Inspector
of the
Police Integrity Commission

Report on the Practices and Procedures of the Police Integrity Commission

June 2003

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EXECUTIVE SUMMARY

Born out of the recommendations of the Royal Commission into the New South Wales Police Service ("Wood Royal Commission"), the Police Integrity Commission ("PIC") became fully operational in early 1997. Tasked with investigating and, where required, reporting to Parliament on matters of serious police misconduct, the PIC discharges the important function of helping to maintain public confidence in NSW Police. It achieves this through various means; sometimes through the use of covert operations and private hearings, sometimes by conducting public hearings and often through the employment of both means. The broad coercive powers ascribed to it under the *Police Integrity Commission Act* 1996 are a measure of the degree to which Parliament, and through Parliament the public, desires the PIC to succeed in its task. It should also be said that the vast majority of submissions received by this Inquiry support that view. The recommendations in this Report are made to the same end; namely, with the purpose of assisting the PIC to succeed in its mandate.

This Report deals with the practices and procedures of the PIC with particular reference to the conduct of its hearings. Section 20 of the Act requires, amongst other things, that the PIC conduct its proceedings with as little technicality or formality as possible and that hearings be conducted in a non-adversarial manner. Further, the PIC is not bound by rules of evidence. The submissions received by this Inquiry demonstrate that this is easier to legislate than to put in practice.

This Report is in Five Chapters. Chapter One is an introduction to this Inspectorate, the Terms of Reference of this Inquiry and to the PIC. Chapter Two sets out the legislative framework and powers of the PIC which are relevant to this Inquiry. Chapter Three considers the criticisms raised in submissions as to the problems with present practices and procedures of the PIC. Chapter Four deals with the responses to those criticisms and contains the relevant recommendations for improvement which are extracted below. Finally, Chapter Five applies the framework adopted in the previous chapters to the hearing and report into Operation Malta.

The following recommendations are made:

1. **The PIC has a broad mandate to investigate police misconduct. Provided that the PIC acts within the scope of its mandate the PIC should conduct its investigations in such a manner as it considers fit, free from interference from external influences.**

2. **The PIC should not engage external assistance on its Operational Advisory Group.**

3. **The Operational Advisory Group must remain fully appraised of the status of investigations and ensure that investigations are appropriately project managed.**

4. **There should be no interference with the way in which the PIC elects to convene public or private hearings.**

5. **That the PIC develop and publish guidelines in relation to its practices concerning the non-publication of names.**

6. **That the guidelines set out the statutory and common law requirements and the manner in which the PIC will interpret these in considering applications for non-publication orders.**

7. **That no change be made to proceedings followed by the PIC with regard to notification or otherwise of the General Scope and Purpose of Proceedings.**

8. **The PIC should develop conflict management guidelines which would regulate the granting of leave to counsel to appear for more than one individual or organisation or an individual and an organisation.**

9. **The PIC should, as soon as the general scope and purpose of the hearing is determined, require counsel wishing to appear for more than one party to provide written submissions seeking leave to appear. Consideration should be given to the inclusion of a declaration from counsel that counsel is free of any conflict.**

10. **If the general scope and purpose of the hearing changes and/or the nature of the investigation becomes such that the general scope and purpose might change, then the PIC should consider convening a special hearing if, in its opinion, those changes might have the effect of producing a conflict of interest in counsel appearing.**

11. **Where a notice to produce is issued the PIC should strictly enforce compliance with the notice, including where necessary, use of its powers under section 26(3) of the Act.**

12. **Parties served with notices to produce should be given reasonable time within which to comply with such notices except in circumstances where, in the view of the PIC, evidence is in jeopardy of being lost or destroyed or where parties might collude to defeat the purpose of the notice.**

13. **No change should be made to the current procedures in place at the PIC to determine privilege over documents.**

14. **The PIC should establish an internal Practice Guidelines Committee which should include the Commissioner, the Assistant Commissioner and the PIC Solicitor.**

15. **The PIC should formulate uniform Practice Guidelines dealing with, amongst other things:**

    - **Legal representation and conflicts of interest;**
    - **The placement of evidence before the PIC; and**
    - **The production of documents.**

16. **The PIC should publish the Practice Guidelines on its Internet site and maintain hardcopies for persons without Internet access.**

17. **The PIC should ensure that the Presiding Officer (with the assistance of Counsel Assisting) firmly controls the course of the proceedings by requiring parties to adhere to orders to produce documents, regulating the extent of the evidence led and ensuring by determining in open hearing timetables for submissions and requiring undertakings from counsel as to adherence. Counsel should be informed that the matter will be listed for mention, out of court hours, seven days prior to the submissions deadline date. Counsel should be requested to attend the mention and advise of progress.**

18. **That the PIC employ the term "interim public hearing" when it is expected that investigations will be ongoing at the conclusion of a public hearing. The purpose of this recommendation is to highlight the fact that a public hearing may be but one step, and not the final step, in the investigation process.**

19. **No change should be made to the PIC's discretion to refer matters to NSW Police pursuant to section 77 of the Act.**

20. **The PIC should retain complete discretion as to the use which NSW Police may make of confidential information provided with draft referrals or reports.**

21. **A process should be in place between the PIC and NSW Police to deal with circumstances where NSW Police consider that a confidential information order should be waived. NSW Police should indicate what information it wishes to use and the purpose for which the information is intended to be used. The PIC should retain an unfettered discretion to authorise the release of such information.**

22. **The Practice Guidelines Committee should develop and publish guidelines on the release of information in accordance with the advices it has received on the PIC's obligations in relation to section 56(4)(c) of the Act. The guidelines should use examples of circumstances in which information may be released and circumstances where information may not be released.**

23. **The Practice Guidelines Committee should publish a "Request for Information" form which would guide applicants through a series of questions matching the guidelines.**

24. **Both the guidelines and the Request for Information form should be available on the PIC's Internet site.**

In formulating the recommendations it is first recognised that the PIC is a commission of inquiry, not a court. This distinction has ramifications for practically every aspect of the way in which proceedings are conducted, including the outcome and reporting of such proceedings. It is evident from the submissions received in this Inquiry that this distinction is not easily understood at times, either by persons called to appear, or,

on occasion, by counsel representing those persons. The gravitation toward a courtroom mentality, unhelpful as it is for the purposes of a commission of inquiry, is not easily discouraged.

Second, it is recognised that, operations which the PIC may be called upon to investigate will break new ground and bring new challenges. Such matters test the existing institutional capacity to control and respond to these challenges. While in some instances the Act will guide the response, in other cases existing internal practices and procedures must be refined or new strategies developed.

Operation Malta is just such a case. That operation involved the investigation of serious allegations concerning the will of senior NSW Police officers to implement reform of the Service. The allegations were formulated and presented in such a way as to attract maximum publicity. Notwithstanding the fact that the complainants were involved with only one aspect of police reform, the allegations were framed in such a way as to call into question the bigger picture of the capacity of NSW Police to implement reform generally. In this sense, the allegations questioned whether or not the Wood Royal Commission reforms were being implemented. Further, the complaints were made against senior serving officers, including the Office of the then Commissioner of Police.

With this background all eyes were on the PIC to respond. The complaints were presented in late October 2000. Many days of public and private hearings were conducted over a two year period. The Report was delivered to Parliament in February 2003.

Both during the operation and following submission of the Report there was disquiet over the nature of the PIC's investigation into the allegations, the time taken to conduct the hearings and the fact that the ultimate conclusions reached in the Report did not involve any adverse recommendations.

From a review of the evidence and submissions considered by this Inquiry it is apparent that the following factors affected the conduct of Operation Malta:

1. During the course of the hearing a conflict of interest arose which required counsel appearing on behalf of two key witnesses to withdraw his representation. The conflict arose in circumstances which are discussed in Chapter Five.

2. Numerous adjournments occurred for reasons which included the need to brief fresh counsel following the abovementioned conflict, for counsel's convenience and due to the unavailability of the hearing room which was required for another concurrent major investigation.

3. Lengthy arguments occurred between the PIC and legal representatives of NSW Police concerning the production of documents pursuant to notices issued by the PIC. This resulted in delays to the production of documents by NSW Police.

4. The gravity of the allegations and the seniority of personnel under investigation met with an adversarial response by the Courts and Legal Services Branch of the

NSW Police. This led to significant friction in relations between the PIC and legal counsel for NSW Police throughout the course of the operation.

5. Although the hearing was conducted in such manner as to meet the requirements of natural justice, the control over the presentation of evidence was not sufficiently robust with the effect that subsidiary issues were not adequately filtered out.

6. Counsel were permitted more than five months to provide written submissions in response to those of Counsel Assisting. This resulted in additional delays in presentation of the Report to Parliament.

The permitted practice of allowing counsel representing parties to call evidence rather than having statements from potential witnesses whose evidence counsel desired to have placed before the inquiry vetted and presented by Counsel Assisting resulted in loss of control of the hearing by the PIC. This practice also introduced an element of open-endedness which culminated in a larger number of witnesses being called by counsel representing NSW Police than by Counsel Assisting the inquiry.

Although the submissions of Counsel Assisting (who had been briefed at a late stage to replace earlier Counsel Assisting) were expeditiously produced, the latitude extended to counsel appearing for the parties was excessive and no apparent effort was made by listing the matter for mention or otherwise to have the parties explain the delays as well as to set and obtain undertakings from counsel to meet deadlines.

Operation Malta was a most unusual, perhaps unique, inquiry involving, as it did, trenchant criticism of the highest echelon of NSW Police administration. The introduction of the complaint accompanied by the calling of a press conference by one of the complainants, guaranteed a great deal of publicity and public interest as no doubt was the complainants' intention.

The response of some of those against whom complaint was made was also ventilated in media. In those circumstances the prospect of the complaint being dealt with by the PIC in-house as an internal or preliminary inquiry was in any real sense, out of the question.

The view expressed in some quarters that Operation Malta produced a 'nil return' is erroneous. On the contrary, the conclusion reached was that there was no serious misconduct by senior police regarding the matters complained of. Nevertheless, the gravity of the allegations and the public interest they generated ensured that the complaints could not, in any sense, have been lightly dealt with.

Two matters should be noted: first, that Operation Malta by virtue of the nature of the complaints made and the adversarial response generated seriously strained the relationship between NSW Police and the PIC, which has now been ameliorated by dint of the efforts of those at the highest executive level of both of those crime prevention agencies; second, a significant number of the recommendations, above, referred to have been identified by the PIC prior to this inquiry and guidelines have been or are in the course of being formulated to obviate unhelpful practices and procedures.

CHAPTER ONE

INTRODUCTION

1.1 The Inspector of the Police Integrity Commission ("the Inspector") is appointed under the *Police Integrity Commission Act (*NSW) 1996 ("the Act") by the Governor on the advice of the Executive Council.[1] The Inspector's duties under the Act are to investigate complaints against officers of the Police Integrity Commission ("PIC"), to audit its operations, effectiveness and compliance with the law, and to report to the Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission. The Inspector is afforded wide powers to carry out his functions including the power to investigate any aspect of the PIC's operations.

1.2 The functions of the Inspector are set out in Part 6 of the Act. In particular section 89 of the Act prescribes the principal functions of the Inspector as follows:

> "**89 Principal functions of Inspector**
>
> (1) The principal functions of the Inspector are:
>
> (a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and
>
> (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and
>
> (c) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.
>
> (2) The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the Minister, in

[1] Section 88 of the Act

response to a complaint made to the Inspector or in response to a reference by the Ombudsman, the ICAC, the New South Wales Crime Commission, the Joint Committee or any other agency.

(3) The Inspector is not subject to the Commission in any respect."

1.3 The powers of the Inspector are set out in section 90 of the Act in the following terms:

"**90 Powers of Inspector**

(1) The Inspector:

(a) may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and

(b) is entitled to full access to the records of the Commission and to take or have copies made of any of them, and

(c) may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and

(d) may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission, and

(e) may investigate and assess complaints about the Commission or officers of the Commission, and

(f) may refer matters relating to the Commission or officers of the Commission to other agencies for consideration or action, and

(g) may recommend disciplinary action or criminal prosecution against officers of the Commission."

1.4 Section 91 of the Act confers power on the Inspector to hold inquiries and grants the Inspector the powers, authorities, protections and immunities

conferred on a Commissioner by Division 1 Part 2 of the *Royal Commission Act* (NSW) 1923. By section 101 of the Act the Inspector is empowered to make a special report to the Presiding Officer of each House of Parliament on, amongst other things, "*any matters affecting the Commission, including, for example, its operational effectiveness or needs[.]"*

1.5 The Inspector acts independently of any interests, and in particular, as section 89(3) of the Act makes clear, "*the Inspector is not subject to the [PIC] in any respect*."

THE INQUIRY INTO THE POLICE INTEGRITY COMMISSION

1.6 On 12 February 2003, the then Minister for Police, the Hon. Michael Costa, referred to the Office of the Inspector of the Police Integrity Commission the question of the appropriateness of the PIC's practices and procedures with respect to the formality and length of its hearings and functions.[2] The Minister noted that the *Report on the Review of the Police Integrity Commission Act 1996* [3] ("Review") had been tabled in Parliament on 17 December 2002 and that:

> "A number of submissions to the *Review* raised concerns about the timeliness, length and formality of the Police Integrity Commission's…investigations and hearings, with particular reference being made to the Malta Operation." [4]

1.7 Following an exchange of correspondence and further discussion with the Ministry for Police the Terms of Reference were agreed as follows:

> "Pursuant to Part 6 of the *Police Integrity Commission Act 1996* and conformably with Recommendation 10 of the 2002 Report on the Review of the *Police Integrity Commission Act 1996*, the Honourable Michael Costa, Minister for Police, requests the Honourable Morris Ireland QC, Inspector of the Police Integrity Commission, to conduct

[2] The matter of an inquiry into the practices and procedures of the PIC had been raised informally with The Office of the Inspector of the Police Integrity Commission in December 2002.
[3] The *Review* was prepared by the Ministry for Police in 2002 and was released as a Discussion Paper.
[4] Letter from the Ministry for Police to the Inspector of the Police Integrity Commission dated 12 February 2003.

an inquiry and furnish a Report on the appropriateness of the Police Integrity Commission's procedures and practices with respect to the formality and length of its hearings and functions (with particular emphasis on public hearings and reporting by the Commission on public hearings) and on any specific improvements that may be made to those practices and procedures.

Specific regard is to be had to section 20 of the Act which provides:

"**20. Evidence and procedure**

(1) The Commission is not bound by the rules of practice of evidence and can inform itself on any matter in such manner as it considers appropriate.

(2) The Commission is required to exercise its functions with as little formality and technicality as possible, and, in particular, the Commission is required to accept written submissions as far as is possible and hearings are to be conducted with as little emphasis on an adversarial approach as possible." [5]

1.8 On 4 March 2003 notices were published in major newspapers calling for written submissions from interested organisations, groups and individuals. An invitation was extended to a number of government and non-government organisations and individuals to make submissions. As a result of the notices the Inspectorate received 12 submissions which are listed in Appendix A to this Report. In addition to the written submissions limited consultations were conducted with various interested parties in order to clarify certain matters raised in the written submissions and to further investigate areas relevant under the Terms of Reference.

SCOPE OF THE REPORT

1.9 This Report examines the ways in which the PIC conducts its hearings, the procedures used and the manner in which the PIC reports to Parliament. In doing so particular reference is made to the Report to Parliament in Operation Malta, which was submitted by the PIC in February 2003. The submission of the Report to Parliament in Operation Malta has been the catalyst for

[5] Letter from the Inspector of the Police Integrity Commission to the Ministry for Police dated 4 April 2003.

considerable public debate concerning the length of hearings, the time taken to produce the report, the nature of the ultimate conclusions reached and the perceived cost of the proceedings. It should be stressed that this Report is not a review of the PIC's conclusions in Operation Malta – indeed such an inquiry would be ultra vires the powers ascribed to the Inspector under the Act. Rather this Report considers, with reference to Operation Malta, whether the current practices and procedures relating to hearings at the PIC are susceptible to improvement.

1.10 A further matter which this Report does not address, except in a tangential sense in terms of hearings, is the power of the PIC to compel production of privileged documents. The Review recommended that investigation of privilege which impinges upon the operations and functions of a number of statutory investigative bodies should be the subject of a separate inquiry.

CHAPTER TWO

STAUTORY PROCEDURES OF THE POLICE INTEGRITY COMMISSION

FORMATION OF THE POLICE INTEGRITY COMMISSION

2.1 The PIC had its genesis in the recommendations of the *First Interim Report of the Royal Commission into the New South Wales Police Service* ("the Wood Royal Commission"). As part of its mandate the Wood Royal Commission considered a number of competing organisational models as to the various ways in which police corruption could best be combated. After considering the then extant regime and possible alternatives, it was recommended that:

- the NSW Police retain a measure of responsibility to combat police corruption; and

- an independent external agency with a specialist capability be created to undertake direct investigation into selected cases.[6]

2.2 In response to those recommendations the PIC was established in 1996 by Act of Parliament. The purpose of the Act establishing the PIC was to set up "*a body whose principal function is to detect, investigate and prevent police corruption and other serious police misconduct*."[7] During the Second Reading Speech the then Minister for Police, The Hon. Paul Whelan, described the *Police Integrity Commission Bill* as being of "*historic significance*" and further that it would:

[6] Royal Commission into the New South Wales Police Service, *First Interim Report*, February 1996, pp. 94-98.
[7] *Police Commission Corruption Bill* 1996, Second Reading Speech, NSW Parliament Legislative Assembly, *Hansard*, 24 April 1996.

> "…provide the foundation on which the integrity of the Police Service will be rebuilt and public confidence restored."[8]

2.3 In its Final Report the Wood Royal Commission noted that:

> "The Royal Commission, which was closely involved in the preparation of the legislation which provided the basis for the formation of the PIC and its establishment, is satisfied with that legislation and with the capacity of the PIC to continue the work it has begun."[9]

2.4 In this regard the PIC was established as an accountable but independent body with significant investigative powers. It has the task of investigating serious police misconduct. It also has the power to expose that misconduct thereby promoting confidence in the mechanism of government to safeguard the interests of the public.

THE STRUCTURE OF THE PIC ACT

2.5 The Act came into full operation on 1 January 1997.

2.6 It is necessary to set out in some detail the scheme of the Act insofar as it is relevant to the functions and procedures of the PIC.

2.7 The aims of the Act are specified as follows:

> "**3 Principal objects of Act**
>
> The principal objects of this Act are:
>
> (a) to establish a body whose principal function is to detect, investigate and prevent police corruption and other serious police misconduct, and

[8] *Police Integrity Commission Bill and Police Legislation Amendment Bill*, Second Reading Speech, NSW Parliament Legislative Assembly, *Hansard*, 4 June 1996 at p.2464. It is noted that those comments were made in the context of the two Bills then under consideration. The name of the Bill (and consequently the PIC) changed from the *Police Corruption Commission Bill* 1996, introduced into Parliament on 24 April 1996, to the *Police Integrity Commission Bill* 1996.

[9] Wood Royal Commission, *Final Report into the New South Wales Police Force* – Volume II: Reform, 1997 at p.526.

(b) to provide special mechanisms for the detection, investigation and prevention of serious police misconduct and other police misconduct, and

(c) to protect the public interest by preventing and dealing with police misconduct, and

(d) to provide for the auditing and monitoring of particular aspects of the operations and procedures of NSW Police**.**"

2.8 Consistent with these objectives, corporately, the PIC's mission is *"to be an effective agent in the reduction of serious police misconduct"*.[10]

2.9 The Act sets out the operational functions of the PIC as follows:

"**13 Principal functions**

(1) The principal functions of the Commission are as follows:

(a) to prevent serious police misconduct and other police misconduct,

(b) to detect or investigate, or manage other agencies in the detection or investigation of, serious police misconduct,

(c) to detect or investigate, or oversee other agencies in the detection or investigation of, other police misconduct, as it thinks fit,

(d) to receive and assess all matters not completed by the Police Royal Commission, to treat any investigations or assessments of the Police Royal Commission as its own, to initiate or continue the investigation of any such matters where appropriate, and otherwise to deal with those matters under this Act, and to deal with records of the Police Royal Commission as provided by this Act.

