

PARLIAMENT OF NEW SOUTH WALES



Committee on the Office of the Ombudsman and the Police Integrity Commission

FIFTH GENERAL MEETING WITH THE INSPECTOR OF THE
POLICE INTEGRITY COMMISSION

Together with Transcript of Proceedings and Minutes

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FUNCTIONS OF THE COMMITTEE

The Committee on the Office of the Ombudsman and the Police Integrity Commission is constituted under Part 4A of the *Ombudsman Act 1974*. The functions of the Committee under the *Ombudsman Act 1974* are set out in s.31B(1) of the Act as follows:

- to monitor and to review the exercise by the Ombudsman of the Ombudsman's functions under this or any other Act;
- to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Ombudsman or connected with the exercise of the Ombudsman's functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;
- to examine each annual and other report made by the Ombudsman, and presented to Parliament, under this or any other Act and to report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;
- to report to both Houses of Parliament any change that the Joint Committee considers desirable to the functions, structures and procedures of the Office of the Ombudsman;
- to inquire into any question in connection with the Joint Committee's functions which is referred to it by both Houses of Parliament, and to report to both Houses on that question.

These functions may be exercised in respect of matters occurring before or after the commencement of this section of the Act.

Section 31B(2) of the Ombudsman Act specifies that the Committee is not authorised:

- to investigate a matter relating to particular conduct; or
- to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint; or
- to exercise any function referred to in subsection (1) in relation to any report under section 27; or
- to reconsider the findings, recommendations, determinations or other decisions of the Ombudsman, or of any other person, in relation to a particular investigation or complaint or in relation to any particular conduct the subject of a report under section 27; or
- to exercise any function referred to in subsection (1) in relation to the Ombudsman's functions under the *Telecommunications (Interception) (New South Wales) Act 1987*.

The Committee also has the following functions under the *Police Integrity Commission Act 1996*:

- to monitor and review the exercise by the Commission and the Inspector of their functions;
- to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected

Functions of the Committee

- with the exercise of their functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;
- to examine each annual and other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing, or arising out of, any such report;
 - to examine trends and changes in police corruption, and practices and methods relating to police corruption, and report to both Houses of Parliament any changes which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector; and
 - to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

The Act further specifies that the Joint Committee is not authorised:

- to investigate a matter relating to particular conduct; or
- to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, a particular matter or particular conduct; or
- to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or a particular complaint.

The *Statutory Appointments (Parliamentary Veto) Amendment Act*, assented to on 19 May 1992, amended the Ombudsman Act by extending the Committee's powers to include the power to veto the proposed appointment of the Ombudsman and the Director of Public Prosecutions. This section was further amended by the *Police Legislation Amendment Act 1996* which provided the Committee with the same veto power in relation to proposed appointments to the positions of Commissioner for the PIC and Inspector of the PIC. Section 31BA of the Ombudsman Act provides:

- (1) The Minister is to refer a proposal to appoint a person as Ombudsman, Director of Public Prosecutions, Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission to the Joint Committee and the Committee is empowered to veto the proposed appointment as provided by this section. The Minister may withdraw a referral at any time.
- (2) The Joint Committee has 14 days after the proposed appointment is referred to it to veto the proposal and has a further 30 days (after the initial 14 days) to veto the proposal if it notifies the Minister within that 14 days that it requires more time to consider the matter.
- (3) The Joint Committee is to notify the Minister, within the time that it has to veto a proposed appointment, whether or not it vetoes it.
- (4) A referral or notification under this section is to be in writing.
- (5) In this section, a reference to the Minister is;
 - (a) in the context of an appointment of Ombudsman, a reference to the Minister administering section 6A of this Act;

- (b) in the context of an appointment of Director of Public Prosecutions, a reference to the Minister administering section 4A of the *Director of Public Prosecutions Act 1986*; and
- (c) in the context of an appointment of Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission, a reference to the Minister administering section 7 or 88 (as appropriate) of the *Police Integrity Commission Act 1996*.”

CHAIRMAN'S FOREWORD

The Fifth General Meeting was the occasion of the first formal meeting of the Committee with the Inspector of the PIC since his appointment on 12 June 2002.

The General Meetings are a valuable tool for the Committee to perform its work of monitoring and reviewing the functions of the PIC. The Inspector is uniquely placed to assist the Committee in this work and the Committee took the opportunity to question the Inspector on a range of issues.

