in imposing sanctions on Members for their conduct, in or outside the House, are not restricted to those contained in the Standing Orders.

- 6.3.12 Should Mrs Arena fail to withdraw and apologise the need to protect the dignity of the House and its Members will, in the Committee's view, be best served by requiring Mrs Arena to be suspended and remain suspended from the House until she has made the necessary formal apology and withdrawal which should be in terms determined by the House, as distinct from those chosen by Mrs Arena herself. As the protective sanction determined by the House should be aimed at remedying the damage caused by Mrs Arena's wrongful conduct, the House should not leave the decision as to the terms of the apology and withdrawal to Mrs Arena's discretion. The danger exists that if Mrs Arena is to choose the words in which to express any apology and withdrawal, she may do so in a manner which leaves the community in doubt as to what she is withdrawing, and whether she is truly apologising.
- 6.3.13 If Mrs Arena merely makes a token apology and withdrawal in grudging or qualified terms which suggest that the real problem has been misinterpretation by the House rather than Mrs Arena's own conduct, the damage done to the House and its reputation resulting from her allegations will persist. The House should not by granting complete latitude to Mrs Arena as to how the apology and withdrawal is framed, permit the House's sanctions to be deprived of effect because any ambiguity of language or uncertainty of meaning in her speech of apology and withdrawal leaves the community in a state of doubt as to whether and to what extent she has in fact done so. For these reasons, the Committee has prepared for the House what it has concluded is an appropriate form of apology and withdrawal.

The Committee therefore recommends:

Recommendation No. 1

- 1. That Mrs Arena be called on to withdraw the allegations made in her speech on 17 September 1997 which involved imputations against:**
- (a) the Premier, Mr Carr.**
 - (b) the Leader of the Opposition, Mr Collins.**
 - (c) the Royal Commissioner, Mr Justice Wood.**

(d) the General Secretary of the Australian Labor Party, Mr Della Bosca.

(e) the President of the Australian Labor Party, Mr Sheahan,

of a criminal conspiracy to ensure that people in high places would not be named in the paedophile segment of the Report of the Royal Commission into the Police Service, and make a written apology to the House.

2. That in the event of the failure of Mrs Arena to withdraw the imputations and make a written apology to the House within a specified time, Mrs Arena be suspended from the service of the House until the submission of a formal apology.

Recommendation No 2.

That the House consider a Resolution in the following terms:

1. That this House, having regard to the findings of the Standing Committee on Parliamentary Privileges and Ethics in relation to its inquiry into the conduct of the Honourable Franca Arena, MLC:

- (a) considers that the conduct of Mrs Arena in making certain allegations in her speech on 17 September 1997, fell below the standards which the House is entitled to expect from its Members and brought the House into disrepute.
- (b) calls on Mrs Arena to make a written apology to the House within 5 sitting days after the passing of this Resolution, and withdraw in writing the imputations against:
 - (i) the Premier, Mr Carr.
 - (ii) the Leader of the Opposition, Mr Collins.
 - (iii) the Royal Commissioner, Mr Justice Wood.
 - (iv) the General Secretary of the Australian Labor Party, Mr Della Bosca.
 - (v) the President of the Australian Labor Party, Mr Sheahan,

of a criminal conspiracy to ensure that people in high places would not be named in the paedophile segment of the Report of the Royal Commission into the Police Service.

2. That, in the event of Mrs Arena not submitting an apology and withdrawing the imputations by the time required in paragraph 1 (b), Mrs Arena is suspended from the service of the House until the submission of a formal apology and withdrawal of the imputations referred to in paragraph 1(b) (i) to (v).

3. That the apology be in the following terms:

I hereby withdraw the allegations made in my speech to the House on 17 September 1997, which involved imputations against Mr Carr, Mr Collins, Mr Justice Wood, Mr Della Bosca and Mr Sheahan, of a criminal conspiracy to ensure that people in high places would not be named in the paedophile segment of the Report of the Royal Commission into the Police Service.

I also hereby apologise to the House and to those people for making those imputations.

4. That the apology and withdrawal be read by Mrs Arena in the House and be also published in the Minutes of Proceedings.