(2) The Commission is, as far as practicable, required to turn its attention principally to serious police misconduct.

(3) The reference in this section to **managing** other agencies in the detection or investigation of serious police misconduct is a reference to the provision by the Commission of detailed guidance in the planning and execution of such detection or investigation.

[10] Police Integrity Commission, *Annual Report*, 2001-2002 at p.2.

(4) The reference in this section to **overseeing** other agencies in the detection or investigation of other police misconduct is a reference to the provision by the Commission of a lower level of such guidance, relying rather on a system of guidelines prepared by it and progress reports and final reports furnished to it.

(5) In managing or overseeing other agencies for the purposes of this section, the Commission does not have a power of control or direction, and any such management or oversight is to be achieved by agreement. However, it is the duty of members of NSW Police to co-operate with the Commission in the exercise of its management and oversight functions and any other functions of the Commission.

(6) However, nothing in subsection (2), (3), (4) or (5):

(a) affects the capacity of the Commission to exercise any of the functions as referred to in subsection (1), or

(b) provides a ground for any appeal or other legal or administrative challenge to the exercise by the Commission of any of those functions."

2.10 There are supplementary functions concerning police activities and education programmes,[11] a special function relating to audit of the reform process[12] and certain functions concerning the use and collection of information.[13]

2.11 Central to the focus of the PIC is the concept of *"police misconduct"* which is defined in Section 5 as:

"**5 Police misconduct**

(1) Definition

For the purposes of this Act, ***police misconduct*** means misconduct (by way of action or inaction or alleged action or inaction) of a police officer:

(a) whether or not it also involves non-police participants, and

(b) whether or not it occurs while the police officer is officially

[11] Section 14 of the Act.
[12] Section 14A of the Act.
[13] Section 15 of the Act.

on duty, and

(c) whether or not it occurred before the commencement of this subsection, and

(d) whether or not it occurred outside the State or outside Australia.

(2) **Examples**
Police misconduct can involve (but is not limited to) any of the following:

(a) police corruption,

(b) the commission of a criminal offence by a police officer,

(b1) misconduct in respect of which the Commissioner of Police may take action under Part 9 of the *Police Act 1990,*

(c) corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* involving a police officer,

(d) any other matters about which a complaint can be made under the *Police Act 1990* .

(3) **Former police officers** (cf ICAC Act s 8 (3))

Conduct may be dealt with, or continue to be dealt with, under this Act even though any police officer involved has ceased to be a police officer. Accordingly, references in this Act to a police officer extend, where appropriate, to include a former police officer.

(4) **Serious and other misconduct**

References in provisions of this Act to "serious" police misconduct and "other" police misconduct are intended for general guidance and are not intended to indicate a precise distinction between the two concepts."

INVESTIGATIONS

2.12 The PIC has very broad powers to initiate and conduct investigations on its own initiative, on a police complaint made or referred to it, or on a police complaint of which it has become aware.[14] The PIC may conduct an investigation even though no particular officer or other person is implicated and even though no police misconduct is suspected.[15] In this regard the PIC is empowered to conduct, continue or discontinue an investigation as it thinks fit whether or not:

> "(a) the subject-matter of the investigation is trivial, or
>
> (b) the conduct or matter concerned occurred at too remote a time to justify investigation, or
>
> (c) if the investigation was initiated as a result of a police complaint - the complaint was frivolous, vexatious or not in good faith."[16]

2.13 In addition to the power to conduct investigations pursuant to section 23, there is further power to conduct preliminary investigations under section 24 of the Act:

> **"24 Preliminary investigations**
>
> (1) An investigation may be in the nature of a preliminary investigation.
>
> (2) A preliminary investigation can be conducted, for example, for the purpose of assisting the Commission:
>
> (a) to discover or identify conduct that might be made the subject of a more complete investigation under this Act, or
>
> (b) to decide whether to make particular conduct the subject of a more complete investigation under this Act.
>
> (3) Nothing in this section affects any other provision of this Act."

[14] Section 23(1) of the Act.
[15] Section 23(2) of the Act.
[16] Section 23(3) It is noted that s.13(2) provides that the PIC is *"required to turn its attention principally to serious police misconduct*."

2.14 The effect of these broad powers is that an investigation by the PIC can cover a wide field which may include events, which taken in isolation, may appear only tangentially related to serious police misconduct. That is not to say that, in the exercise of its discretion, the PIC can inquire into any matter. There must be at least a *bona fide* potential issue of police misconduct.

2.15 Investigations of the PIC are overseen by an Operations Advisory Group ("the OAG") which is charged with determining long-term and short-term goals of investigations, together with the assessment of investigations in terms of performance. The Commissioner chairs the OAG. The Assistant Commissioner, the Director Operations, the Executive Officer and the Manager Intelligence also sit on the OAG.[17]

HEARINGS

2.16 The PIC is not a court. In keeping with this, the Act requires that hearings are conducted in a manner which is neither formal nor technical. This requirement is supported by the fact that the Act relieves the PIC from being bound by the rules of evidence while emphasising that proceedings should be conducted in a non-adversarial manner.

"**20 Evidence and procedure**
(cf ICAC Act s 17)

(1) The Commission is not bound by the rules or practice of evidence and can inform itself on any matter in such manner as it considers appropriate.

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

(3) Despite subsection (1), section 127 (Religious confessions) of the

[17] The OAG was reconstituted between 2000-2001 and 2001-2002 to include the Commissioner as Chairman.

Evidence Act 1995 applies to any hearing before the Commission."

2.17 It is noted in this regard that the PIC's Code of Conduct requires the business of the PIC to be conducted with *'efficiency and economy'*. [18]

2.18 At the commencement of a hearing the Commissioner or the Assistant Commissioner must announce the general scope and purpose of the hearing except where this would seriously prejudice the investigation concerned.[19]

PUBLIC AND PRIVATE HEARINGS

2.19 One of the features of the Act is that the PIC may hold hearings in pubic or private. The Act confers a discretion on the PIC in this regard based on the notion of public interest.

2.20 In the year 2001-2002 the PIC conducted 105 public hearing days and 35 private hearing days. This represented a *"substantial increase"* in public hearings over previous years.[20]

"**33 Public and private hearings**
(cf ICAC Act s 31)

(1) A hearing may be held in public or in private, or partly in public and partly in private, as decided by the Commission.

(2) Without limiting the above, the Commission may decide to hear closing submissions in private. This extends to a closing submission by a person appearing before the Commission or by a legal practitioner representing such a person, as well as to a closing submission by a legal practitioner assisting the Commission as counsel.

(3) In reaching these decisions, the Commission is obliged to have regard to any matters that it considers to be related to the public interest.

(4) The Commission may give directions as to the persons who may be present at a hearing when it is being held in private. A

[18] Appendix 4, Code of Conduct, Police Integrity Commission, *Annual Report*, 1997-1998.
[19] Section 32 of the Act.
[20] Police Integrity Commission, *Annual Report*, 2001-2002 at p.9.

person must not be present at a hearing in contravention of any such direction."

2.21 There are a number of factors which bear on the exercise of the statutory discretion to determine what is *"in the public interest"*. There are of course numerous reasons as to why the PIC has the option of holding hearings in public or private, not least of which is that public hearings can have the effect of eliciting 'cooperation' from police officers under investigation.[21] The reasons for public hearings are discussed in detail in Chapters Three and Four of this Report.

RIGHTS OF APPEARANCE

2.22 Rights of appearance before the PIC are governed by sections 34 and 35 of the Act.

"**34 Right of appearance of affected person** (cf ICAC Act s 32)

If it is shown to the satisfaction of the Commission that any person is substantially and directly interested in any subject-matter of a hearing, the Commission may authorise the person to appear at the hearing or a specified part of the hearing.

35 Legal representation (cf ICAC Act s 33)

(1) The Commission may, in relation to a hearing, authorise:

(a) a person giving evidence at the hearing, or

(b) a person referred to in section 34, to be represented by a legal practitioner at the hearing or a specified part of the hearing.

(2) The Commission is required to give a reasonable opportunity for a person giving evidence at the hearing to be legally represented.

(3) A legal practitioner appointed by the Commission to assist it may appear before the Commission.

[21] *Ibid*.

36 Groups and unincorporated associations
(cf ICAC Act s 33A)

(1) Groups and unincorporated associations may be authorised to appear at a hearing or authorised or required to give evidence at a hearing.

(2) Accordingly, references in sections 34 and 35 to a "person" extend for this purpose to a group or unincorporated association.

(3) However, this section does not affect the application in any other context of the principle that a reference to a word in the singular form includes a reference to the word in the plural form."

2.23 Accordingly there is no legal right to legal representation for an individual or group or unincorporated association although this is subject to the requirement in section 35(2) that the PIC give a reasonable opportunity for an individual or group or unincorporated association to be legally represented.

2.24 Leave is also required for examination and cross examination of witnesses. The granting of leave is subject to the exercise of discretion by the PIC to determine that the matter in issue is relevant.[22]

EVIDENCE

2.25 The PIC has very strong powers to obtain information and documents for the purposes of an investigation. In particular the PIC has the power to seek documents that might otherwise be privileged in the circumstances specified in section 27 of the Act. As will be seen in Chapter Five, the use of that power had a significant effect on the hearing in Operation Malta.

"**25 Power to obtain information**
(cf ICAC Act ss 21, 82; RC (PS) Act s 6)

(1) For the purposes of an investigation, the Commission may, by notice in writing served on a public authority or public official, require the authority or official to produce a statement of

[22] Section 37 of the Act.

information.

(2) A notice under this section must specify or describe the information concerned, must fix a time and date for compliance, and must specify the person (being the Commissioner, an Assistant Commissioner or any other officer of the Commission) to whom production is to be made.

(3) The notice may provide that the requirement may be satisfied by some other person acting on behalf of the public authority or public official and may, but need not, specify the person or class of persons who may so act.

(4) A person must not:

(a) without reasonable excuse, fail to comply with a notice served on the person under this section, or

(b) in purported compliance with a notice served on the person or some other person under this section, furnish information knowing it to be false or misleading in a material particular.
Maximum penalty: 20 penalty units or imprisonment for 6 months, or both.

(5) This section does not apply to:

(a) the Independent Commission Against Corruption or an officer of the Commission as defined in the *Independent Commission Against Corruption Act 1988*, or

(b) the Ombudsman or an officer of the Ombudsman.

26 Power to obtain documents or other things
(cf ICAC Act ss 22, 83; RC (PS) Act s 7)

(1) For the purposes of an investigation, the Commission may, by notice in writing served on a person (whether or not a public authority or public official), require the person:

(a) to attend, at a time and place specified in the notice, before a person (being the Commissioner, an Assistant Commissioner or any other officer of the Commission) specified in the notice, and

(b) to produce at that time and place to the person so specified a document or other thing specified in the notice.

(2) The notice may provide that the requirement may be satisfied

by some other person acting on behalf of the person on whom it was imposed and may, but need not, specify the person or class of persons who may so act.

(3) A person must not, without reasonable excuse, refuse or fail to comply with a notice served on the person under this section. Maximum penalty: 20 penalty units or imprisonment for 6 months, or both.

(4) This section does not apply to:

(a) the Independent Commission Against Corruption or an officer of the Commission as defined in the *Independent Commission Against Corruption Act 1988* , or

(b) the Ombudsman or an officer of the Ombudsman

27 Privilege as regards information, documents or other things
(cf ICAC Act s 24; RC (PS) Act s 8)

(1) This section applies where, under section 25 or 26, the Commission requires any person:

(a) to produce any statement of information, or

(b) to produce any document or other thing.

(2) The Commission must set aside the requirement if it appears to the Commission that any person has a ground of privilege whereby, in proceedings in a court of law, the person might resist a like requirement and it does not appear to the Commission that the person consents to compliance with the requirement.

(3) The person must however comply with the requirement despite:

(a) any rule that in proceedings in a court of law might justify an objection to compliance with a like requirement on grounds of public interest, or

(b) any privilege of a public authority or public official in that capacity that the authority or official could have claimed in a court of law, or

(c) any duty of secrecy or other restriction on disclosure applying to a public authority or public official."

2.26 The PIC has in place procedures to be followed by persons claiming privilege

over documents the subject of notices to produce. The purpose of the notice is to enable the PIC to determine, as a preliminary matter, whether privilege inures in any of the documents submitted. If it does, the practice of the PIC is to return the documents to the person. If not then the PIC conducts a hearing in order for the claimant to make submissions.

2.27 It is noted that section 26(3) provides the PIC with a sanction in respect of persons failing to comply with a notice to produce in circumstances where that person has no reasonable excuse.

WITNESSES

2.28 In terms of the taking of evidence, a legal practitioner authorised to appear on behalf of a person may, with the leave of the PIC, examine or cross-examine a witness on any matters which the Commissioner considers relevant.[23] The Act also makes provision for the reimbursement of witnesses appearing before the PIC.[24]

2.29 The PIC has the power to summon witnesses to appear before it and to take evidence.[25] Where a person fails to attend in answer to a summons the Commissioner has the power to issue a warrant for the arrest of the person.[26]

2.30 An important feature of the Act is that, under certain specified circumstances, there are privileges accorded to witness' answers and documents:

> **"40 Privilege as regards answers, documents etc**
> (cf ICAC Act s 37)
>
> (1) A witness summoned to attend or appearing before the Commission at a hearing is not entitled to refuse:
>
> (a) to be sworn or to make an affirmation, or
>
> (b) to answer any question relevant to an investigation put

[23] Section 37 of the Act.
[24] Section 42 of the Act.
[25] Section 28 of the Act.
[26] Section 39 of the Act.

to the witness by the Commissioner or other person presiding at a hearing, or

(c) to produce any document or other thing in the witness's custody or control that the witness is required by the summons or by the person presiding to produce.

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

(3) An answer made, or document or other thing produced, by a witness at a hearing before the Commission is not (except as otherwise provided in this section) admissible in evidence against the person in any civil or criminal proceedings, but may be used in deciding whether to make an order under section 173 or 181D of the *Police Act 1990* and is admissible in any proceedings under Division 1A or 1C of Part 9 of that Act, an order under section 183A of that Act or any proceedings for the purposes of Division 2A of Part 9 of that Act with respect to an order under section 183A of that Act and in any disciplinary proceedings.

(4) Nothing in this section makes inadmissible:

(a) any answer, document or other thing in proceedings for an offence against this Act or in proceedings for contempt under this Act, or

(b) any answer, document or other thing in any civil or criminal proceedings if the witness does not object to giving the answer or producing the document or other thing irrespective of the provisions of subsection (2), or

(c) any document in any civil proceedings for or in respect of any right or liability conferred or imposed by the document or other thing.

(5) Where:

(a) a legal practitioner or other person is required to answer a question or produce a document or other thing at a hearing before the Commission, and

(b) the answer to the question would disclose, or the

document or other thing contains, a privileged communication passing between a legal practitioner (in his or her capacity as a legal practitioner) and a person for the purpose of providing or receiving legal professional services in relation to the appearance, or reasonably anticipated appearance, of a person at a hearing before the Commission, the legal practitioner or other person is entitled to refuse to comply with the requirement, unless the privilege is waived by a person having authority to do so.

41 Declaration as to objection by witness
(cf ICAC Act s 38; RC (PS) Act s 12)

The Commissioner or person presiding at the hearing may declare that all or any classes of answers given by a witness or that all or any classes of documents or other things produced by a witness will be regarded as having been given or produced on objection by the witness, and there is accordingly no need for the witness to make an objection in respect of each such answer, document or other thing."

USE OF INFORMATION OBTAINED BY THE PIC

2.31 Once an opinion or recommendation concerning police misconduct is made by the PIC, or in instances where an investigation is under way concerning a police officer, an issue may arise as to what, if any, effect such an opinion or recommendation may have on persons who were convicted on the basis of that police evidence or other evidence given by that police officer.

2.32 There is general prohibition on the release of information arising out of PIC investigations.

Section 56(4)(c) provides the following exception:

" (4) Despite this section, a person to whom this section applies may divulge any such information:

….

(c) in accordance with a direction of the Commissioner or Inspector, if the Commissioner or Inspector certifies that it is necessary to do so in the public interest, or

(d) to any prescribed authority or person."

2.33 The PIC has developed its own methodology and interpretation of the application of this section and this is discussed in detail in Chapter Four of this Report.

FINDINGS OF THE PIC

2.34 As previously noted a key feature of the PIC is that it is not a court of law. Accordingly its role is restricted to making assessments, forming opinions and making recommendations in relation to police misconduct. The nature of these assessments are recorded not in judgments, but where it is required to do so, in reports to Parliament.

2.35 The Act relevantly provides:

> **"16 Provisions regarding assessments, opinions and recommendations**
>
> (1) The Commission may:
>
> (a) make assessments and form opinions, on the basis of its investigations or those of the Police Royal Commission or of agencies of which it has management or oversight under this Act, as to whether police misconduct or other misconduct:
>
> - has or may have occurred, or
> - is or may be occurring, or
> - is or may be about to occur, or
> - is likely to occur, and
>
> (b) make recommendations as to whether consideration should or should not be given to the prosecution of or the taking of action under Part 9 of the *Police Act 1990* or other disciplinary action against particular persons, and
>
> (c) make recommendations for the taking of other action that the Commission considers should be taken in relation to the subject-matter of its assessments or opinions or the results of any such investigations.
>
> (2) However, the Commission may not:

(a) make a finding or form an opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence), or

(b) make a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence).

(3) An opinion that a person has engaged, is engaging or is about to engage:

(a) in police misconduct (whether or not specified conduct), or

(b) in specified conduct (being conduct that constitutes or involves or could constitute or involve police misconduct),

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

(4) Nothing is [sic] this section prevents or affects the exercise of any function by the Commissioner that it considers appropriate for the purposes of or in the context of Division 2 of Part 9 of the *Police Act 1990."*

2.36 Section 16(2) is of particular note in this respect. The PIC does not make findings of guilt, nor does it make recommendations or form opinions that a person should be prosecuted.

REPORTING

2.37 The reporting function of the PIC falls into two categories. First, the PIC *may* report on any matter that has been the subject of investigation. Second, where there has been a public hearing the PIC is *required* to prepare a report. Reports are furnished to the Presiding Officer of each House of Parliament. Relevantly, section 96 provides:

"96 Reports on investigations

(1) Report where investigation (cf ICAC Act s 74 (1))

The Commission may prepare reports in relation to any matter that has been or is the subject of an investigation.

(2) Report where public hearing (cf ICAC Act s 74 (3))

The Commission must prepare reports in relation to matters as to which the Commission has conducted a public hearing.

(3) Report to be furnished to Presiding Officer (cf ICAC Act s 74 (4))

The Commission is to furnish reports prepared under this section to the Presiding Officer of each House of Parliament.

(4) Timing of report (cf ICAC Act s 74 (7))

A report required under this section is to be furnished as soon as possible after the Commission has concluded its involvement in the matter.

(5) Deferral (cf ICAC Act s 74 (8))

The Commission may defer making a report under this section if it is satisfied that it is desirable to do so in the public interest.

2.38 It is noted that there is a positive obligation in section 96(4) to furnish reports in a timely manner.

CODE OF CONDUCT

2.39 In addition to the statutory regime the PIC also has an internal Code of Conduct.[27] It is noted that, although the Code of Conduct is principally directed at staff management issues, it does record that:

> "…[The PIC] recognises that the public has the right to expect the highest standards of ethics and conduct from its staff in the performance of their duties. The public also has the right to expect that

[27] Police Integrity Commission, *Annual Report*, 1997-1998 at Appendix 4.

the business of the Commission will be conducted with efficiency, economy, fairness, impartiality and integrity."[28]

2.40 The Code of Conduct also records that the officers of the PIC should "*strive to attain value for money and avoid waste in the use of public resources.*"[29]

[28] *Ibid* at p.73.
[29] *Ibid* at p.75.