The public hearing predominantly focussed on the Inspector's recent *Report on the Practices and Procedures of the Police Integrity Commission*. Evidence was taken from the Inspector on the way in which the PIC's hearings are conducted, legal representation and conflict of interest, the placement of evidence and the production of documents. However, it is important to note that some of the problems identified during Operation Malta were specific to the unusual nature of that inquiry and should be seen in this context.

During the General Meeting, the Inspector emphasised, as he had done previously in his report, that the PIC is a commission of inquiry, not a court. This distinction is essential to understanding the role of the PIC, its powers and the way in which it operates. Failure to appreciate this point can lead to misconceptions and confusion rather than informed debate about the PIC.

The Committee was very interested in the Inspector's comments on the application of legal professional privilege, which relates to the PIC's power to compel the production of documents and obtain evidence, and the proposal for external membership of the Operations Advisory Group, which has implications for the independence of the PIC and the integrity of its investigations.

Additionally, the Committee sought information from the Inspector concerning his ability to investigate complaints about non-PIC officers involved in joint operations, or other activities, with the PIC. The Committee has recommended that there should be a limited extension to the Inspector's jurisdiction to enable examination of the conduct of non-PIC officers in certain circumstances. This recommendation is prompted by two recent matters reviewed by the Inspector and his predecessor, which related to joint investigations, and apparently originated in the actions of officers from the New South Wales Crime Commission.

The Committee appreciated the robust participation of the Inspector in the General Meeting and will monitor the implementation of his recommendations by the PIC.

Mr Paul Lynch MP
Chair

Chapter One - Commentary

- 1.1 The Fifth General Meeting with the Inspector of the Police Integrity Commission (PIC) was held on Wednesday 25 June 2003. This was the first General Meeting to be held with the Hon Morris Ireland QC since his appointment to the role of Inspector of the PIC on 12 June 2002. The term of the previous Inspector, the Hon Mervyn Finlay QC, expired just prior to the tabling of the Inspector's Annual Report for 2001 – 2002, and the then Committee decided against conducting a General Meeting with the new Inspector only two weeks into his term.
- 1.2 In preparation for the Fifth General Meeting, questions on notice were sent to the Inspector based on the Annual Report for 2001 – 2002 and jurisdictional issues that had arisen during the annual reporting period.
- 1.3 Just prior to the General Meeting, the Inspector furnished a report to the Presiding Officers, entitled *Report on the Practices and Procedures of the Police Integrity Commission*, to be tabled in the Parliament. The Report was made in response to a Ministerial reference from the previous Minister for Police, the Hon Michael Costa MLC. The reference stemmed from a recommendation, contained in the Discussion Paper prepared by the Ministry for Police on the *Review of the Police Integrity Commission Act 1996*, which proposed that the Inspector examine the appropriateness of the practices and procedures of the Commission.
- 1.4 The Practices and Procedures Report also encompassed a complaint to the Inspector from Mr Andrew Tink MP, Shadow Attorney General, concerning the performance of the Police Integrity Commission during Operation Malta. The majority of the discussion during the Committee's General Meeting with the Inspector focused on this report.

THE PIC AS A COMMISSION OF INQUIRY

- 1.5 A sound appreciation of the PIC's status as a Commission of Inquiry is essential to fully understanding the significance of its role and functions, and the mechanisms developed to ensure the accountability of the PIC.
- 1.6 With reference to his recent report on the practices and procedures of the PIC, the Inspector made the following comments in his opening remarks to the Committee:

In formulating the recommendations it is first paramount to recognise 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 towards a courtroom mentality, unhelpful as it is for the purposes of a commission of inquiry, is not easily discouraged.¹
- 1.7 Problems associated with the conduct of proceedings during Operation Malta are evident in the Inspector's report:

¹ Evidence, 25 June 2003.

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.²

1.8 The importance of the role of the Presiding Officer and Counsel Assisting in managing the conduct of PIC proceedings is evident in Recommendation 17 of the Inspector's report on the Practices and Procedures of the PIC, which states:

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.³

1.9 The Inspector gave the following evidence to the Committee about the impact of a court-like approach to the hearings for Operation Malta:

CHAIR: Having read the Malta report and your report, I have a sense that part of the problem with Malta stemmed from the inquiry being treated too much as a court and too little as a commission. All the issues about witnesses being called, no control over the evidence and the issues about representation strike me as things that are very reminiscent of a court rather than a commission. Is that an analysis that would find any favour with you?