CHAPTER THREE

REVIEW OF THE CRITICISIMS RAISED IN SUBMISSIONS

INTRODUCTION

3.1 As a specialist agency the PIC undertakes the critical public function of investigating and exposing police misconduct. As with any agency time is needed to develop what might best be described as an institutional culture. While the Act and the common law provide an external framework, the day-to-day practices in terms of investigations, hearings and report preparation are, generally, internal management matters. Issues arise from time to time which test the capacity of an institution to respond to unique situations. Notwithstanding that the PIC is in its seventh year of full operation, novel situations as to the administration of the Act, the conduct of hearings and the preparation of reports can and do arise.

3.2 As is evident from the statutory framework set out in the previous Chapter the PIC has at its disposal extensive powers to discharge its function of investigating police misconduct. In conducting investigations, holding private or public hearings and reporting it does not act as a court of law in the sense that it makes adverse findings of guilt against persons. Nor does it impose penalties on individuals the subject of investigation.[30] In this regard the PIC's assessments are not determinative of any fact, nor do they *"create or affect legal rights or obligations*".[31] From time to time, persons who appear before the PIC, or who are the subject of adverse comment, find this to be a fine legal distinction which is difficult to disengage from strongly held preconceptions.

[30] Other than penalties which apply where individuals the subject of orders such as for the production of documents refuse to comply.
[31] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at 147.

3.3 Notwithstanding this, the majority of submissions were supportive of the work of the PIC and were appreciative of the importance of the function the PIC serves in investigating and reporting on police misconduct. Rather than being directed at a structural level, criticisms were in the main directed at ways in which the PIC could improve its practices and procedures.

3.4 It should be noted that it is beyond the scope of this Report to consider the nature or efficacy of the operational investigations of the PIC. A number of submissions made detailed reference to operational aspects of particular operations, including Operation Malta, Operation Belfast, Operation Florida, Operation Oslo and Operation Colorado. These submissions were taken into account for the purposes of this Report except insofar as they dealt with the operational aspects of investigations of the PIC.

PRELIMINARY INVESTIGATIONS AND HEARINGS

3.5 Section 24 of the Act enables the PIC to conduct preliminary investigations in order to identify conduct requiring further or more complete investigation. A number of submissions commented on ways in which the PIC could better run its hearings by increasing the frequency and altering the manner in which it conducts preliminary investigations. The view adopted in some submissions was that, prior to the commencement of an investigation, the PIC should:

- make an initial assessment concerning its investigative focus;
- identify the risks associated with the investigation;
- articulate the objectives of the investigation;
- define the scope of the investigation;
- properly resource requirements; and
- identify financial costs and constraints.

3.6 The point was made that if the PIC intends to conduct public hearings then, for the sake of public confidence in the inquiry, preliminary investigations should

be the subject of careful planning so as to avoid future difficulties once the matter progresses to the hearing stage.

3.7 A three-tiered solution to the way in which the preliminary stage of investigations are dealt with was suggested. First, it was submitted that the PIC Investigations Unit conduct a comprehensive assessment under the watch of the Chief Investigator; second, that a management committee be set up to review compliance of the investigation with legislation and other relevant criteria; and third, that preliminary investigations should be held in conjunction with private hearings.

3.8 It was also contended that efficiencies would be gained by reducing time spent on an investigation if more emphasis were to be placed on preliminary investigations. The rationale for this is that such investigation would either rapidly short-circuit a potential case which had no real basis or alternatively bolster the PIC's case for the purposes of a future hearing. In relation to the former situation, the PIC could then terminate its investigation in circumstances where a preliminary hearing was sufficient to determine no real issue arose. In relation to the later situation, early interviews could be used in later proceedings with the result that the investigative focus for any public hearing would be sharpened. It was also submitted that the careful formulation of preliminary plans would be prudent from a risk management point of view.

3.9 Further, it was suggested that there might be circumstances where it would be appropriate for legal counsel to be present at the preliminary investigation stage and to be informed, prior to the preliminary investigation, of the nature of the allegations. This would, it was argued, afford the affected person an opportunity to have an early input into the veracity or credibility of a complaint. Examples of specific operations were raised where the bases of initial complaints were destroyed under cross-examination in circumstances where, had the initial consultation taken place, the complaint may never have needed to be publicly ventilated.

3.10 One suggested benefit of conducting a preliminary hearing is that it would be possible for the PIC to present a private report to the Commissioner of Police on any matters arising as a result of a preliminary investigation.

3.11 A number of submissions made the point that the PIC could have sought assistance at the preliminary stage of its inquiries directly from persons the subject of investigation. In addition it was contended that persons under investigation could refer the PIC to other persons or organisations for assistance in their inquiries.

3.12 As an example one private submission made the point that had that individual been contacted by the PIC before a public hearing then that person would have been pleased to have voluntarily assisted the PIC. If the PIC had taken up this offer it would have avoided the need for that individual to be put through rigorous cross-examination on the very subject of investigation. Such an approach, it was contended, would have allowed the PIC to conduct itself in accordance with its own Code of Conduct in striving to achieve economy and efficiency.[32]

3.13 Another private submission referred to an apprehended "*corporate paranoia*" claimed to exist within the PIC of "*not wishing to approach other individuals for assistance*". The submission focused on the fact that:

- documents which may have assisted the PIC were readily available but were not sought in a timely fashion, or were not sought at all;

- that potential witnesses were willing to assist but were not contacted; and

- that a public interest legal centre had expressed a desire to assist the PIC but that offer was never taken up.

[32] *Ibid* at fn. 27.

3.14 It was suggested that, as a potential remedy to the perception that the investigative focus of the PIC is insufficiently scrutinised, an oversight body, similar to that which exists at the Independent Commission Against Corruption ("the ICAC"), be established. Although the PIC does have the OAG it was suggested that as presently constituted it is not discharging its functions in a manner which would prevent investigations from losing direction because it has no external or independent presence. To remedy this it was suggested that a representative of the Attorney General's Department or the NSW Crime Commission be installed on the OAG to provide an independent and objective perspective on matters under investigation.

3.15 As an external measure designed to promote public confidence it was contended that the PIC publish information in its Annual Report setting out a clearly defined decision-making model with a common set of criteria applied to operational decisions affecting priorities and resource allocation.

3.16 In terms of the way in which investigations are carried out by PIC investigators, one submission suggested that the PIC's investigators were *'too aggressive*' in their use of techniques of coercion in order to obtain '*confessions*' under duress. The same submission suggested that such practices were widespread and constituted an abuse of process. As an example it was suggested that in certain cases warrants for listening devices were obtained in conjunction with other agencies with the result that use of the material obtained was then inappropriately directed against individuals who were peripheral to the initial investigation for which the listening device was sought. In this context it was contended that PIC investigations should not be "*fishing expeditions*" but rather the PIC should be meticulous in the preservation of individual rights whether persons are the target of an investigation or whether they are on the periphery.

3.17 It was also contended in one submission that the relative priority afforded by the PIC to various investigations should be the subject of objective scrutiny. In this context it was suggested that, for example, where the circumstances of one

inquiry concerned allegations of greater gravity that another inquiry, then resources should be allotted to the more serious investigation. It was submitted that the vigour with which the PIC investigates and pursues its operations is measured by the level of fanfare and public attention with which the allegations are put forward.

3.18 As a final matter some submissions referred to the need for greater consideration be given to the termination and discontinuance of investigations at a preliminary stage. In this regard it was said that the PIC should be able to terminate investigations on its own motion or on the motion of a public authority or public official, or an interested individual. The rationale of such an application being that to do so would be in the public interest.

PRIVATE AND PUBLIC HEARINGS

3.19 The PIC is empowered to hold its hearings in public or private or partly in public and partly in private. In forming a view as to the appropriate course the PIC is "*obliged to have regard to the public interest*."[33]

3.20 The purposes and potential benefits of holding public hearings are numerous and include:

- the need for public confidence to be maintained in the operations of the PIC;

- the need for transparency in the resolution of matters touching on corruption in an apparatus of public administration;

- the benefit of the use of surveillance material in serving the public interest in obtaining truthful answers during the course of evidence in a hearing; and

[33] Section 33(2) of the Act.

- the potential of other persons coming forward with information or assistance upon becoming aware of the investigation.

3.21 There are also a number of potentially harmful effects of holding public hearings. These include:

- the potential to cause harm to the reputations of persons adversely named during the hearing; and

- the possible prejudice caused to an accused person's right to a fair trial.

3.22 The vast majority of submissions recognised the need for public hearings and the attendant potential benefits. However, a number of submissions were critical of the manner in which the PIC exercised its discretion to hold public hearings and considered that greater use of private hearings would neither prejudice the effectiveness of the work of the PIC, nor cause undue harm to persons under investigation.

3.23 One view prevalent in submissions was that the PIC has shifted to a greater emphasis of the use of public hearings. This view was said to be supported by the number of public hearing days in recent times, in particular in relation to Operations Malta and Florida. It was pointed out in one submission, in which an analysis of the PIC's Annual Reports was undertaken, [34] that:

- in the period 1999 – 2000 there were 24 public hearing days and 52 private hearing days;

- in the period 2000 – 2001 there were 46 public hearing days and 72 private hearing days; and

[34] It is noted in the submission that the information was drawn from the Police Integrity Commission, *Annual Report*, 2001-2002 at p.64 but that the information was reconfigured by the authors of the submission.

- in the period 2001- 2002 there were 105 public hearing days and 35 private hearing days.

3.24 It was submitted that the disadvantages of shifting to public hearings are that public hearings are longer to run and that those who are the subject of the allegations are driven into adopting a heightened defensive posture. This latter position, so the submission runs, is inconsistent with the ideal of the speedy resolution of matters by the PIC. In addition, the PIC has had some success through its use of private hearings in identifying police misconduct and there is no reason why private hearings are not equally as effective in performing the task at hand.

3.25 In terms of the above statistical breakdown one submission suggested that there is no publicly available breakdown of the number of private hearings forming part of preliminary investigations, the number of full investigations, or the number of public and private hearings. Such information would be useful as a tool to measure the investigative benefit of public and private hearings and the cases where private hearings have enabled the termination of investigations. The same submission went on to cite the PIC's 2001-2002 Annual Report where it was said that the increase in public hearings has caused:

> "…a consequential increase in public awareness and deterrence outcomes. Public hearings, together with the efforts of the involved agencies, have led to a number of officers under investigation 'cooperating' during the year."[35]

3.26 The two difficulties suggested which arise out of this statement are first, that there is no opportunity to conduct a cost benefit analysis of the putative increase in public hearings and second, that there is no discernible method for measuring outcomes which would assist in determining useful initiatives for improving performance at PIC hearings.

3.27 Although there was strong support in submissions for greater use of private hearings one submission made the point that where the PIC does elect to use

private hearings as part of its preliminary process it should consider whether it would be useful to involve legal counsel. While the submission recognised that not all cases would be suitable for the involvement of legal counsel at the preliminary stage, such involvement would have the significant benefit of enabling specific issues to be identified which require further investigation. Moreover, it was considered that this would also ensure that the outcome of such investigations would be communicated to the relevant organisation which might have an interest in the outcome in relation to the individual under investigation. This interest might either be in the ability of that organisation to take pre-emptive action against the individual or to be in a position to more readily assist the PIC in its preparations of the substantive case against the individual.

3.28 It was recognised in submissions that the work of the PIC attracts a certain amount of media scrutiny and that, on one view, the PIC uses the media as an "*investigative tool*". The same submission also recognised that public hearings are often necessary in cases where very public allegations are made in the national press.

3.29 Certain submissions remarked on the broad investigatory powers the PIC has been granted and the concomitant responsibility arising out of the widespread public and media attention which the PIC's public hearings draw. It was suggested that these public hearings are:

- a significant cost to the public purse;
- personally destructive; and
- apt to expose individuals to criticism which may ultimately
- prove unjustified.

3.30 Accordingly it was contended that the use by the PIC of public hearings should always take into account the careful balance required between the rights of individuals whose names are exposed to publicity, the need to ensure

[35] Police Integrity Commission, *Annual Report*, 2001-2002 at p.9.

the deterrent effect is not lost and the public interest in having police corruption publicly ventilated.

3.31 Only one submission considered that public hearings were unnecessary in that the cost of such proceedings and the results obtained did not justify the public expenditure on what amounted to, in the writers' opinion, "*theatre*". The particular circumstances of that submission considered that issues could have been properly dealt with either by way of thorough preliminary investigations or in private hearings.

NON-PUBLICATION ORDERS

3.32 Related to the issue as to whether hearings should be held in public or private is the question of whether or not the names of witnesses, or potential witnesses, should be the subject of non-publication orders.

3.33 The PIC has the statutory authority to make a non-publication order if it is satisfied that such a direction is "*necessary or desirable in the public interest*."[36]

3.34 More than one submission raised this issue. At its highest it was argued that the PIC displays an apparent unwillingness to readily suppress the names of police who are the subject of serious allegations. Concern was expressed of the fact that once a corrupt police officer '*rolls over'* almost invariably serious allegations are made against other police officers. Where officers are unsuccessful in seeking a non-publication their names are often published in the media before their case is heard. The harm done in this situation, it was said, is compounded in circumstances where the person making the initial allegation is found to be incredulous or the allegations are ultimately proven incorrect. It was argued that where such a belated finding is made it is of little comfort to officers whose names have already been released.

[36] Section 52(2) of the Act.

3.35 One submission considered that the public shaming of a person in these circumstances had just the same effect as a conviction.

3.36 To remedy this situation it was submitted that the PIC should adopt a practice of never denying a non-publication order unless allegations were first properly tested. Notwithstanding an acknowledgment in the submission that '*naming names*' might have the effect of causing others to come forward with complaints, it was argued that there is no evidence in support of such a proposition.

GENERAL SCOPE AND PURPOSE OF THE HEARING

3.37 At the beginning of each hearing the Presiding Officer announces the "*general scope and purpose of the hearing"*.[37]

3.38 It was suggested that on more than one occasion there has been dissonance between the announcement of the scope and purpose of the hearing on day one of the hearing and the scope and purpose of the hearing as viewed with hindsight at the time of completion and report to Parliament. Although it was recognised that it would not be prudent to seek to limit the PIC's investigations by insisting on a strict 'terms of reference' document which would bind the PIC to a certain view,[38] it was suggested that there must be a tangible relationship between the general scope and purpose of the investigation and the general scope and purpose of the hearing.

3.39 In addition criticism was levelled at the PIC for failing to adequately notify parties in advance of the general scope and purpose of the hearing in circumstances where the PIC intends to hold public hearings. It was submitted by one organisation that, despite repeated written requests, they were not properly informed of the general scope and purpose of the hearing until some months after allegations were raised and that details of particulars were not forthcoming until the Friday before commencement of the hearing.

[37] Section 32(2) of the Act.
[38] It is noted that the development of a "Terms of Reference" document was rejected by the *Review* at p.62.

3.40 It was contended that before each hearing the PIC should submit to the affected person or agency, within four weeks of the date set down for hearing, the following:

- a statement of the general scope and purpose of the hearing;
- the date of the commencement of the hearing;
- the initial complaint;
- any particulars of the complaint;

LEGAL REPRESENTATION

3.41 In accordance with section 20 of the Act the PIC is not bound by the rules of evidence and must exercise its functions with as little formality as possible. The PIC is required to accept written submissions where appropriate and conduct its hearings in a non-adversarial manner.

3.42 Consistent with this approach is the stipulation in the Act that there is no automatic right to legal representation before the PIC. Rather, a person appearing may be legally represented subject to the requirement that the PIC must give the person appearing a reasonable opportunity to be legally represented.[39]

3.43 An issue raised in submissions in relation to representation is the way in which potential conflicts of interest by counsel representing multiple parties are dealt with before and during the course of hearings.

3.44 The gravamen of this argument is that legal counsel appearing before the PIC must carefully consider their position when representing more than one party. The difficulty of representing multiple parties was exemplified in Operation Malta. In that case NSW Police instructed counsel who sought leave to appear on behalf of the NSW Police, the Commissioner of Police and various other

[39] Sections 34 and 35 of the Act.

officers. Prior to the commencement of the hearing it was evident that at least one of the persons on whose behalf leave to appear was sought had a divergent interest and had made known his desire for separate representation. The facts and circumstances surrounding that conflict of interest in Operation Malta are discussed in detail in Chapter Five of this Report.

3.45 It was suggested that the effect of failing to adequately deal with legal representation and conflict of interest has the disastrous potential not only to derail proceedings and occasion extensive delay but also to cause serious prejudice to individuals and organisations which have otherwise been granted leave.

3.46 As a possible solution one submission suggested that following the distribution of a general scope and purpose statement by the PIC, a recipient could respond in writing with details of counsel and the person on whose behalf counsel would seek leave to appear. This in turn would trigger the PIC to consider carefully whether, in light of the terms of the general scope and purpose statement, there is a potential conflict of interest. If such a conflict could be identified at an early stage then there would be scope to correct the problem before commencement of the public hearing. Moreover, it was contended that the PIC, of its own volition, should notify an affected person or organisation at the preliminary investigation stage as to whether any conflict of interest might arise.

PRODUCTION OF DOCUMENTS

3.47 The PIC has broad powers to compel the production of documents under sections 25 and 26 of the Act.

3.48 Certain submissions were critical of the way in which the PIC uses its powers to compel production of documents by leaving the issue of notices until the very last moment. Cases were reported of notices being issued on the evening before a hearing or late at night.

3.49 Although it was recognised that, on occasion, the PIC needs to ensure that documents are not destroyed or that officers are not given time to collude before being called, it was generally felt that, on the grounds of procedural fairness, there should be a more judicious use of the power to compel evidence. In this regard one submission considered that issuing notices at the last minute was effectively a tactic used by the PIC to deny legal counsel time for preparation.

3.50 Another private submission considered that the PIC misused its powers to compel production of documents by tendering the medical records of that individual and that individual's family in circumstances where it was wholly inappropriate to do so.

3.51 There was also strong criticism of the use by the PIC of its powers to override legal professional privilege.[40] This issue is not discussed in this Report, except to the extent that it impacts on the length of the hearings.

PROCEDURAL RULES

3.52 It was submitted that the PIC should develop Procedural Rulings to deal with a number of matters pertaining to the conduct of hearings. These include:

- the calling of witnesses;
- appearance and legal representation;
- cross-examination by Counsel Assisting and counsel;
- leave to appear before the PIC; and
- use of written submissions.

3.53 As a model of appropriate procedural rulings it was suggested that, with some modifications, the rulings used by the Wood Royal Commission would also be appropriate for use by the PIC. It was recognised that in formulating any such rules it would be necessary to bear in mind the informality with which

proceedings should be conducted. A draft proposal based on the Wood Royal Commission rulings (with suggested amendments in bold) was submitted for consideration. This is reproduced at Appendix B to this Report.

REPORTING

3.54 As noted in Chapter Two the PIC is required to report to Parliament when it holds a public hearing and may exercise a discretion whether or not to report to Parliament in other cases, for example, where private hearings are conducted.

3.55 Almost without exception the submissions received by this Inquiry were highly critical of the perceived delay taken by the PIC between the commencement of investigations and/or hearings and the time taken to present a final report to Parliament. There were a number of issues raised in this regard.

3.56 First it was contended that, where matters have received wide media coverage, and there is significant delay between the hearing date and the date of delivery of the report to Parliament, the public interest is not properly served.

3.57 Second, it was suggested that the consequence of delay in publishing reports often diminishes the relevance of the ultimate recommendations made by the PIC. It was suggested that there have been a number of occasions where extensive delays have taken place in finalising reports and that in the interim the affected organisation had already instituted relevant reforms.

3.58 Third, it was reported that instances have arisen where, by the time the PIC has presented its report, officers have already been dismissed from the NSW Police or prosecuted in the courts.

[40] It is noted that it was suggested in the *Review* that the issue of privilege be the subject of a separate inquiry.

3.59 Fourth, delay in producing a report can have a negative affect on police morale, which, in some cases, can have the effect of paralysing large sections of the administration.

3.60 Fifth, it is not appropriate for police officers to be carrying out their duties whilst under suspicion by the PIC for long periods of time until recommendations are finally made. It was suggested that the longer the period of time a police officer is able to serve whist awaiting the PIC's recommendations the greater the chance of success he or she will have in any proceedings before the Industrial Relations Commission.

3.61 Finally it was submitted that delay in reporting extends the suffering of individuals and can affect the ability of NSW Police to carry out its function due to the distraction of hearings and the loss of confidence associated with those hearings.

3.62 Several submissions included tables of the perceived length of time taken between the PIC first being seized of a matter and the report to Parliament.

3.63 One submission, the response to which is discussed in Chapter Five suggested that the following was an accurate description of the time taken between the final hearing and the report to Parliament:

Name of Operation	**Assumed Time To Report**
Jade	9 months
Warsaw	9 months
Metals	2 years
Belfast	1 year 8 months
Saigon	1 year
Algiers	1 year 3 months
Oslo	1 year 2 months
Glacier	2 years
Pelican	1 year 1 month
Malta	10 months
Jetz	1 year 2 months

3.64 Although the accuracy of these dates is disputed by the PIC, other submissions also concluded that there were similar delays in reporting to Parliament.

3.65 It was also contended that there might not be an objective way of measuring the performance and diligence of the PIC in submitting reports to Parliament. Some submissions did recognise that public hearings are not necessarily the conclusion of the investigation and that in certain cases public hearings are only one of the means by which the PIC conducts its activities. Nevertheless there appeared to be a view expressed in some submissions that it was not possible to readily discern from the PIC's Annual Reports the breakdown between:

- the time for investigation;
- the time for hearings;
- the time for any further investigations; and
- the time taken to submit the report to Parliament.

3.66 Authorship of reports was another matter raised in submissions. One submission suggested that it was a fundamental right not only for persons affected but also for the general public to know who authored a PIC report. This, it was argued, is particularly so in circumstances where conclusions, whether formal findings or not, affect the reputation of the person the subject of the findings.

3.67 It was a subject of comment in certain submissions that the person who signs the report should be the same person who presides over hearings, makes assessments as to credibility and makes any recommendations. In this regard one submission doubted the legal status of such a report and suggested that such a report might not comply with the statutory requirements for a report by the PIC.

3.68 The provision of draft reports was another topic of consideration in submissions. One submission adopted the stance that, as part of its standard operating procedures, the PIC should provide a draft copy of any report it intends to publish to NSW Police for comment. It was maintained that this practice would not represent a great leap from the PIC's current practice in that there have been a number of reports – such as in Operation Jetz and in Operation Dresden 2 - where input has been sought prior to publication. In these cases it was contended that, following extensive comment on the accuracy and quality of information contained in the reports by NSW Police, the PIC either reconsidered or re-wrote segments of the reports.

3.69 The submission went on to suggest that the practice of early submission of reports has the advantages that:

- the matters relating to policies and procedures in the draft report are correct; and

- the actions taken or reported to have been taken are accurate at the time of publication.

3.70 In this regard, where the PIC makes recommendations, there is an obvious public interest in ensuring that those recommendations are as accurate as possible at the time of publication.

SECTION 77 REFERRALS

3.71 The PIC is able to refer matters either before or after investigation to the police for investigation or action.[41]

[41] The reference in the Act is to the "*police authority*" which is defined in section 76 as "…. *the Commissioner of Police or such other police officer or police officers as such unit or other part of NSW Police as are agreed on by the PIC Commissioner and the Commissioner of Police or as are prescribed by the regulations*."

3.72 One submission advocated the greater use of the PIC's power under section 77 to refer matters as an alternative to making reports to Parliament. According to this view referrals could be made in confidence to the Commissioner of Police who would then take the recommended action.

3.73 Of the referrals that have been made under this section it was contended that there was some confusion as to the manner in which 'draft referrals' should be treated and further, the use which could be made of information under section 77(4) of information that was passed on pursuant to such a reference where such information was deemed confidential by the PIC.

3.74 By way of example it was suggested that in one case where the referral was made the subject of a confidentiality requirement, legal counsel was impeded in making recommendations or advising on the veracity of matters pertaining to a claim by an officer. The claim was also made that, had relevant information been made available by the PIC to NSW Police, then appropriate action could have been taken against officers.

REQUESTS FOR INFORMATION CONCERNING WRONGFUL CONVICTIONS

3.75 One submission suggested that there was considerable difficulty in obtaining information from the PIC in matters involving possible wrongful convictions of persons on the strength of tainted police evidence where either:

- information has become available at a public hearing as to a police officer's misconduct which might impact on an accused's conviction; and/or

- the agency requesting the information has become aware of information provided in a private hearing of misconduct by police officers including, amongst other things, the planting of evidence and the giving of perjured evidence.

3.76 The submission stressed the difficulty of obtaining information such as transcripts of hearing and other pertinent information, even in instances where that information was sought on a confidential basis. This difficulty was also encountered where witnesses were given codenames and the PIC determined that the names of those persons could not be revealed.

3.77 Where review of a conviction is on the basis that the evidence of the police officer was tainted, the submission argued that the PIC should be under a positive duty to alert appropriate authorities to the existence of information which might result in the review of a conviction and thereby facilitate a process by which tainted convictions may be overturned.

3.78 The submission recognised the tension between confidentiality concerning an ongoing investigation and the rights of those who have been the subject of wrongful convictions. Nonetheless the submission stressed the need to facilitate the responsibility of the Crown to bring to light corrupt practices of Police that impact on a conviction at the earliest possible opportunity.

CHAPTER FOUR

RESPONSE TO CRITICISMS AND RECOMMENDATIONS

4.1 It has been said that "[*a*]*n understanding of the purposes of a commission is fundamental to determining how the commission should be run*."[42] The purpose of the PIC, to investigate and expose serious police misconduct, is determinative of its organisational structure and institutional culture.

4.2 As a general proposition the idea of a commission exposing crime and revealing the truth is not new. As one learned author described it:

> "Commissions may be used to expose conduct even if that conduct cannot be proved to be criminal. This may be done so that the public is made aware of matters of importance concerning, for example, the behaviour of public officials. This objective is in many ways inconsistent with assembling evidence and pursuing prosecutions, as an emphasis on exposing crime will inevitably result in extensive prejudicial publicity...Furthermore, indemnities that will prevent or hamper prosecutions may sometimes be necessary to convince suspects to cooperate and thus to enable commissions to discover the truth."[43]

4.3 This distinction between a court in the regular sense and the nature of the PIC as a body of inquiry is a significant one. The statutory mandate of the PIC is limited to the expression of opinions and the making of certain assessments and recommendations.[44] It cannot make findings or form an opinion or make recommendations concerning criminal guilt.[45] Rather the power of the PIC in this regard is circumscribed to the expression of an opinion as to whether or not consideration should be given to prosecution or action against a person.[46]

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[42] S. Donaghue, *Royal Commissions and Permanent Commissions of Inquiry,* Butterworths, 2001 at p.22.
[43] Ibid at p.22. The author's footnotes are omitted.
[44] Section 16(1) of the Act.
[45] Section 16(2) of the Act.
[46] Section 97(2) of the Act.

4.4 In *Balog v Independent Commission Agaisnt Corruption*[47] the High Court, in considering the nature and function of bodies equivalent to the PIC, said in relation to the Independent Commission Against Corruption:

> "…the broad function of the Commission … is to communicate the results of its investigations concerning corrupt conduct to appropriate authorities, it is apparent that its primary role is not that of expressing, at all events in any formal way, any conclusions which it might reach concerning criminal liability.
>
> The one function expressly given to the Commission which directly relates to criminal proceedings (and it is not a principal function) is that referred to in s 14(1), where it is required to assemble evidence that may be admissible and to pass it on to the Director of Public Prosecutions … It is significant that this sub-section speaks of evidence in this way, because it is apparent that the Commission in the exercise of its other functions is not required to confine itself to evidence that may be admissible in a court of law. It may proceed upon the basis of hearsay or privileged evidence, being able to inform itself as it considers appropriate. Not only does this, together with the other matters which we have mentioned, indicate that the Commission is intended to be primarily an investigative body and is not a body the purpose of which is to make determinations, however preliminary, as part of the criminal process, …
>
> … it is someone else's evaluation of the evidence – that of the person who is to consider it – which is to determine whether a person is to be prosecuted or not and …the function of the Commission is to investigate and assemble the evidence rather than evaluate it for itself, save for the limited purpose of deciding whether it warrants further consideration." [48]

4.5 In *National Companies and Securities Commission v News Corporation Limited & Ors*[49], the High Court discussed the nature of a hearing for an investigative purpose in the context of an investigation by the National Companies and Securities Commission:

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[47] (1990) 169 CLR 625.
[48] *Ibid* at 632.
[49] (1984) 156 CLR 296 per Gibbs CJ @309

> "For the purposes of performing any of the functions so widely described, the Commission may hold a hearing …
>
> Where … the Commission decides to hold a hearing for the purpose of investigating whether a person has committed an offence … there is no issue to be decided; the hearing is designed to discover facts which may or may not lead to further action being taken; no finding of fact or decision of law need be made; and the procedure is not an adversary one but inquisitorial. In the case of such hearings … the word 'hearing' has no significance other than to indicate that Part VI applies; the word is not used for the purpose of prescribing, implicitly, the procedure which the Commission must follow at a hearing …"

4.6 With this in mind we now turn to the response to the criticisms raised in Chapter Three and, where appropriate, recommendations.

PRELIMINARY INVESTIGATIONS

4.7 It will be recalled that there was criticism in some submissions of the way in which it was perceived that the PIC made use of preliminary investigations and hearings. The argument was put that these investigations were not used to full effect, or infrequently, with the result that time was wasted and matters proceeded to hearing which would have otherwise not done so had sufficient systems been in place.

4.8 In response it was submitted that it is the usual practice of the PIC to commence an investigation on a preliminary basis, to make use of the information gathered and consider whether a private hearing is required. If necessary, consideration is then given to whether a public hearings is necessary. The private hearing phase is often used to gather information on a complaint in a controlled and non-adversarial manner. In this regard the PIC's view is that caution must be exercised in the early phases of an investigation. This is because the emphasis is on ventilating the complaint in such a way as not to discourage the complainant from being able to freely and openly discuss the matter. Further, the alternative of early rigorous cross-examination of a complainant at the preliminary stage, or granting leave to counsel to

intervene at the early investigative stage, may produce the adverse effect of preventing complainants from coming forward. Accordingly it was submitted that it is not appropriate at the preliminary investigation stage to grant legal counsel leave to intervene to cross-examine in order to determine a complainant's credibility.

4.9 In conjunction with this submission it was also suggested that investigators exercising preliminary investigation functions are using intimidatory tactics and should be subject to a code of conduct.

4.10 The PIC's position is that it values the opportunity to approach police and request assistance at a preliminary stage without formally summoning the officer before the PIC. The procedure whereby on officer is afforded the opportunity to provide a record of interview voluntarily is one which, provided there are appropriate protections, can ultimately save time and resources. The offering of inducements, such as the offer not to use a record of interview against an officer, will sometimes lead to the officer being discharged from giving evidence at a public or private hearing. It was contended that it would be quite wrong not to have any way of making allowances for officers who were prepared to give evidence to the PIC in this way.

4.11 The criticism in submissions has previously been noted that the PIC engaged in conduct during the course of its investigations that amounted to a "*fishing expedition*". In *Gibson v O'Keefe,*[50], Einstein J cited the following passage in relation to the ICAC with approval:

> "…it is arguable that some protection for a witness exists in the general qualification that questions asked or documents or other things required to be produced must be relevant to the investigation being conducted by the commission. However the courts have given a liberal interpretation to this requirement. The very nature of ad hoc commissions permit(s) them to carry

[50] *Unreported, Supreme Court of New South Wales*, 20 May 1998.

> out "fishing expeditions", to determine the actual relevancy of any matter…"[51]

4.12 The views expressed by the PIC on this issue find favour. The preliminary investigations carried out by the PIC and the manner in which those investigations are conducted should be left to the PIC, save of course in circumstances of misconduct by investigating officers. The broad powers of the Act and the nature of the PIC as a commission of inquiry are consistent with this view. This aspect is further considered in Chapter Five.

4.13 Another suggestion made in submissions was that consideration should be given to the inclusion of external persons on the OAG It was suggested that oversight by persons from other agencies or the Attorney General's Department would ensure an independent view as to the conduct and/or appropriateness of investigations.

4.14 The OAG oversees the operational decisions of the PIC and is composed of the Commissioner, the Assistant Commissioner, the Director Operations the Manager, Intelligence and the Executive Officer. It is noted that this option of having external oversight was rejected the by the Review. [52] The functions and constitution of the OAG were recently reviewed:

> "The OAG meets fortnightly, or as required, and makes key decisions concerning new investigative opportunities, operational priorities and broad investigation direction. The OAG is also involved in managing risk and developing short-term strategy with investigations staff…
>
> Key decision making is underpinned by a defined set of criteria which are [sic] applied to operational decisions affecting priorities and resource allocation at a number of levels within the Commission. The management of risk is also a major consideration in OAG operational decisions. The OAG also

[51] *Ibid* at p.41 citing Helen Reed, "*The Permanent Commissions of Inquiry – A Comparison with Ad Hoc Commissions – Part II*" (1995) Australian Journal of Administrative Law 156 at 157.
[52] *Review* at 116-117.

uses elements of its Investigations Performance Framework to assess ongoing performance."[53]

4.15 There are untenable risks associated with the imposition of external persons on the OAG. First, any person sitting on the OAG would have only a part-time function and this would be limited as that person would not having a complete understanding of operational and investigative procedures and priorities. Second, there is a heightened risk of disclosure, albeit inadvertent, of highly confidential information. Although it might be difficult to quantify the risk of such leakages, given the sensitivity of the information, the mere existence of the risk is sufficient to outweigh any perceived benefit from altering the composition of the OAG.

4.16 Further the view put in some submissions that there should be wider consultation with persons who, it was suggested, might be in a position to short-circuit some of the PIC's work by providing information prior to formal interviews or hearings is not supported. The PIC seeks and encourages the provision of information by members of the community at large. However, except in circumstances of joint operations with other crime agencies, it stops short of having organisations or individuals becoming partners in an investigation. The PIC as an investigative body must necessarily conduct its investigations in an unbiased fashion. In so doing it does not form alliances with individuals or organisations who may have a particular predilection or view. In this sense, the PIC must be able to conduct investigations in the manner it deems appropriate and without fear or favour. Similar considerations apply to the allocation of resources.

Recommendations

1. **The PIC has a broad mandate to investigate police misconduct. Provided that the PIC acts within the scope of its mandate the**

[53] Police Integrity Commission, *Annual Report*, 2001-2002 at 45.

PIC should conduct its investigations in such a manner as it considers fit, free from interference from external influences.

2. **The PIC should not engage external assistance on its Operational Advisory Group.**

3. **The Operational Advisory Group must remain fully appraised of the status of investigations and ensure that investigations are appropriately project managed.**

PRIVATE AND PUBLIC HEARINGS

4.17 A number of submissions considered that there has been a shift toward public hearings by the PIC and that this is not a positive move as public hearings have potential to damage reputations. Certain submissions put the view that private hearings should be used wherever possible and that public hearings should only be used as a last resort.

4.18 The Act prescribes that the test the PIC must apply in determining whether or not to hold a hearing in public is whether such a hearing would be "*in the public interest*".[54] That requirement was considered by Gleeson CJ in *ICAC v Chaffey* to involve a *"conscious weighing of the public interest and openness of proceedings against the harm to reputation that can result."*[55]

4.19 The PIC determines whether a hearing is to be held in public or private on the following basis:

> "Hearings may be held in public or in private, or partly in public and partly in private, as decided by the Commission (sub-section 33(1)). Whether a hearing is held in public or private will depend upon a variety of considerations, including:

[54] Section 33(3) of the Act.
[55] *ICAC v Chaffey* (1992) 30 NSWLR 21 at 31. The comment was made in the context of considering s.31 of the *ICAC Act* 1988 which is expressed in identical terms to section 33 of the PIC's Act.

- whether it is in the public interest for the Commission to publish its interest in particular events or persons,
- whether the Commission's investigation is likely to be advanced by the holding of hearings in public,
- whether holding hearings in public is likely to prejudice an accused's right to a fair trial in proceedings for an indictable offence before any court [,]tribunal, warden, coroner, Magistrate, justice of the peace or other person (section 21),
- potential risks to the safety and well-being of witnesses and other persons assisting the Commission,
- likelihood of unnecessary damage to the reputation of a witness or any other person, and
- risk of disposal or concealment of assets which may be the subject of confiscation proceedings[.]" [56]

4.20 There can be little doubt that public hearings are often used to great effect by the PIC, bringing to bear, as one judge described, the "*disinfectant effect of sunlight*"[57] on corrupt conduct. The balancing exercise of encouraging others to come forward voluntarily on the strength of public allegations and the need to safeguard the reputations of persons affected by such allegations is a fine one. Nevertheless the public interest test prescribed by the Act is one which carries with it an exercise of discretion which is directed towards achieving the right balance between the public function of the PIC and the rights of affected individuals, subject to considerations of procedural fairness.

4.21 Although it has been said in relation to certain commissions of inquiry that where a commission proceeds in private it potentially has the effect of "*seriously undermin[ing] the value of the inquiry*"[58] the same cannot be said of the scheme of the Act insofar as it applies to the operations of the PIC. There are valid reasons for the PIC proceeding in private. In the first place there is the need to encourage co-operation

[56] Police Integrity Commission, *Procedures at Hearings*, 5111/194 at p.1.
[57] *ICAC v Chaffey* (1993) 30 NSWLR 21 per Mahoney JA at 53.

from corrupt officers. Second, there are times during an investigation when to publicly air allegations might have the effect of compromising other elements of the investigation. Third, there may be an imperative to keep confidential the identity of witnesses. Finally, private hearings can be used to present evidence against a person in such a way as to foster greater co-operation with investigators where, for example, an individual has been less than frank in providing a statement.

4.22 The very discretion to proceed in the public interest will produce different outcomes in different circumstances. A formulaic approach to holding public or private hearings would have the undesirable consequence of diminishing the PIC's effectiveness by reducing its capacity to freely expose misconduct. Moreover, the PIC is an organisation with a watchdog brief: in part its effectiveness lies in its very existence. That fact alone may be said to have the result that officers who engage in corrupt conduct are aware that there is a full-time, permanent and independent body charged with routing out such behaviour. Moreover, there is the ever-present threat that, aside from the potential of criminal proceedings and loss of a career, the officer will be subject to public exposure.

4.23 It is understandable that police officers would prefer to be dealt with in private. On one level such a view would also be understandable from the point of view of NSW Police, where it might be felt that the PIC's successes in identifying corruption are NSW Police's failures.[59] Ultimately the discretion to hold public or private hearings must rest with the PIC alone.

4.24 It was suggested that where private hearings are conducted the PIC might avail itself of the opportunity, where appropriate, to involve NSW Police with the effect that this might, in the long term, reduce the need for public hearings and/or enable the credibility of complainants

[58] *State of Victoria & Ors v Bowen & Ors (the BLF Case)* (1982) 152 CR 25 per Mason J (as His Honour then was) at p.97.
[59] It is not suggested that this was a view expressed in submissions.

to be tested at an early stage. This argument was developed further to suggest that NSW Police should be given an opportunity to make submissions in cases where it considers that a public hearing is not appropriate.

4.25 Again, provided it keeps within its statutory mandate, the manner in which the PIC elects to conduct private hearings must be free from external interference unless of course the PIC considers external input would be beneficial.

4.26 The issue of public hearings is a matter which has been raised a number of times by the Joint Parliamentary Committee.[60] In February 2001 the Joint Parliamentary Committee asked, on notice, whether the PIC had done a case study of the cost and contribution of public hearings to an investigation. The PIC responded as follows:

> "The Commission has not undertaken a specific case study in relation to the cost and contribution of the use of public hearings. It can, however, provide some comment regarding the typical costs associated with public hearings. In October 1999, the Commission conducted a one-day public hearing in relation to Operation Glacier. The cost in relation to that hearing was approximately $8,500. Included in this cost were such elements as:
>
> - the salaries of Commission staff whose services were required for the purposes of the hearing
> - the fee for Counsel Assisting the Commission
> - the cost of court reporters
> - the cost of advertising and
> - running costs for the hearing room.
>
> As to the contribution made by public hearings to investigations, the experience of the Commission since the Third General Meeting

[60] See for example the *Third General Meeting with the Commissioner of the Police Integrity Commission: Report of the Committee of the Ombudsman & the Police Integrity Committee*, August 1998 at p.10, *Fourth General Meeting with the Commissioner of the Police Integrity Commission: Report of the Committee of the Ombudsman & the Police Integrity Committee*, December 1999 at p. 42 and *Fifth General Meeting with the Commissioner of the Police Integrity Commission: Report of the Committee of the Ombudsman & the Police Integrity Committee*, February 2001 at p.26.