The Hon. Mr IRELAND: I agree with that analysis, Mr Chairman.⁴

1.10 The PIC's proceedings are intended under the legislation to be more flexible and informal than court proceedings. Section 20 of the PIC Act provides that:

- a. 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.
- b. 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.

² Inspector of the Police Integrity Commission, *Report on the Practices and Procedures of the Police Integrity Commission*, June 2003, p.v.

³ *ibid*, p.iii.

⁴ Evidence, 25 June 2003.

- 1.11 In response to questions from Mr Kerr concerning the application of s.20 of the PIC Act, the Inspector restated the importance of this particular provision concerning taking of evidence and procedure:

Mr KERR: Also I think in answer to the Chairman's question you said that this had been conducted too much like a court-based action rather than a commission of inquiry, and I think in your introductory remarks you were at length to say there was a distinction between the proceedings. On page 104, 5.74 states that "it is apparent from the submissions received by this inquiry what little regard was had to section 20 of the Act insofar as it relates to the non-adversarial nature of proceedings", and in fact it was the Commission that conducted those proceedings, wasn't it?

The Hon. Mr IRELAND: Yes.

Mr KERR: In effect, you would be saying that they should have had far more regard to section 20 of the legislation in the conduct of that inquiry?

The Hon. Mr IRELAND: I would agree with that, and reasons of course are given.⁵

- 1.12 The Committee notes that the recommendations contained in the Inspector's report support the retention and exercise of certain discretions by the PIC, as provided for under the PIC Act, but also aim at ensuring the PIC is accountable for the exercise of such discretions. It is the view of the Committee that the Inspector acts as an appropriate accountability mechanism in respect of the specific exercise of the PIC's powers and that the Committee acts as a further accountability safeguard through its general oversight role. In accordance with its statutory functions, the Committee will monitor the implementation and use of the Inspector's recommendations by the PIC. In particular, the Committee's next General Meeting with the PIC will provide an opportunity to take evidence on the extent to which the following recommendations have been adopted:

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.
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.

⁵ *ibid.*

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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.⁶

ISSUES ARISING FROM THE PRACTICES AND PROCEDURES REPORT AND OPERATION MALTA

Legal Professional Privilege

1.13 Questions concerning legal professional privilege and the proceedings of the PIC were raised during the review of the PIC Act, conducted by the Police Ministry in 2002 on behalf of the former Minister for Police. The previous Committee took evidence from the PIC on the issue of privilege during the Sixth General Meeting with the Commissioner and his senior officers, held on 16 May 2002. The report on the General Meeting outlined the nature of privilege, recent decisions by the PIC and the implications of proposals to amend relevant provisions of the PIC Act.

1.14 The Committee report notes:

The position... seems to be that privilege cannot be claimed by a public authority, or by a public official, in respect of that public official's capacity as an official, to refuse to provide information or documents to the PIC. However, an individual can claim privilege in a personal capacity. The distinction would appear to be between being unable to exercise the privilege for or on behalf of a public authority, but being able to claim it where it can be asserted on a personal basis (such as where personal misconduct outside the scope of official duties might be involved).

At times, particularly with heads of agencies who might be seen as having personal responsibilities for the management and control of those agencies, the line between official and personal conduct can become blurred. It follows that particular questions of whether privilege is being claimed officially or personally can only be resolved on a case by case basis.

The principle underlying s.27(3)(b) of the PIC Act seems sound enough. The proposal that the relevant provisions should be changed is not persuasive and may act to place new constraints on the PIC's ability to gather information. Under the present approach, where personal liability or jeopardy may be involved an individual can claim privilege, including legal professional privilege. But the PIC's capacity to investigate official conduct should not be reduced by allowing privilege to be claimed by public officials acting in that capacity.

1.15 The previous Committee concluded that:

... the principles on which the legislative provisions concerning legal professional privilege is based are sound. Practice is affected on a case by case basis and there is some available case law at Federal level⁷ which gives guidance as to how these

⁶ Inspector of the Police Integrity Commission, *Report on the Practices and Procedures of the Police Integrity Commission*, June 2003, pp.ii-iii.