> in July 1998 would suggest that it is problematic to attempt to quantify such things. The Commission has seen a significant degree of diversity in investigations where a public hearing has been held; it is unlikely that a matter could be identified that is representative of the contribution made of public hearings to investigations.
>
> At an organisational level, the value of public hearings is that, amongst other things, they provide a deterrent effect and, it is reasonable to conclude, contribute towards the prevention of serious police misconduct. Measuring these outcomes, however, is not a feasible proposition at this point in time."[61]

4.27 The decision to proceed with a public or private hearing is a matter which is considered by the OAG which meets on a regular basis. The internal procedures used by the PIC which determine whether a matter should proceed to a public or private hearing are not in need of reform. Nor is the view held that the discretion to hold public or private hearings should be in any way subject to external review. While it is trite to say that the PIC should make use of any resources which are offered to it to achieve its purposes, the use of such resources or assistance must not compromise its independence as an investigatory body.

Recommendation

4. There should be no interference with the way in which the PIC elects to convene public or private hearings.

NON-PUBLICATION ORDERS

4.28 It was contended in certain submissions that the names of police officers against whom allegations of corruption are made should be suppressed until such time as the officer has at least had the opportunity to respond. This, it was argued, is a matter of procedural fairness to those whose names and reputations are tarnished by the allegations of complainants which might not be sustainable.

[61] *Fifth General Meeting with the Commissioner of the Police Integrity Commission: Report of the Committee of the Ombudsman & the Police Integrity Committee*, February 2001 at p.26.

4.29 In making non-publication orders the PIC must be satisfied that the direction to do so is "*necessary or desirable in the public interest*".[62]

4.30 There has been some judicial consideration as to the extent of procedural fairness in circumstances where reputation is at stake. In this regard Gleeson CJ (then Chief Justice of the New South Wales Supreme Court) observed that:

> "There is a danger of confusing two rather different ideas. The authorities amply demonstrate that potential damage to the reputation of a person who is the subject of a complaint being investigated by the Commission enlivens the requirement to observe the rules of natural justice and entitles that person to procedural fairness: eg. *Mahon v Air New Zealand Ltd [1984] AC 808.* There remains to be considered, however, the question of the practical content of those rules in a given case. There is a fallacy in passing from the premises that the danger of harm to reputation requires the observance of procedural fairness to the conclusion that fairness requires that proceedings be conducted in all respects in such a way as to minimise damage to reputation"[63]

4.31 It is evident from the submissions that a hiatus has developed between the interpretation of the non-publication requirements by the PIC and the expectations of parties and their representatives when making an application for such orders. The PIC has indicated that it is willing to develop practice guidelines in this regard.

Recommendations

5. That the PIC develop and publish guidelines in relation to its practices concerning the non-publication of names.

[62] Section 52(2) of the Act.
[63] *ICAC v Chaffey* (1992) 30 NSWLR 21 at 28. That view is supported by *Donaghue* op. cit. at p.170 where the author notes that while commissions generally may be bound by the rules of procedural fairness those rules will not apply to commissions that investigate crime where an investigation may damage reputations.

6. That the guidelines set out the statutory and common law requirements and the manner in which the PIC will interpret these in considering applications for non-publication orders.

GENERAL SCOPE AND PURPOSE

4.32 It was suggested in submissions that the PIC should formulate a general scope and purpose statement which is as reflective of proceedings from the outset as it is at the end of proceedings. It was also suggested that notification of the general scope and purpose be given at least four weeks in advance in order for the affected person or agency to prepare and/or respond.[64]

4.33 Whilst it is desirable that, unless the circumstances of the investigation dictate otherwise, parties should be informed as soon as practicable of the scope and purpose of the hearing, the PIC as an investigative agency cannot be tied to the general scope and purpose of a hearing in the way in which parties to court proceedings are tied to pleadings.[65]

Relevantly, section 32 of the Act provides:

"**32 Hearings**
(cf ICAC Act s 30)

(1) For the purposes of an investigation, the Commission may hold hearings.

(2) A hearing must be conducted by the Commissioner or by an Assistant Commissioner, as determined by the Commissioner.

(3) At each hearing, the person presiding must announce the general scope and purpose of the hearing.

[64] See suggested procedural ruling at paragraph 13 of the "*Proposed Procedural Rulings of the Police Integrity Commission*" at Appendix B.
[65] This was also recognised by the *Review* which rejected the suggestion that the PIC formulate Terms of Reference for the purposes of its hearings.

(4) A person appearing before the Commission at a hearing is entitled to be informed of the general scope and purpose of the hearing, unless the Commissioner is of the opinion that this would seriously prejudice the investigation concerned."

4.34 The practice adopted by the PIC is to annex as a schedule to each summons issued pursuant to section 38(1) a statement of the general scope and purpose of the hearing and in conformity with section 32(3) to make the prescribed announcement. However, the subsection is expressed in general terms and in practice is so construed.

4.35 It follows that should circumstances so dictate the general scope and purpose of the hearing may at any time be amended to accommodate the PIC's investigatory role.

Recommendation

7. That no change be made to proceedings followed by the PIC with regard to notification or otherwise of the General Scope and Purpose of Proceedings.

LEGAL REPRESENTATION

4.36 Leave to appear before the PIC was the subject of comment in submissions in terms of the potential for conflict to arise where one counsel is given leave to appear for more than one individual or organisation. This section deals with representation generally. Operation Malta, where such a conflict did arise, is discussed in the following Chapter Five.

4.37 As a general rule, procedural fairness does not confer an entitlement to legal representation on the basis that a commission has the power to affect individual rights or interests.[66]

[66] *Cain v Jenkins* (1979) 28 ALR 219 at 230.

4.38 The statutory regime of the Act is such that there is no automatic right to legal representation before the PIC. Legal representation may be authorised but this is at the discretion of the PIC.[67] The Act also confers incidental powers to do all things necessary in the exercise of its powers.[68] That discretion is subject to the requirement of procedural fairness which would not entitle the PIC to act so unreasonably that no reasonable authority with similar powers would so act.[69] Moreover, procedural fairness would require that in exercising the discretion regard is given to the policy and objectives of the Act where the Act does not expressly provide for the circumstances of the exercise of the discretion.[70] In the present circumstances this is relevant to the exercise of discretion where the Act does not expressly provide for the exclusion of legal representation.

4.39 The power of a commission or tribunal to exclude legal representation has been considered in a number of cases.

4.40 As a preliminary point it is apparent that, in the absence of a contrary intention expressed in the relevant act, a commission will have the power to control its own proceedings. This was confirmed by the Full Federal Court in *National Crime Authority v A, B and D*[71] in which the Court determined that the then National Crime Authority[72] ("NCA") could regulate its own proceedings in such a manner as to ensure those proceedings were neither prejudiced nor exposed to the risk of being prejudiced.[73]

4.41 The Court also held that the NCA could exclude a legal practitioner from appearing for three witnesses where he had already appeared for the first witness. The case involved the potential breach by a legal

[67] Sections 34 and 35 of the Act.
[68] Section 22 of the Act.
[69] *Associated Provincial Picture House Ltd. v Wednesbury Corporation* [1948] 1KB 223
[70] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.
[71] (1988) 78 ALR 707.
[72] The National Crime Authority is one of the several agencies which were amalgamated to form the Australian Crime Commission which commenced operation on 1 January 2003.

practitioner of the secrecy provisions of the *National Crime Authority Act* 1984. The information obtained while acting for the first witness during private conferences was information which might inadvertently be disclosed during conferences with the other witnesses:

> "…the question whether the legal representative, by accepting the retainers of each of the [witnesses], would place himself in a position of conflict between his duty to his clients and his duty to the Authority…was not to the point. What the Authority feared was that a legal practitioner anxious to do his duty to his clients might, quite unintentionally, perhaps subconsciously, reveal to one of more of the respondents matters which would forewarn them of what they might be expected to be asked. That is the sort of risk which concerned the Authority and which persuaded it that it should refuse to allow the legal representative to appear."[74]

4.42 The test formulated by the Court as to the circumstances in which the NCA had the power to refuse leave to a legal practitioner was whether on reasonable grounds and in good faith it concluded that representation "*will, or may, prejudice the investigation*".[75]

4.43 Lockhart J suggested a variation on the test formulated by the Full Federal Court in *Australian Securities Commission v Bell.*[76] In that case His Honour suggested the slightly higher test of "*will or likely to*" prejudice the investigation. This approach was followed by the Queensland Court of Appeal in *Re Whiting,*[77] a case in which the Criminal Justice Commission refused to permit an appearance by counsel for a police officer against whom an allegation of assault was made and her two fellow officers who were also witnesses to the alleged assault. The first instance judgment of Williams J was cited with approval on appeal by Pincus J:

> "The perception would be that the witnesses and the person under investigation had banded together in order to protect the latter. The results of the investigation carried out in those

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[73] Ibid fn. 71 at 715.
[74] Ibid at 716.
[75] *Ibid* at 716.
[76] (1991) 32 FCR 517
[77] [1994] 1 Qd. R 561.

> circumstances would hardly be received by the public as the product of independent, impartial and fair investigation. In that way there were reasonable grounds on which a bona fide belief could be based that to allow the particular representation sought would be likely to prejudice the investigation"[78]

4.44 Public perception is but one consideration in determining whether or not a pro-active or reactive approach should be taken by the PIC when deciding whether or not to grant leave to appear. Although no actual prejudice need be shown it is within the purview of the PIC to act in circumstances where there is potential prejudice to its ability to properly discharge its functions. Presently, when the PIC compels persons to appear to give evidence it does so with the following caveat:

> "Your legal representative does not have an automatic right of appearance at the Commission. However, a legal practitioner who acts for a person giving evidence at the Commission is entitled to make application to legally represent that person at the hearing. In most cases, such applications will be granted (sub-section 35(1)). **The Commission reserves the right to decline an application for legal representation if such a representation is likely to prejudice an investigation, for example, by reason of a conflict of interest**."[79] (emphasis added)

4.45 Relevant also to the obligations of the PIC in exercising its discretion in relation to legal representation are the concomitant obligations of counsel seeking leave to appear before the PIC. The scope and content of the obligations of counsel is prescribed by *The New South Wales Barristers' Rules of the New South Wales Bar Association* ("Barristers' Rules") and the common law. Particular rules govern the conduct of counsel where counsel has a conflict of interest.[80]

4.46 The risk of a conflict emerging during the course of a hearing has potentially grave consequences not only for a witness affected by the conflict but also for the conduct of the hearing generally.

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[78] *Ibid* at 571.
[79] *Summons to Appear Before the Commission and Give Evidence issued pursuant to s38(1) of the Police Integrity Act 1996 - Information for Witnesses* at p.6.
[80] See *Barristers' Rules* 103-111.

4.47 The point of intersection between the duty of counsel to appear without conflict and the obligations, if any, of the PIC to supervise the nature of counsel's appearance is not easy to find. On the one hand the PIC might reasonably take the view that the matter of conflict management is purely the responsibility of counsel and, to that end, that the Barristers' Rules and the common law provide sufficient protections regulating those decisions. On the other hand, there are circumstances where the PIC might also recognise, given the circumstances of a particular investigation, that a future conflict may arise. This is particularly so where an investigation later develops in a different way from that expected at the outset. Similarly events may develop in such a manner as to generate conflict.

4.48 The principle that a court may act on its own motion to ensure it has the benefit of independent counsel where parties have divergent interests has received judicial support.[81] The rationale for such a rule is that a court, and by analogy a tribunal, may act in such a way as to protect the administration of justice.

4.49 The ethical obligations of counsel to clients and to the PIC on the one hand, and the protective obligations of the PIC to fulfil its mandate, cannot operate in a vacuum. If, as is the case under the Act, there is a requirement for leave to be granted before legal representation will be authorised then, as part of the consideration of whether or not to grant leave, the PIC should satisfy itself that counsel appears without conflict. In circumstances where counsel seeks to act for more than one individual or organisation, or for both an individual and an organisation, the PIC should apply a threshold test which protects both witnesses and its own process. The uniqueness of the PIC's processes means that instances arise where, to rely solely on counsel to self-regulate client conflicts, can prove an insufficient safeguard.

[81] *Nagus v Pty Ltd v Charles Donovan Pty Ltd* [1989] VR 184.

Recommendations

8. **The PIC should develop conflict management guidelines which would regulate the granting of leave to counsel to appear for more than one individual or organisation or an individual and an organisation.**

9. **The PIC should, as soon as the general scope and purpose of the hearing is determined, require counsel wishing to appear for more than one party to provide written submissions seeking leave to appear. Consideration should be given to the inclusion of a declaration from counsel that counsel is free of any conflict.**

10. **If the general scope and purpose of the hearing changes and/or the nature of the investigation becomes such that the general scope and purpose might change, then the PIC should consider convening a special hearing if, in its opinion, those changes might have the effect of producing a conflict of interest in counsel appearing.**

DOCUMENT PRODUCTION

4.50 A number of submissions criticised the PIC for its late notice of orders requiring the production of documents. The criticisms focused on the nature of the documents which the PIC sought to compel, including privileged documents, and in the case of one private submission, personal and family-related documents.

4.51 The powers of the PIC to compel the production of documents are broad. The PIC may compel the production of a statement of information from a "*public authority*" or a "*public official*" and it may require any person to produce documents or things.[82] By section 27 of the Act, only persons in their private capacity and private corporations may assert a claim for privilege where they would be entitled to resist a like requirement in a court of law. The PIC has interpreted section 27(3)(b) of the Act, which abrogates any "*privilege of a public authority or public official in that capacity*", to mean that any claim for privilege, including legal professional privilege, cannot be claimed by a public authority or an individual acting in a public capacity.

[82] Sections 25 and 26 of the Act.

4.52 The use of these powers, and in particular the power to abrogate legal professional privilege, have been the subject of vigorous objection before the PIC by parties affected by such notices to produce. As indicated earlier, it is not within the purview of this Report to consider the question of privilege. Notwithstanding that, the question of document production does arise in terms of the practices and procedures of the PIC in the sense that the failure of a party the subject of a notice to produce documents in a timely and complete manner can have serious ramifications for the conduct of an investigation or hearing.

4.53 The PIC's present practice is to issue the following explanation with the notice to produce:

> "CLAIMS FOR PRIVILEGE
>
> You may have the requirement contained in the Notice set aside if it appears to the Commission that you have a ground of privilege that would be recognised in a court of law and it does not appear to the Commission that you consent to compliance with the requirement (section 27).
>
> The Notice must be complied with despite the following:
>
> (a) any rule that in a proceedings in a court of law might justify an objection to compliance with a like requirement on grounds of public interest, or
> (b) any privilege of a public authority or public official in that capacity that the authority or official could have claimed in a court of law, or
> (c) any duty of secrecy or other restriction on disclosure applying to a public authority or public official.
>
> In the event that you wish to raise a claim for privilege, the procedures set out below shall apply.
>
> 1. Prior to the return date shown on the Notice, you should produce the documents or other things sought by the Notice. Information the subject of the claim should be placed into a sealed envelope and the envelope marked with the words, "Response to Notice X of 2001 – Claim for Privilege". The documents or other things the subject of the claim should be accompanied by:

(a) a list identifying the documents or other things the subject of the claim;
(b) a written application that the Notice, or part thereof, be set aside on the ground of a specified form of privilege, and
(c) a statutory declaration made by you in support of the claim for privilege, setting out particulars of the grounds of the claim.

2. Pursuant to sub-section 27(2) of the Act, the claim shall be determined by the Commissioner. The Commission undertakes to retain the documents or other things undisturbed in the sealed envelope until the claim is determined.

3. If, from an examination of the material submitted in support of the claim, it appears to the Commissioner that you have a ground of privilege whereby, in proceedings in a court of law, you might resist a like requirement to produce and it does not appear to the Commission that you consent to compliance with the requirement to produce, the documents or other things will be returned without being further inspected by the Commission.

4. If, upon an examination of the information by the Commissioner, it does not appear to the Commissioner that you have a ground of privilege whereby, in proceedings in a court of law, you might resist a like requirement or, if a ground of privilege does exist, you appear to the Commission to have consented to compliance with the requirement to produce, then you will be invited to attend a hearing of the Commission at which time an opportunity will be given for you to be heard as to why the claim for privilege should not be dismissed. You may be legally represented during this process.

TAKING OBJECTION

5. A requirement contained in the Notice need not be set aside on the basis of privilege against self-incrimination (sub-section 28(3)). The privilege against self-incrimination only applies to individual persons and not bodies corporate (sub-section 28 (1)).

6. If the documents or other things sought by the Notice tend to incriminate you and you object to production of the documents or other things at the time they are produced to the Commission, then neither the fact of the requirement to produce nor the documents or other things may be used in any proceedings against you (except proceedings for an offence against the Act).

7. Documents or other things produced in response to a Notice may be used for the purposes of the investigation concerned, despite any objection."

4.54 This process enables the PIC to form a preliminary view as to whether privilege exists in relation to relevant documents without the necessity, at first instance, of holding a hearing. In the event the PIC determines that the documents are indeed privileged the documents are returned. If privilege is in dispute then a hearing is held to enable the claimant's case to be put.

4.55 The PIC's powers to require the production of documents are of paramount importance not only at the investigation stage but also for the purposes of determining the general scope and purpose of the hearing. It is therefore critical that parties served with such a notice act diligently in complying with the timeframe specified in the notice and properly produce the documents requested. It is noted that a person failing to comply without reasonable excuse is liable to a maximum penalty of 20 penalty units or imprisonment for 6 months or both.[83]

4.56 Whilst it is desirable that persons served with notices to produce are given reasonable time to properly comply, what is reasonable in each individual case must be determined by considerations which include the risk that evidence might be lost or destroyed or used for purposes of collusion.

Recommendations

11. Where a notice to produce is issued the PIC should strictly enforce compliance with the notice, including where necessary, use of its powers under section 26(3) of the Act.

12. Parties served with notices to produce should be given reasonable time within which to comply with such notices

[83] Section 26(3) of the Act.

except in circumstances where, in the view of the PIC, evidence is in jeopardy of being lost or destroyed or where parties might collude to defeat the purpose of the notice.

13. No change should be made to the current procedures in place at the PIC to determine privilege over documents.

PROCEDURAL RULES

4.57 It was suggested in submissions that Procedural Rulings should be developed by the PIC in order to give parties a better understanding of the procedures adopted in the hearing room.

4.58 The PIC currently uses various *ad hoc* documents which are either sent out with notices or are available to parties involved in a hearing upon request. These documents are not available on the PIC's Internet site.

4.59 One submission suggested that the PIC adopt a variation of the Procedural Rulings used for the purposes of the Wood Royal Commission, with certain amendments (see Appendix B).

4.60 In response the PIC indicated it did not consider these Procedural Rulings to be appropriate as the Wood Royal Commission was conducted on a week-to-week basis as an ongoing inquiry into police corruption. The PIC submitted that its hearings are held for a particular purpose and that no general statement as to how these hearings are to be held should be applied.

4.61 It is recognised that the PIC is intending to draw together its guidelines with a view to publishing the results for the benefit of practitioners. This initiative is encouraged and commended.

4.62 Two areas require careful consideration. First, the manner in which witnesses are examined and cross-examined and second, the manner in which evidence is placed before the PIC.

4.63 The PIC has formulated its own procedure in relation to the way in which witness are examined and cross-examined:

> "Procedure
>
> 1. Counsel Assisting will examine the witness.
>
> 2. The witness may seek leave to give further evidence and, if such leave is granted, may then give such evidence. Alternatively, if the witness is legally represented, the legal practitioner representing the witness may seek leave to examine the witness and , if such leave is granted, may then examine the witness.
>
> 3. In most, if not all, public hearings of the Commission, the Police Service will also be represented as a group which is substantially and directly interested in the subject matter of the hearing. Subject to the grant of leave to examine or cross-examine the witness, the legal practitioner representing the Police Service may then examine the witness.
>
> 4. Other witnesses adversely affected by the evidence of the witness and other person who have been shown to be substantially or directly interested in the subject-matter of the hearing, or the legal practitioners representing either of these groups, may then seek leave to examine the witness and, if such is granted, examine the witness.
>
> 5. Counsel Assisting may re-examine the witness." [84]

4.64 While these procedures are well stated the practical application of these rules is not without difficulty, particularly in a long hearing. The careful application of these rules by both Counsel Assisting and the Presiding Officer must balance the rights of persons called, together with the informality in which proceedings are to be conducted, against the need to conduct any investigation in a timely and diligent fashion.

4.65 Related to this concept is the difficult balancing exercise required in relation to the placing of evidence before the PIC. The present formulation by the PIC is as follows:

[84] *Hearing Room Procedures of the PIC*, ref 5111/194 of 7 December 2001 at p5.

"PLACING EVIDENCE BEFORE THE COMMISSION

Persons have no right to appear before the commission to give evidence nor to tender documents or other things. Such evidence as is called and/or exhibited is at the discretion of the Commissioner.

Persons against whom substantial allegations have been made and other persons, or their legal representatives, wishing to place evidence before the Commission are encouraged, in the first instance, to notify Counsel Assisting or the legal officer instructing in relation to the matter being heard. Whether the information is reduced to writing, such as a statement, and whether oral evidence is called from the potential witness, is a matter for the Commission. In determining whether further evidence is called and the form in which it is taken, the Commission shall take into account the particular circumstances, including:

- other available evidence;
- other available potential sources of information;
- the degree of corroboration (if any);
- the credibility of the respective sources of information;
- the value or potential value of the evidence to the investigation as a whole;
- the public interest;
- practical matters as regards leading or obtaining the evidence; and
- the need to ensure efficiency.

In circumstances where the information is to be reduced to writing, generally it will be appropriate for this document to be in the form of a signed and witnessed statement admissible in accordance with the requirements of section 48C of the *Justices Act 1902*." [85]

4.66 It is recognised that, on the face of it, this guideline is a reasonable formulation of the rule. However, the key to the rule is in its application. There is danger where a hearing is the subject of intense public and media scrutiny, and the Presiding Officer is faced with forceful opposing counsel who insists on taking an adversarial approach to the way in which evidence is elicited, that the hearing can be derailed. This can be done in a number of ways. For example, it is

[85] *Ibid* at pp. 5-6

not difficult for counsel opposing to use the concept of natural justice to argue that alternative theories are not being placed before the commission of inquiry as a means of insisting on the tender of contradictory evidence.

4.67 As part of the amendments to the Wood Royal Commission rulings at Appendix B it was suggested that in relation to the adducing of evidence, both the legal representatives and those assisting the PIC decide what evidence is to be place before the PIC.[86] With respect to the author of the submission, that cannot be the case in relation to a commission of inquiry such as the PIC. Control over the placing of evidence cannot fall outside the control of the Presiding Officer and/or Counsel Assisting. The gatekeepers of evidence in an inquiry are Counsel Assisting and the Presiding Officer. There can be no comparison between the exercise of these duties in an investigation and the conduct of curial proceedings. The very nature of a PIC inquiry, which is freed by statute from the constraints of the rules of evidence; of formality and of adversarial confrontation, requires the Presiding Officer, together with Counsel Assisting, to maintain a firm grip on the course of the evidence elicited during the hearing. Without this firm stewardship the practices and procedures of the PIC are open to abuse by counsel who are unable or unwilling to recognise that PIC investigations are not curial proceedings.

4.68 Concomitant with the need to control the evidence to be called or, if by way of statement, tendered, lies the vital function of fixing and preserving hearing dates.

4.69 In lengthy matters involving multiple parties difficulties associated with meeting the convenience of parties, witnesses and counsel are inevitable. Experience dictates that endeavours to meet other than the

[86] See amended sub-paragraphs 8 and 9 of the *Proposed Procedural Ruling of the Police Integrity Commission*.

gravest exigencies result in intolerable delays. The paramount consideration must be and remain the timely disposition of the Inquiry.

4.70 That clients may have invested substantial time and money in counsel of their choice is not to the point. The imperative is for counsel to honour that obligation by their presence and not for the PIC to adjust its timetable with the consequence of others seeking similar indulgences on the basis of fairness.

4.71 Finally the obligation of Counsel Assisting to undertake the assessment of all evidence to be placed before the inquiry and to exercise control in this regard should be made plain. In addition the duty of counsel to provide timely submissions at the conclusion of the hearing or the investigation as the case may be, should be a matter of specific emphasis and agreement with counsel at the time of briefing.

4.72 The requirement that the PIC conduct its business with as little formality as possible in accordance with section 20 of the Act does not mean that it cannot or should not establish basic operational parameters in aid of the conduct of its investigations and hearings. A uniform set of practice guidelines should be formulated. These should deal with issues relating to conflicts of interest, the placement of evidence before the PIC, and the production of documents.

Recommendations

14. The PIC should establish an internal Practice Guidelines Committee which should include the Commissioner, the Assistant Commissioner and the PIC Solicitor.

15. The PIC should formulate uniform Practice Guidelines dealing with, amongst other things:

- **Legal representation and conflicts of interest;**

- **The placement of evidence before the PIC; and**

- **The production of documents.**

16. The PIC should publish the Practice Guidelines on its Internet site and maintain hardcopies for persons without Internet access.

17. The PIC should ensure that the Presiding Officer (with the assistance of Counsel Assisting) firmly controls the course of the proceedings by requiring parties to adhere to orders to produce documents, regulating the extent of the evidence led and ensuring by determining in open hearing timetables for submissions and requiring undertakings from counsel as to adherence. Counsel should be informed that the matter will be listed for mention, out of court hours, seven days prior to the submissions deadline. Counsel should be requested to attend the mention and advise of progress.

REPORTING

4.73 The issue of reporting to Parliament by the PIC was the subject of much criticism in submissions. The principal objections focused on the perceived delay in report production, the authorship of reports and the effect of reports on the reputations of person named in the reports.

4.74 Section 96(2) of the Act requires the PIC to report to Parliament where it holds a public hearing. Section 96(4) states that the report must be "*furnished as soon as possible after the Commission has concluded its involvement in the matter*." The PIC acknowledges its obligation to Parliament to produce reports in a timely manner. It was suggested that the most compelling reason for what the public might perceive as delay in the production of a report is the fact that public hearings are but one possible phase of an investigation. Put simply, a public hearing does

not mark the conclusion of an investigation as it does in criminal proceedings before a court, rather it is but one of a number of steps in the investigative process. The reason for this is that hearings may disclose further avenues of inquiry or witnesses may decide to assist the PIC with further information or evidence.

4.75 Accordingly, public hearings potentially take place at any time during the course of an investigation. The effect of this is there may be a period of further investigation following the hearing. This is then followed by submissions from Counsel Assisting and submissions in reply.

4.76 Other factors in the delay in producing reports were identified by the PIC as follows:

- the availability of counsel to provide submissions in a timely fashion and to a suitable standard;
- the availability of counsel and/or the PIC solicitor to conduct a legal review of Reports;
- the need to factor in any changes to legislation;
- the loss of key staff and counsel during and or after hearings;
- the need to consult NSW Police on matters of police procedures and management practices in regard to PIC recommendations; and
- the need to obtain legal advice on complex matters.

4.77 It follows that the date of a public hearing will not necessarily bear any particular relationship with the time taken to report to Parliament. Rather, the time taken needs to be assessed by reference to two markers: first, the time at which the PIC completes its investigation and second, the time from which written submissions are received and processed into a report.

4.78 In this sense the table which appears at page 40 detailing the time taken from the final public hearing to the submission of a report to Parliament is flawed. This is because the final date of public hearing is irrelevant for the purposes of reporting where investigations are ongoing.

4.79 The PIC submitted a table listing the key dates in relation to each of the matters it has reported on to Parliament. That table is produced below, minus the commentary and footnotes which have been deleted for reasons of confidentiality.

Operation Name	Date matter declared an investigation (preliminary or full)	Date public hearing commenced	Last date of oral evidence (public hearing)	Total days of oral evidence public & private	Date further enquires completed	Date PIC submissions served	Date last Submissions in reply received	Date report tabled in parliament
Jade 2024	30/05/97	24/11/97	3/2/98	14 (4 days were both public & private)	N/A	13/2/98	27/2/98	20/10/98
Warsaw 2594	31/07/97	14/04/98	27/05/98	32 (12 days public hearings – some public hearing days also had private hearings) (20 days private hearings)	September 1998	19/08/98 8/12/98	26/08/98 17/12/98	09/02/99
Algiers 3619	15/12/97	30/03/99	14/04/99	13 (5 days of public hearings)	17/6/99	19/07/99	20/08/99	30/06/00
Copper 2571	04/08/97	04/05/98	6/05/98	3	N/A	2/09/98	10/09/98	30/06/00
Triton 3856	20/01/98	06/07/98	16/07/98	6	18/12/98 (Triton II)	11/08/98	17/08/98	30/06/00
Nickel 3806	13/01/98	13/07/98	15/07/98	3	1/10/99	12/08/98	18/08/98	30/06/00
Belfast 4364	30/03/98	17/11/98	09/02/99	23 (3 days tendering submissions)	11/5/99	26/05/99	19/11/99	18/10/00 (200 pages)
Glacier 5478	26/11/98	27/10/99	27/10/99	1	19/10/00	7/02/00	2/06/00	22/11/00
Oslo 1556	20/06/97	20/04/99	22/6/99 30/09/99 [corrections to transcript & final tender of exhibits] 29 & 30/11/99 Calvin gave evidence	22 (1 day was both public & private	May 2000	5/10/99 & 6/10/99	27/10/99	15/06/01
Saigon I 2287	25/11/98	15/02/99	25/2/99	9	29/11/00	28/07/00	11/9/00	15/06/01
Saigon II and III	25/11/98	1/09/99	2/03/00	26	29/11/00	28/07/00	3/11/00	15/06/01
Pelican 6330	16/10/00	20/11/00	14/06/01	14 (1 day was both public & private)	N/A	25/06/01	13/07/01	17/08/01
Jetz 8474	29/03/01	20/08/01	29/11/01	13	02/05/02	20/05/02	23/08/2002	07/02/03
Malta 7919	23/10/00	19/03/01	18/03/02	73 (5 days were both public & private)	N/A	29/04/02	08/10/02	12/02/03

4.83 The above table discloses a number of factors:

4.84 First, as the PIC indicated there is often considerable effluxion of time between the public hearing and the date on which the investigations of the PIC concluded. No adverse comment or criticism is levelled at the PIC by this Inspectorate for this time period.

4.85 Second, there would appear to be a long delay between the receipt of submissions from the conclusion of the investigation by, in some cases, Counsel Assisting the PIC, but more often, by other counsel. This is not an isolated occurrence. The PIC should not permit counsel the liberty of what amounts to many months to make submissions following the termination of an investigation. Rather, definite timeframes should be established for the production of submissions with the sanction that submissions which fall foul of this rule will not be taken into account in the production of a final report. The listing of the matter for mention approximately 7 days prior to the deadline for submissions with counsel requested to attend and advise the PIC of progress is recommended.

4.86 Third, the internal report writing procedures adopted in the past have been a contributing factor. Regrettable but nonetheless predictable occurrences such as staff changes, ill health and unavoidable absences are recognised as causing delay outside the ambit of the PIC's control.

4.87 Operation Malta, to be later considered in this Report, is a prime example where vital changes in both Counsel Assisting and report writing staff had to be accommodated, at critical times, resulting in both procedural and report writing set-backs.

4.88 The consequences to individuals and organisations which may flow from a report to Parliament by the PIC justify a careful and considered, albeit time consuming, approach. Failure to fairly, accurately and comprehensively report can result, amongst other things in; damage to the reputation and career prospects of affected persons; exposure to

legal action against the PIC and or its staff and public loss of confidence in the investigations and operations of the PIC.

4.89 That said, and the propriety of the approach outlined above acknowledged, the table extracted above nevertheless gives rise to the inference that: first, the time taken after close of hearings and further investigations for the making of submissions by counsel or other legal advisers; and second, the time taken for report writing do not reflect a degree of urgency commensurate with the gravity of a PIC report. While there are clearly some admirable examples of the timely production of reports such as Operation Pelican, the delays in Operations Oslo, Belfast, Algiers and Malta, notwithstanding that some elements of the individual operations fall within appropriate timeframes, are not examples of best practice in the hearing and reporting phase.

4.90 Fourth, the issue of report writing brings with it the issue of accountability. As indicted above the time from which the reporting clock should be set is the time at which the PIC investigation concludes. This, it is recognised, may not coincide with the time at which public hearings conclude.

4.91 The authorship of reports is another issue which was raised in submissions where it was contended that the presiding officer should be the person who authors any report of the PIC.

4.92 The PIC currently prepares reports corporately; that is to say that reports are prepared at a number of different levels within the PIC and by a number of different individuals, with the Commissioner ultimately having the responsibility to sign-off. Those with involvement include: Counsel Assisting the PIC; the Operational Lawyer responsible for the matter; the report's Project Manager, PIC research staff; the PIC Solicitor; senior PIC staff; and the Commissioner.

4.93 The consequences of delay in reporting are obvious: aside from the potential damage in terms of public confidence in the PIC there are real issues concerning fairness to persons likely to be affected by a recommendation. Several submissions also suggested that delay can have the effect that reports are rendered less valid as officers may have already been dealt with by NSW Police. However these submissions fail to appreciate that, for example, criminal or disciplinary proceedings will often proceed in parallel with the PIC's investigations.

4.94 In terms of the PIC's reporting obligations under the Act it is clear that there is nothing in the Act that would require the Commissioner alone or the Presiding Officer to prepare the report.

4.95 It is appropriate that reports should be prepared corporately and not exclusively by the Commissioner or the Presiding Officer. The caveat is that the report writing procedures must make sufficient allowances for the person presiding at the hearing to have an opportunity to provide sufficient input into the report. Allied to this responsibility is the obligation on Counsel Assisting to provide written submissions in a timely and comprehensive fashion.

4.96 The rationale underlying the view that reports should be prepared corporately relates to the nature of the PIC: it is not a court making legal findings or imposing penalties, but rather a commission of inquiry making assessments and forming opinions upon which it ultimately makes recommendations.

Recommendation

18. That the PIC employ the term "interim public hearing" when it is expected that investigations will be ongoing at the conclusion of a public hearing. The purpose of this recommendation is to highlight the fact that a public hearing

may be but one step, and not the final step, in the investigation process.

SECTION 77 REFERRALS

4.97 It was suggested in submissions that the PIC should make greater use of its powers to refer matters back to NSW Police either before the conclusion of an investigation or as an alternative to presenting a report to Parliament. Further, it was contended by NSW Police that the information obtained upon referral of a draft report concerning private hearings was subject to confidentiality requirements and thus prevented or impeded NSW Police from taking any action.

4.98 It is the view of the PIC that the process of referrals remain at the sole discretion of the PIC. That view is endorsed on the basis that referrals should not be a substitute for proper PIC investigations of alleged police misconduct.

4.99 The same reasoning applies to the release of information from draft reports sent to NSW Police by the PIC. There are valid reasons why the PIC may choose to place confidentiality orders on reports which might possibly prejudice an ongoing investigation or inadvertently cause the premature release of material which may later form the basis for allegations for misconduct. Where confidentiality orders are made and NSW Police consider that there is a real need to use that confidential information there should be a procedure in place which would allow NSW Police to indicate the purposes for which such information would be used.

Recommendations

19. No change should be made to the PIC's discretion to refer matters to NSW Police pursuant to section 77 of the Act.

20. The PIC should retain complete discretion as to the use which NSW Police may make of confidential information provided with draft referrals or reports.

21. A process should be in place between the PIC and NSW Police to deal with circumstances where NSW Police consider that a confidential information order should be waived. NSW Police should indicate what information it wishes to use and the purpose for which the information is intended to be used. The PIC should retain an unfettered discretion to authorise the release of such information.

REQUESTS FOR INFORMATION CONCERNING WRONGFUL CONVICTIONS

4.100 Reference was made at paragraphs 3.75 – 3.78 to one submission which raised the issue of the release of information following findings of police misconduct for the purposes of reviews of convictions pursuant to Part 13A of the *Crimes Act* 1900. The submission suggested that the current practice of the PIC of withholding information may prejudice persons who may have been wrongfully convicted on police evidence in circumstances where that police officer is later found guilty of misconduct.

4.101 The PIC indicated that at present there are internal procedures in place for the release of such information but that these are being formalised into guidelines.

4.102 Section 56(4)(c) of the Act stipulates that the Commissioner or Inspector may release information for purposes such as Part 13A *Crimes Act* review if it is necessary in the public interest for the information to be released.

4.103 Currently requests for information are processed by the PIC Solicitor who has been delegated the power to release non-controversial information by the Commissioner.

4.104 It is the position of the PIC that it is not under a positive obligation to disclose any information of potential relevance to the review of a conviction for two reasons:

- first, the need to avoid prejudice to an ongoing investigation. This includes the possible deterrent to persons wishing to come forward with additional information concerning police misconduct; and

- second, the need to protect the identity of confidential informers. Where the PIC has made a non-publication order as to the identity of a person then that order cannot be lifted lightly.

4.105 The PIC has obtained advices from more than one counsel on the way in which it should deal with such requests for information. In making a determination as to whether or not to release information the PIC considers:

- whether there is an arguable basis for unease about a conviction;[87]and, if so,

- whether the information sought will be likely to lead to an inquiry; a referral to the Court of Criminal Appeal, or require an opinion from the Court of Criminal Appeal.[88]

4.106 One difficulty the PIC encounters with such requests is that they are usually framed in such a way that there is little more than a bland

[87] *R v Rendell* (1987) 32 A Crim R 243.

statement to the effect that it is 'in the public interest' for the PIC to release the information requested. The PIC is unable to properly process such a request.

4.107 There may be some argument that the public is not aware of the determinative requirements of the PIC when deciding such matters. It is noted that an article appeared in the May 2002 edition of the Law Society Journal entitled "*Dealing with the Police Integrity Commission*" which contained limited information for making such requests. [89] However, at present, no documents are available from the PIC setting out this information.

4.108 The PIC must undertake a difficult balancing exercise in making decisions to release information. The PIC must consider the need to maintain the integrity of its inquiries and the interest in protecting witnesses where it is necessary to do so. Nevertheless this is a matter of importance, especially in circumstances where the release of such information could help show that an accused is wrongfully convicted.[90] It brings with it a heavy obligation on the PIC to deal with requests in a fair and uniformly principled fashion in accordance with its obligations under the Act and the common law.

Recommendations

22. The Practice Guidelines Committee should develop and publish guidelines on the release of information in accordance with the advices it has received on the PIC's obligations in relation to s56(4)(c) of the Act. The guidelines should use examples of circumstances in which information may be released and circumstances where information may not be released.

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[88] See s.474C(1) of the *Crimes Act* 1900.
[89] Kate Deakin, "*Dealing with the Police Integrity Commission*" (2002) 40 (4) LSJ 52.
[90] *Smith (The Court)* (1996) 86 A Crim R 308 at 314.

23. **The Practice Guidelines Committee should publish a "Request for Information" form which would guide applicants through a series of questions matching the guidelines.**

24. **Both the guidelines and the Request for Information form should be available on the PIC's Internet site.**

CHAPTER FIVE

OPERATION MALTA

5.1 One of the purposes of this Inquiry is to assess the "*appropriateness"* of the PIC's practices and procedures. In exchange of correspondence between the then Minister for Police, The Hon. Michael Costa, and this Inspectorate, the request was made to consider the appropriateness of these practices and procedures with reference to Operation Malta ("Malta").

5.2 Malta began with a complaint made to the PIC against senior members of NSW Police in October 2000, and culminated in a 166-page Report to Parliament which was presented on 12 February 2003 ("Malta Report"). [91] Between these dates the PIC held 73 hearing days at which 51 witnesses gave evidence and 438 exhibits were tendered.[92]

5.3 Of all the persons deemed *"affected persons*" because they were the subject of substantial allegations in the Malta Report, none was the subject of a recommendation that any adverse action be taken under section 97(2)(a)(b)(c) or (d) of the Act. Moreover the Report found that the allegations complained of were not made out. In these circumstances a number of submissions expressed dissatisfaction with the PIC's investigation and the Malta Report. These criticisms included criticism of the PIC's preliminary investigations; its procedures for dealing with the allegations; the conduct, length and cost of the hearing; and; time taken to report and the conclusions reached.

5.4 One outcome which is apparent from Malta is the friction that the operation created between sections of NSW Police and sections of the PIC. That friction was exacerbated by the challenges which arose in the context of the unique allegations raised by the complainants in

[91] Report to Parliament, *Operation Malta*, Police Integrity Commission, January 2003.
[92] *Ibid* at paras. 1.10-1.11, p.4.

Malta. Investigating and responding to those allegations tested the PIC's institutional practices and procedures in ways not previously encountered in its relatively short operation. NSW Police, and those the subject of the allegations, were also faced with challenges in dealing with the scope, size and complexity of the investigation.

THE ALLEGATIONS

5.5 Operation Malta concerned allegations by four members of the NSW Police Crime Management Support Unit ("CMSU"), Paul Francis Herring ("Herring"), Acting Chief Inspector Michael Edwin Lazarus ("Lazarus"), Acting Chief Inspector Dean Richard Olsen ("Olsen") and James Andrew Ritchie ("Ritchie") that senior members of NSW Police had deliberately obstructed reform of the service over a period of three years. The allegations, which attracted significant media attention, called into question the commitment of NSW Police to implement reforms concerning cultural and structural change suggested by the Wood Royal Commission.[93]

5.6 On 20 October 2000, Herring, Lazarus and Olsen formally lodged a written complaint with the PIC in the following terms:

"

1. We the members of the above group wish to express our extreme concerns about the long trail of deliberate obstruction of Police reform by senior members of the Police Service over the past three years.

2. We also have grave apprehension about the appalling protocols for internal investigation and the unprofessional way in [sic] these are instigated, based on hearsay, the absolute lack of evidence, and how they are focused on building a brief on certain individuals. These issues should have been addressed up-front with us initially rather than embarking on a surreptitious smear campaign to destroy the credibility of the team and our work in the field. We consider this is nothing short of a 'set-up'

[93] Wood Royal Commission, *Final Report Volume III: Appendices*, May 1997, p.A246.

3. As officers involved in a comprehensive and significant reform program, namely the implementation of the commissioners *'Principle-Led & Evidence-Based'* Policing model throughout the State, we have determined the Police Service is totally confused about the direction in which it is going. In a few instances management tactics are modern and collaborative – in others they mostly resort to fear and intimidation upon the staff.

4. We consider working in this type of environment is completely untenable. There is definitely no commitment to reform from the senior members of the Service – particularly Superintendents and above. None of them remotely understand the complexities of what it is we do, and it appears none are genuinely interested.

5. We are alarmed at the preposterous claims of our group rorting the travel allowance process, the allegations of tampering with statistical data concerning crime reduction successes in the Local Area Commands where the CMSP is operating, and the drunken threats towards members of the CMSU from a member of the Commissioners Executive Team (CET), Des Mooney (*see attached document)*

6. We are annoyed by the constant veiled threats levelled at this unit indicating it is destined for death – Edd Chadbourne, (through the Morgan & Banks Report) Mick Tiltman and Christine Nixon who were all directed by the Commissioner to close us down. And Des Mooney who indicated in his recent drunken rage (quote) – "I make decisions about people like you". And lastly, Deputy Commissioner Ken Moroney's open and blatant declaration in a speech at the Police Academy to – 'see Ken Seddon on a plane back to the UK'.

7. Within the policing domain, because of the so-called controversial work we are engaged in, no branch within the Service has wanted to own us. As a consequence, no budget has been allocated, we have no reasonable accommodation, no administrative support has been provided and a rather malicious investigation, aimed clearly at 'catching us out', has been launched into our administrative procedures.

8. Because he has had an on-going link to the Commissioner in relation to the rolling out of this program, the Commander of the CMSU – Ken Seddon has become 'out of favour' with the Commander of Crime Agencies and has had his delegated authority withdrawn.

9. We consider Ken Seddon a thoroughly professional officer who has demonstrated enormous courage challenging the Deputy Commissioners at times about their inappropriate behaviour,

and swaying the Commissioner towards the virtues of the model and this reform process. Ken is considered highly popular and respected in the field for his unquestionable integrity and his ability to influence rather than direct others. His only crime has been to accept command of the CMSU.

10. We are not here to argue the merits or the demerits of the Commander of Internal Affairs – Mal Brammer, however, in this instance, we consider he is highly prejudice, [sic] has embarked on a 'witch hunt', and is obviously intent on deconstructing the CMSU. Evidence of this is referred to in a memo he sent to Ken Seddon. A member of Mr Brammer's staff also reported (quote) "He is obsessed about your group". We consider this not only unprofessional, but also rather distressing behaviour."[94]

5.7 Ritchie elected to air his allegations at a media conference held on the morning of the same day as the written complaint was lodged, at which he distributed, together with confidential police documents, [95] the following press release:

"FEAR AND THREAT REMAIN PREDOMINANT POLICE MANAGEMENT TACTICS IN NSW

James Ritchie-one of the architects of the New South Wales Police reform programme will be conducting a Press Conference to discuss the following issues of concern:

Internal Affairs Issues (SCIA)

Issue 1
A senior officer is misusing SCIA investigative powers to conduct a personal vendetta against the senior officer managing the NSW Police Service's primary change management and cultural change programme, and members of the Crime Management Support Unit (CMSU). A wide ranging 'witch hunt' is being conducted.

> 'Internal Affairs are using malicious and unfounded investigations into individuals as a means of maintaining the old control and punishment mechanisms in order to derail and delay genuine reform.'

Inappropriate actions of senior SCIA personnel include;

[94] Malta Report para. 1.2 at pp.1-2.
[95] Malta Report para. 7.59 at p.100.

- Briefing the Commissioner of Police employing inculpatory materials leaving easily accessed exculpatory materials unpresented [sic], in what could reasonably be regarded as a deliberate process of smearing.
- Briefing all Regional Commanders on Tuesday 10th October advising them that senior personnel in the CMSU were being investigated by SCIA.

The senior officer's interest in briefing the Regional Commanders – the same group that voted secretly in September 1997 not to participate in behavioural change initiatives – is explained by his inaccurate and unfounded reference in the attached paper.

There is a clear implication of payback involving a group known to have been antagonistic to this.

Issue 2
This same senior officer is simultaneously, and separately, in blatant and direct contradiction of PIC guidelines spelt out in the Dresden Report, being himself the subject of an investigation by a more junior officer.

Crime Agency Issues

Issue 1
A senior office in Crime Agencies has released to those being investigated, on almost a daily basis, aspects of the IA investigation. (The CMSU comes under Crime Agencies aegis). This entirely inappropriate behaviour is clearly meant to intimidate personnel under investigation as well as bystanders.

All personnel in the CMSU are under investigation, apparently. In six separate investigative matters revealed to date, all are preposterously ill-informed propositions.

Issue 2
The group members now being investigated were, on a couple of occasions over the last few months, asked to advise Deputy Commissioner Moroney on ways that the Service could manage the destructive consequences of the constant ego driven ambitions of these two individuals; one from Internal Affairs and the other from Crime Agencies.

Issue 3
The cultural change programme has elicited widespread praise from those within it, and is the principal means of reform of the NSWPS. It is the centrepiece of the commissioner policing

model and is to be included as a central platform of the next industrial agreement between police unions, the Service and the government. It is now threatened with derailment. It is to be completely emasculated by people in Crime agencies who have worked surreptitiously against it for some time.

Where to From Here?

a) In Respect of the Investigation
No one minds being investigated, when fair process is on offer. Complaints in the NSWPS have to be investigated. But this inquisition is not about precise complaints at all. It is designed to cower and intimidate. In any case, any hint of fair and just treatment has been completely obliterated in the behaviours of these two officers. We welcome any relevant complaint being handed to an independent authority.

b) In Respect of Reform Efforts
This present activity is no accident. It is part of a much wider and longer campaign by senior police in NSW to close down, or in any way possible inhibit genuine reform in the NSWPS. This ongoing and multi-faceted campaign has been very well documented by past and present members of the Crime Management Support Unit. Our investigation into the senior officers of the NSW Police Service has been proceeding for two years.
It reveals a world of total incompetents; of drunken, threatening, bullying, hand picked members of the Commissioner's Executive 'team'; of Deputy Commissioners meeting Senior Constables secretly in pubs to correct their own Superintendent-level posting errors; of constant last minute scrambling to make the Commissioner 'look good'.

Material will now be released to demonstrate that despite the emergence of a few wonderful and indeed exceptional reform 'islands', the senior executives of the Police Service are simply not committed to deep reform."[96]

5.8 The then Police Commissioner, Peter James Ryan, ("Police Commissioner") responded publicly to the allegations, which he denied. In so doing the Police Commissioner called for a full investigation by the PIC.

5.9 At or about the time of these allegations the PIC was informed that the Special Crime and Internal Affairs Unit ("SCIA") of NSW Police was

[96] Malta Report, paras. 7.58.

already conducting an internal investigation, codenamed "Operation Spa" under Commander Malcolm James Brammer ("Brammer").

5.10 Operation Spa began as an investigation into the conduct of Kenneth John Seddon ("Seddon"), a seconded UK officer who was appointed as head of the CMSU. It was later expanded to investigate complaints against other members of the CSMU, including Ritchie.

BACKGROUND TO THE ALLEGATIONS

5.11 It is not necessary for the purposes of this Inquiry to re-state at length the background and intricacies of the investigation. However it is necessary to refer to the essence of the complaints and to some of those persons involved.

5.12 The CMSU had its antecedents in the Restorative Justice Group ("RJG") which became the Behavioural Change Unit ("BCU") in which Ritchie and Herring, who were civilians, came to work. The concept of the BCU in terms of its application to policing was to replace the traditional command and control structure with more direct participation of the whole of the investigative team in police decision-making.[97]

5.13 The RJG or BCU had been operating in one form or another since 1995 within the Human Resources Services of NSW Police ("HR Services"). In 1998 an independent review of the HR Services conducted by the firm, Morgan & Banks, suggested that HR Services were overstaffed. The BCU was identified as one area of potential review, both in terms of its functional necessity and as to whether it should remain under the umbrella of HR Services. Following the review by Morgan & Banks Dr Edwin Chadbourne ("Chadbourne")

[97] Malta Report, paras. 2.5-2.6.

was engaged by NSW Police as Executive Director, HR Services, in part to implement the Morgan & Banks recommendations.[98]

5.14 As a result of the recommendations and general internal restructure the BCU was closed down in late 1999 with its personnel redirected to other areas of NSW Police.[99] Ritchie, who had initially been retained as a consultant, was due to complete his contract in December 1999.

5.15 During the time the BCU was still in operation two senior English police officers, Seddon and Robin Peter Napper ("Napper"), were seconded to NSW Police. Although initially seconded for another purpose Seddon ultimately became involved in the implementation of Crime Management Units ("CMU's") into each Local Area Command ("LAC"). CMU's were to involve a small number of persons in each LAC, coordinating activities, supporting intelligence and in implementing the latest pro-active investigation techniques.

5.16 In late 1999 Seddon came to see the work Ritchie and the BCU were doing with one particular LAC. Seddon considered that the work of the BCU might be incorporated into the CMU, combining behavioural change with crime management. This was to become the CSMU, which, notwithstanding his personal reservations in relation to Ritchie, was supported by the Police Commissioner, who announced its imminent establishment in April 2000. Ritchie and Herring thereafter commenced working for Seddon.

5.17 In accordance with usual NSW Police procedures Seddon was required to produce a business plan and other supporting documentation for the CSMU. This did not occur in time for the CSMU's formal establishment in June 2000, causing consternation amongst the then Deputy Commissioners Kenneth Edward Moroney ("Moroney") and Jeffrey Thomas Jarratt.

[98] Malta Report, paras. 2.16-2.20.

5.18 In August 2000 Seddon's fellow secondee from England, Napper, made a complaint to Moroney about the personal and financial probity of Seddon.

5.19 In September 2000 Operation Spa was commenced by Brammer to investigate those complaints against Seddon but was later expanded to include:

- the secondment of Napper and Seddon;
- the establishment of the CSMU;
- financial delegation by Seddon; and
- the adherence to NSW Police procedures by members of the CSMU.

5.20 Shortly thereafter the complainants in Malta became aware of their investigation by Brammer. The complainants then made their allegations.

5.21 The PIC began its investigations in October 2000. In December 2000 the Operation Spa report was finalised. Ultimately the report exonerated Seddon but was critical of the CSMU and its staff, including Seddon, Ritchie and Herring.[100] It was also critical of the Police Commissioner and NSW Police in relation to the secondment and management of Seddon and Napper.

5.22 Following a lengthy investigation and a long hearing the PIC formed the opinion and made the assessment that:

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- The allegation by Ritchie, Herring, Lazarus and Olsen that senior members of the Service were deliberately obstructing the reform of the Service was not supported by the evidence;

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[99] Malta Report, para. 2.19.
[100] Malta Report, paras. 1.7-1.8.

- There was evidence that some senior members of the Service, namely Moroney, Jarratt, Brammer and Small displayed a lack of support at times for the Crime Management Support Unit;

- Lack of support for the Crime Management Support Unit or its members was not synonymous with lack of support for the reform process;

- There was evidence to support the allegation by Ritchie, Herring, Lazarus and Olsen that Brammer was affected by bias in his investigation of Seddon and the Crime Management Support Unit;

- There was a lack of fairness in Brammer's investigation in that none of the individuals concerned were [sic] spoken to about the allegations against them;

- The Commissioner of Police had obtained legal advice prior to taking the action he took in December 2000 against Seddon, Ritchie and Herring." [101]

5.23 It is appropriate to consider, in light of the criticisms raised in Chapter Three and the responses to those criticisms in Chapter Four, where Malta stands in terms of the PIC's practices and procedures. As indicated earlier, in so doing, it is not within the purview of this Inquiry, nor within the powers of this Inspectorate under the Act, to review the assessments, opinions or recommendations made in the Malta Report. Rather, it is hoped that this analysis provides some insight into the PIC's operational mechanisms in dealing with this unique case.

PRELIMINARY INVESTIGATIONS

5.24 It was said in submissions that the PIC could reduce the overall time spent conducting hearings through a combination of the use of preliminary investigations and a greater use of private hearings.

5.25 In relation to Malta it was contended that during the initial phase the PIC conducted interviews and held private hearings at which NSW Police was not represented. The effect of this, it was submitted, was that the complainants

were taken at face value as to their credibility and the veracity of the complaints was not called into question. It was suggested that much time at the public hearings was devoted to destroying the credibility of the complainants in circumstances where, had the PIC conducted a proper preliminary investigation, there would have been no need for such a drawn out public process.

5.26 Two alternatives were suggested: first, the PIC could have submitted a private report to the Commissioner of Police on the matter. Second, it was suggested that, if conducted properly, the preliminary investigation would have had the benefit of refining the investigative focus which ultimately would have reduced the time taken for the public hearing phase. In so doing, it was submitted that the PIC should have used its power under section 25 to obtain information from NSW Police which, so the submission runs, would have assisted in assessing the veracity of the complaints.

5.27 In the context of internal preliminary examination of the matter, concern was raised as to whether the presently constituted OAG, which now includes the Commissioner of the PIC, is sufficient to address what was suggested are shortcomings in PIC practices and procedures as illustrated by Malta.

5.28 The suggestion that the PIC could have handled the investigation by way of private report to the Commissioner of Police is unsustainable. In the first place, the allegations were raised in a very public manner and were styled to be directed at the heart of the reforms of NSW Police. In this sense, the allegations, rightly or wrongly, came to be seen as a litmus test of the seriousness and diligence with which NSW Police were implementing the suggested reforms of the Wood Royal Commission. It would have been singularly inappropriate for the PIC to have dealt with claims of this gravity by way of a private report - neither the public nor the Parliament would have had the benefit of any opinions, assessments or recommendations. Second, it would have been an extraordinary outcome had a private report been prepared in circumstances where the Commissioner of Police, was in part, the subject of

[101] Malta Report, Executive Summary at p.5.

the allegations in the sense that it was he who was ultimately responsible for the implementation of reform. Moreover the Police Commissioner who had handpicked Seddon and negotiated his conditions was also the person whose name was associated with the formal approval of the CSMU. Accordingly, the Commissioner's evidence was always going to be a key factor in any investigation or hearing.

5.29 Turning to the notion that the PIC should have agreed to NSW Police legal representatives being present at any preliminary interview so as to test the credibility of the complaints, it must be recognised that there is a genuine interest in allowing the proper exposure of complaints. Once the PIC decided to hold its hearings in public it was necessary for matters going to credibility to be ventilated in public. It would not be appropriate or desirable that, at a first or second interview, lawyers for NSW Police appeared as contradictor of any allegations. Moreover, such an approach would have had the effect of denying those publicly accused by the complainants in Malta the right to respond publicly to the serious allegations raised.

5.30 The assessment of the credibility of complainants at first instance must reside with the PIC alone. If the PIC considers that circumstances are such that a contribution from NSW Police would be useful then nothing in the PIC's mandate would prevent it from making such a request.

5.31 The general scope and purpose presented at the Malta hearing is discussed below. However it is relevant to the preliminary investigation phase to consider whether the OAG might have had any control in refining the scope of the investigation before it developed into a full public hearing.

5.32 Contrary to some submissions, the OAG did move early (October 2000) to require the production of documents by way of section 25 and 26 notices. It also conducted private hearings, commencing in late October 2000, to gather evidence. This resulted in a refinement of the purpose of the investigation in late February to early March 2001.

5.33 What later became apparent was that the central allegation concerning the implementation of reform brought with it numerous and arguably less significant satellite issues which grew around that allegation. The use of a police car, the nature of a salary package and the taxation arrangements of seconded officers are all matters which might not be thought to have merited a public hearing. However, it is apparent that once the investigation proceeded around the central allegation it became difficult, for a variety of reasons discussed below, to reign in the subsidiary issues. This was no doubt as a result of the fact that the PIC's investigation had to incorporate the detail set out in the Operation Spa report which was not completed until December 2000. In turn, that report raised a number of issues as to the way in which members of the CMSU had been investigated.

5.34 Further investigations were required as to the reasons why Seddon and Ritchie were dismissed in late December 2000 and Herring was suspended.

5.35 Given both the public nature of the central allegations and the seniority of the persons alleged to be involved, the PIC acted appropriately at the preliminary investigation stage by moving quickly to obtain material and bring the matter on for hearing. There was no alternative to commencing and pursuing an investigation to a public hearing – to have done otherwise, against the momentum generated by the complainants, NSW Police and the public, would have unacceptably compromised the PIC.

PRIVATE AND PUBLIC HEARINGS

5.36 As noted above the allegations were presented in such a way as to attract maximum publicity. Ritchie, who styled himself as "*one of the architects of the New South Wales Police Reform Programme,*"[102] and the other complainants had called into question the commitment of NSW Police to the implementation of reform and in so doing brought into question the conduct of the Police Commissioner's Senior Executive team.

5.37 On the day the allegations were made public the Police Commissioner issued a media release requesting an expedited inquiry. At the same time he telephoned the then Commissioner of the PIC, Judge Urquhart QC, requesting a full and expeditious inquiry. Also on 20 October 2000, Andrew Tink MP wrote to the PIC calling for a full inquiry into Ritchie's allegations.

5.38 In the media flurry which followed the then Police Minister, the Hon. Paul Whelan, publicly stated he welcomed the PIC's investigation. The Police Commissioner publicly requested that the entire NSW Police Service (as it then was) cooperate with the investigation.

5.39 In light of this there can be no doubt that Malta was always destined to have a public hearing element: this was conceded in almost all of the submissions.

5.40 It was suggested in one submission that at the completion of the private hearing phase the PIC should have provided NSW Police with transcripts or a summary of evidence of issues that were to be further examined by the PIC. Further it was contended that, in Malta, the PIC should have submitted an early request for documentation to NSW Police following the conclusion of private hearings in order to assess whether to move to a pubic hearing.

5.41 For the reasons mentioned above - and in the preceding Chapter - these are not measures which would have materially altered the conduct of the early phase of Malta, nor would they have precluded a public hearing being conducted.

GENERAL SCOPE AND PURPOSE

5.42 It was contended in submissions that NSW Police should have been sent particulars of the investigation into Malta together with details of witnesses to be called at the earliest opportunity.

5.43 It is apparent from submissions that the decision to hold public hearings was not taken until February 2000. NSW Police was provided with details of the

[102] *Press Release of James Ritchie*, PIC Exhibit 142, Malta Report at p. 99.

general scope and purpose of the hearing on 20 February 2000. The public hearing into Malta commenced on 19 March 2001 at which the general scope and purpose was announced as follows:

"To investigate:

(1) Allegations by certain members of the Crime Management Support Unit of the New South Wales Police Service concerning certain members of the New South Wales Police Service;

(2) The investigation by the New South Wales Police Service of allegations of misconduct concerning certain members of the Crime Management Support Unit and matters arising from the conduct of that investigation;

(3) Action taken by the New South Wales Police Service concerning certain members of the Crime Management Support Unit." [103]

5.44 There was some criticism in submissions that a balance was never struck between the stated general scope and purpose of the hearing and the lines of investigation. Further, it was contended that in submissions following the hearing, NSW Police sought to argue that the scope and purpose stated at the commencement of the hearings did not allow for inclusion in the PIC's report of one particular phase of evidence; namely, the evidence relating to the Police Commissioner's testimony before the Parliamentary Estimates Committee of the New South Wales Parliament concerning the existence of the CSMU.

5.45 In keeping with the broad allegations raised by the complainants, the general scope and purpose formulated in Malta was very wide indeed. It would not be correct to suggest that the areas covered in the Report fell outside the parameters set by the PIC. Moreover, the need to allow flexibility in any investigation by the PIC necessitates that there be a degree of elasticity in any stated general scope and purpose. Further, as previously stated there is no impediment to amendment of the scope and purpose of an inquiry, should that be warranted, in the discretion of the PIC.

[103] Malta Report, p4.

LEGAL REPRESENTATION

5.46 Mr Buddin SC (now The Hon. Justice Buddin of the Supreme Court of New South Wales) was appointed by the PIC as Counsel Assisting.

5.47 On the first day of hearing leave to appear was sought by Mr Toomey QC and Ms Stenmark of counsel, on behalf of NSW Police, Ryan, Moroney, Brammer and various other members of NSW Police. Subsequently Chadborne was included in this representation. Mr Rushton SC sought leave to appear on behalf of Ritchie, Seddon, Herring, Lazarus and Olsen.

5.48 The course of the hearing was seriously affected when, in late June 2001, after 28 hearing days, Mr Toomey QC advised the PIC that he could no longer act for Brammer due to a conflict of interest. It later emerged, in October 2001, that in addition to ceasing to act for Brammer, Mr Toomey QC had a conflict of interest with Chadborne.

5.49 Following the resignation of Mr Toomey QC, both Brammer and Chadborne needed to locate and instruct new counsel.

5.50 Brammer, who was the author of the report into Operation Spa, was a key figure in the investigation and as a consequence his evidence would be critical to the proper conduct of Malta. Commissioner Urquhart considered that, in fairness, to the new counsel for Brammer, a period of four weeks should be allowed in order to enable proper preparation of the brief.

5.51 As a consequence, hearings were adjourned. However, it was eight weeks before all counsel were available again to resume hearings.

5.52 One of the issues in relation to the representation of Brammer was whether the PIC could have, or should have, acted to ensure that there was no conflict of interest when leave was sought by Mr Toomey QC to appear on behalf of Brammer and Chadborne.

5.53 It is apparent from the submissions received by this Inquiry that Brammer had raised the issue of a conflict in his representation with NSW Police and Mr Toomey QC in late 2000. Documents detailing these concerns were produced under notice to the PIC. It is also the case that Brammer had taken the step of bringing notice of his concern to the attention of the PIC. In a letter in March 2001 he emphatically expressed the view that he should be separately represented.

5.54 The PIC did not intervene in determining whether the representation of Brammer and Chadborne by Mr Toomey QC was free of conflict at the time when leave was granted.

5.55 It would be unhelpful to conclude, with the benefit of hindsight, that the PIC ought to have adopted one course in preference to another. It is understandable why the PIC would have been reluctant to intervene: first, there is the valid consideration that the ethical obligations of counsel appearing should be sufficiently strong as to self-regulate counsel's course of action where there is a potential conflict and second, there is a risk generally that a conflict can emerge between the investigation phase and the hearing phase of an operation.

5.56 However, the consequence of electing not to intervene did result in lost time in the hearing. This was acknowledged by the PIC in its Annual Report of 2001-2002 in which it commented in the context of Malta:

> "Difficulties were also encountered in relation to legal representation before the inquiry of certain members of NSW Police, necessitating adjournments or modifications to the Commission's hearing programme to accommodate the briefing of fresh counsel for those persons."[104]

5.57 Delay aside, no doubt Brammer and Chadborne were also significantly affected by the conflict. For legal reasons no further comment is made in this regard.

[104] Police Integrity Commission, *Annual Report*, 2001-2002 at p. 20.

PRODUCTION OF DOCUMENTS

5.58 Right from the outset difficulties emerged between the PIC and NSW Police over the production of documents. With reference to Malta the PIC's Annual Report for 2001-2002 noted that:

> "During the course of the public hearing the then Commissioner of Police objected to the production and use of certain documents on the ground of legal professional privilege. Such documents included witness statements obtained from members of NSW Police concerning aspects of the events under investigation, which were first required to be produced in April 2001."[105]

5.59 The PIC issued a number of notices to produce. It is apparent from submissions that documents were produced late and were "*drip-fed*" through the course of proceedings.

5.60 It would appear that there were two reasons for this state of affairs.

5.61 First, NSW Police sought to challenge the power of the PIC to compel the production of privileged documents pursuant to section 27(3) of the Act. The consequence of this was that protracted correspondence and negotiations were entered into with the PIC over the effect and scope of the notices to produce in the early phase of the hearing, causing very substantial delay.

5.62 In a decision on 25 June 2001 Commissioner Urquhart determined the question of privilege (and the effect of the notices) in favour of the PIC.

5.63 Notwithstanding this, NSW Police pressed its claims over the issue of privilege, adopting a different line of attack and instructing new counsel on the point.

5.64 On 10 September 2001 a second determination was made, this time by Assistant Commissioner Sage, again rejecting the objection to production.

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[105] *Ibid*.

5.65 Second, the conduct of the dispute over production of documents had the unfortunate effect of causing a significant degree of friction between the legal branches of the PIC and NSW Police, with correspondence between the two sections becoming increasingly intemperate as frustrations grew on both sides. It was apparent that NSW Police were not pleased with the scope of the notices nor the timeframe allowed for compliance. The PIC was displeased with what it viewed as an obstructionist and adversarial approach taken by NSW Police to its investigations.

5.66 As with the disruptions caused to the hearing as a result of the conflict arising out of representation, the dispute over documents also caused many months of delay.

PRACTICE AND PROCEDURE

5.67 There were other areas of delay arising out of the way in which the hearings were project-managed.

5.68 The project management side of the hearings took place primarily at the OAG level. The OAG had responsibility for the direction and logistics of Malta, including the logistics relevant to the hearing. One of the features of the OAG at the time of Malta was that the then PIC Commissioner took the view that he should not sit on the OAG in circumstances where he was to preside over the hearing of the matter in order to avoid possible assertions of bias. Instead, Counsel Assisting became a de facto member of the OAG.

5.69 Most notable in terms of adding additional delays were the number of adjournments that were granted to suit counsel's convenience and, on occasion, to suit witnesses. An analysis of the hearing days and the reasons for the delay reveals that many months were lost to suit counsel's convenience, most notably the period from 7 November 2001 until 4 March 2002. There were other periods too during the course of the hearing that were lost: the four week adjournment originally thought necessary for Brammer's new counsel

turned into an eight week adjournment. Hearing days were also disrupted by counsel attending to other commitments and arriving late. On one occasion the PIC needed the hearing room for other hearings, which resulted in the need for a two-week adjournment.

5.70 Unlike other operations, where there may be continuing investigations by the PIC from one hearing to another, the majority of the delay in this instance was occasioned by the fact that as the hearings increased in numbers of days not all counsel were available to fit into revised schedules. As a result, 73 hearing days took almost 2 years to complete.

5.71 Another area falling under this heading is the management and receipt of evidence by the PIC. In early June 2001 NSW Police produced 26 statements from new witnesses, none of whom was on the PIC's original list of witnesses. counsel for Seddon, Ritchie, Herron and Lazarus indicated he would object to the tender of the statements unless witnesses were available to be called.

5.72 Control of the presentation of evidence before an investigative tribunal such as the PIC rests with Counsel Assisting together with the Presiding Officer. The exercise of that control is critical in the sense that the consequences of failing to regulate the flow of evidence may lead to the hearing being subsumed by issues which are tangential to the core allegations. Once that control is lost it can have the effect of setting the entire hearing on a lengthy, time-consuming and costly course. It is therefore essential to the management of hearings that Counsel Assisting act as gatekeeper of the evidence to be presented, with the Presiding Officer (having regard to the general scope and purpose of the hearing) making any final determination as to the relevance of disputed evidence.

NON ADVERSARIAL PROCEEDINGS

5.73 Reference has been made to the friction caused by Malta between elements of NSW Police and the PIC.

5.74 It is apparent from the submissions received by this Inquiry that little regard was had to section 20 of the Act insofar as it relates to the non-adversarial nature of proceedings.

5.75 There are a number of reasons for this, namely:

- The allegations were presented in such a public way that, from the outset, there was intense scrutiny of the responses to those allegations by NSW Police and the PIC;

- the makers of the allegations considered their involvement with the CMSU of such importance that any interference with the CMSU (in their minds) was tantamount to NSW Police, led from the top, not implementing the Wood Royal Commission reforms; and

- the allegations involved very senior officers of NSW Police, including the Police Commissioner.

5.76 Of regret is the adversarial stance which the material under review makes plain was adopted from the very outset of the hearing. The complaints which the PIC was duty bound to investigate were met with a highly defensive response on the part of the Courts and Legal Services branch of NSW Police and certain of their counsel. The PIC contended in submissions that for NSW Police, as a corporate entity, to adopt a "*damage control*" mentality in relation to allegations raised against its officers is counter-productive and might have the effect of preventing police misconduct from coming to light. It was further suggested that such an approach might have the effect of clouding judgment over whether or not NSW Police should take criminal or disciplinary action against personnel.

5.77 There is a common interest between the PIC and NSW Police in routing out police misconduct. That common interest is served when NSW Police adopts a co-operative approach with the PIC for the purposes of its investigations. In this regard it would be erroneous on the part of NSW Police to consider itself

either as a stakeholder in PIC investigations or as the natural contradictor of allegations concerning officers.

REPORTING

5.78 Criticism in submissions was levelled at the PIC for the delay taken in Malta to report to Parliament and also as to the authorship of the report.

5.79 Turning to the first issue, it is apparent that once the hearings finished the element occasioning the greatest delay was the time taken by counsel, other than Counsel Assisting, to produce written submissions.

5.80 The following table shows the time taken to produce the Malta Report following the final day of oral evidence:

Activity	**Date**
Last day of oral evidence	18 March 2002
Counsel Assisting Submissions served	29 April 2002
Final submission in reply received	8 October 2002
First draft of report circulated for 'peer' and 'project manager' review	18 October 2002
Senior Officer Review – Report deficient in form, withdrawn from review for major rewrite	15 November 2002
Senior Officer Review	24-29 January 2003
Report edited, formatted and printed	29 January – 12 February 2003
Report tabled in Parliament	12 February 2003

5.81 Although there were internal staffing difficulties faced by the PIC at the time which added to some of the time taken to produce the Malta Report, the actual time taken to write the Malta Report once all the submissions were received

from counsel was not unreasonable in the circumstances. The real delay (not taking into account the delay in the hearing phase) was the time taken by counsel to produce submissions, which added over five months to the total time taken to report.

5.82 In terms of authorship of the Malta Report one submission expressed the view that the Malta Report should have been written by the Presiding Officer when in fact it was signed by the current Commissioner of the PIC.

5.83 During the course of Malta the term of the then Commissioner, His Honour Judge Urquhart Q.C. expired. On 20 August 2001 Judge Urquhart was re-appointed as an Assistant Commissioner for the purpose of continuing until completion the hearings in Malta. On 15 November 2002 the draft report was submitted to His Honour for comment. It is apparent that, although His Honour had returned to the bench of the District Court by the time the Malta Report was drafted, there was ample opportunity for His Honour to have input into the Malta Report. Moreover, the appropriate person to sign-off on a report emanating from the PIC is the current Commissioner. For the reasons alluded to in Chapter Four, there is no reason why the PIC should not continue to prepare reports corporately.

5.84 There can be no doubt that the adversarial posture adopted by the legal representatives of NSW Police to the matters complained of in Operation Malta generated a high degree of antipathy which not only hindered the investigation but was detrimental to the relationship between NSW Police and the PIC.

5.85 That said, the role to be played by the PIC in the fulfilment of its statutory functions, including the need to undertake investigations is acknowledged by NSW Police.

5.86 Whilst Malta may be seen as the low-water mark in relations between these two crime prevention agencies it is fair to say that lessons have been learned

on both sides with a positive and co-operative relationship now being restored at the highest executive level.

APPENDIX A

SUBMISSIONS RECEIVED BY THE INQUIRY

1. The Police Integrity Commission
2. NSW Police
3. The Legal Aid Commission of New South Wales
4. The New South Wales Ombudsman
5. The New South Wales Crime Commission
6. The Police Association of New South Wales
7. The Law Society of New South Wales
8. Five private submissions were received

APPENDIX B

(ANNEXURE TO SUBMISSIONS BY NSW POLICE)

"DRAFT – 24 MARCH 2003

PROPOSED PROCEDURAL RULINGS OF THE POLICE INTEGRITY COMMISSION

1. Leave to appear before the Commission may be withdrawn by the Commissioner, or subject to altered or additional limitations or conditions at any time.

2. Such leave to appear entitles the person or organisation, to whom or to which it is granted, to participate in the proceedings of the Commission, subject to the Commission's control and to such extent as the Commission considers appropriate.

3. The Commission proposes to sit from Monday to Thursday each week, and usual hearing hours will be from 9:45 am to 4:00 pm, Monday to Thursday, with a morning break from 11:15 am to 11:45 am and a luncheon adjournment from 1:00 pm to 2:00 pm.

5. [Sic] Any person or organisation wishing to have evidence placed before the Commission is to notify Senior Counsel Assisting the Commission of the names of all witnesses, with a statement of their expected evidence, if possible in the form of a statutory declaration. The orderly conduct of the Commission will be greatly facilitated if this evidence is made available without delay. A copy of any document proposed to be put to a witness in cross-examination must be handed to Counsel Assisting the Commission as soon as possible after a decision is made to use the document for this purpose.

6. Procedures will be implemented by the Commission to ensure that confidentiality is maintained with respect to the identity of persons who assist the commission, and the information and documents which they provide insofar as this is appropriate and consistent with the discharge of the Commission's functions. Any person who feels particular concern in this area may, upon request, have his or her communication referred directly to Counsel Assisting the Commission.

7. The Commission's proceedings will be as orderly and expeditious as possible. Attempts will be made to ensure that those who may be adversely affected by the evidence are treated fairly, while protecting confidentiality, where that is appropriate.

8. ***All interested parties and those given leave to appear have the right to submit a list of witnesses whom they think should be called to assist the Commission. Those parties their legal representatives and those assisting the Commission shall thereafter determine who of***

those suggested witnesses shall be called.

9. Subject to the control of the Commission, Counsel Assisting the Commission will determine what witnesses are called and what documents are tendered to the Commission and in what order they will call and examine the witnesses ***subject to the rules of natural justice, procedural fairness and submission of interested parties or witnesses to be called.***

10. Where a witness has been introduced to the Commission by a person or organisation with leave to appear before the Commission, an attempt will be made to give that person or organisation reasonable advance notice that that witness is to be called.

11. Any witness who is legally represented who has been examined by Counsel Assisting the Commission may next be examined by his or her own representative and then cross-examined (see section 37) by or on behalf of any person or organisation considered by the Commission to have sufficient interest in so doing. The witness's own representative and finally Counsel Assisting the Commission may re-examine. At all times, duplication and repetition is to be avoided.

12. The details of evidence to be produced to the Commission will not be published in advance of the hearing at which it is produced and will not be opened before it is called.

    However, where practicable, a person or organisation who or which, to the prior knowledge of Counsel Assisting the Commission, will be the subject of adverse evidence before a public hearing of the Commission will, if practicable, be notified of that fact before that hearing, with such particulars, if any, as are considered appropriate by Counsel Assisting the Commission, or will, if practicable, be notified as soon as reasonably convenient thereafter and provided with a copy of the material portion of the transcript, or such particulars, if any, as are considered appropriate by Counsel Assisting the Commission, and will be given an opportunity to contest their evidence, if requested.

13. Subject to para 12, when PIC decides to hold a hearing (pursuant to section 32 (1), particulars of the Scope and Purpose should be given asap to any interested party who requests same.

14. At the conclusion of the evidence, ***PIC*** will decide who will have the right to address the Commission, on what issues and in what order and whether, by way of written submission or otherwise.

15. Whilst the inquiry will so far as possible conduct hearings in public, and evidence tendered will be available to the public, names and identifying details of police informants, minors, and witnesses who show a legitimate need for protection ought not to be made public, unless the publication of such evidence is needed for some other

sufficient reason, such as to alert potential sources of significant information to the possibility that they can assist the Commission. Evidence which suggests that the person who has otherwise been identified, whether or not as a witness, has acted as an informant for the Police will not be made public. Other evidence which cannot be made public as a matter of course includes evidence of activities which cannot be notified to criminals without serious community detriment, such as ongoing covert police operations, police intelligence, police methods of investigation, or evidence which would prematurely release details of the Commission's own information and inquiries.

16. In respect of all evidence, oral and documentary, the following rulings will apply until vacated or varied either generally or in respect of particular evidence or categories of evidence:

(a) The testimony of any witness before the Commission may be published unless an order is made prohibiting the publication of particular evidence;

(b) Counsel Assisting the Commission must be given adequate prior notification of evidence intended to be placed before the Commission, and counsel representing the Police Service should also be given an advance copy of any of its records intended to be tendered;

(c) No person may take or obtain a copy of any book, document or writing tendered in evidence before the Commission, except by leave, and then only subject to the condition that it not be used or be permitted to be used except for the purpose of appearance before the Commission. Any application for leave to obtain a copy of an exhibit should be made in writing to solicitor assisting the Commission;

(d) Any person (or the legal representative of that person) having leave to appear before the Commission may inspect and take extracts from any book, document or writing tendered in evidence for the purpose only of appearance before the Commission.

(e) For the purpose of and to the extent necessary for the public reporting of the proceedings of the Commission, any authorised representative of a newspaper, magazine, radio station or television channel may inspect and take extracts form any book, document or writing tendered in evidence after it has been notified as available for inspection by Counsel Assisting the Commission, subject to the conditions that:

i. it not be used or permitted to be used for any purpose other than the public reporting of the proceedings of the Commission; and
ii. any part of the contents thereof indicated by Counsel Assisting the Commission as unsuitable for publication ***should be excised and not published*** without the leave of the Commission, which can be sought if, for example, there is a

restriction which is believed to obstruct proper reporting of any matter of significance.

iii. Any application for leave should be made in writing, ***to the solicitor for PIC. Such application should be forwarded to the legal representatives of the NSWP for submissions relating to publication if necessary and appropriate.***"