⁷ *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319; *Eso Australia Resources Ltd v Federal Commissioner of Taxation* (1990) 168 ALR 123; *NCA v S* (1991) 100 ALR 151; see S. Donaghue, *Royal Commissions and Permanent Commissions of Inquiry*, (Butterworths, Australia), 2001.

provisions should be applied in practice.⁸

1.16 In his recent report, the Inspector recommends that:

13. No change should be made to the current procedures in place at the PIC to determine privilege over documents.⁹

1.17 With regard to the production of documents pursuant to a notice issued by the PIC, he proposed that:

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.¹⁰

1.18 The Inspector also made the following comments in his opening statement at the General Meeting:

. . . I would like to emphasise that my report does not address the question of privilege. At paragraph 1.10 on page 5 of my report I note that the review of the Police Integrity Commission Act recommended that investigation of privilege, which impinges upon the operation and function of a number of statutory investigative bodies, should be the subject of a separate inquiry. That passage should not be taken to mean that I share that view. I do not. As presently advised, I consider the provisions of the Act to be appropriate and adequate for the purpose of an investigative arm of the executive government which the Police Integrity Commission is. The construction placed upon the relevant provisions of the Act by the Commissioner, Judge Urquhart QC, in June 2001 and Mr Tim Sage, Assistant Commissioner, in September 2001 were not the subject of appeal to the Court of Appeal, although this was said to be the intended course. Until the Court of Appeal has considered these or other rulings on the question of legal professional privilege arising under the Police Integrity Commission Act or similar legislation affecting law enforcement agencies, it would, in my view, be inappropriate for consideration of change or amendment by any other body to be undertaken.

1.19 In response to a question from the Chairman, the Inspector confirmed that the Police Service had foreshadowed its intent to pursue an appeal on the decisions given by the PIC regarding legal professional privilege but that this course had not been pursued and that no reasons had been offered for the decision not to appeal. The PIC hearing subsequently proceeded on the basis of privilege not being available for those documents.

1.20 The current Committee has carefully considered the documentation available to the previous Committee, the Inspector's recent report and the evidence taken at the General Meeting with the Inspector. The Committee concurs with the views expressed

⁸ Committee on the Office of the Ombudsman and the Police Integrity Commission, *Sixth General Meeting with the Commissioner for the Police Integrity Commission*, June 2002, pp.xxvii-xxviii.

⁹ Inspector of the Police Integrity Commission, *Report on the Practices and Procedures of the Police Integrity Commission*, June 2003, p.ii.

¹⁰ *ibid.*

by the previous Committee and notes that the Inspector's report supports this position. The present Committee has not been provided with any information that would change the views expressed on the question of legal professional privilege in the Sixth General Meeting Report.

External membership of the Operations Advisory Group

- 1.21 Discussion Paper proposal - The proposal that a person external to the PIC be appointed to the PIC's Operations Advisory Group arose from a NSW Police submission to the review of the *Police Integrity Commission Act 1996*. The recommendation was modelled on other investigative bodies, such as the Independent Commission Against Corruption, the NSW Crime Commission and the former National Crime Commission, all of which have statutory committees with external membership to advise and review complaint investigations. According to NSW Police, a committee similar to the ICAC's Operations Review Committee should be appointed to ensure "the limited investigative resources that are available [to the PIC] are used appropriately".¹¹
- 1.22 However, the Discussion Paper noted that, unlike the case with the PIC, none of the above bodies were subject to oversight by an Inspector, and that "there is a clear public accounting of much of the work the Commission undertakes".¹² The Discussion Paper concluded that:
- [T]he recommendation of NSW Police is not supported, as it would simply create an unnecessary and costly additional level of 'oversight'.¹³
- 1.23 Inspector's Review of the Practices and Procedures of the PIC - Recommendation 10 of the Discussion Paper on the Review of the PIC Act proposed that the Minister for Police should request the Inspector of the Police Integrity Commission to review the appropriateness of the Commission's procedures and practices, in respect to the formality and length of Commission investigations. The Inspector would advise on whether current procedures and practices are appropriate and how they could be improved, if necessary.¹⁴
- 1.24 The issue of an independent presence on the PIC's Operations Advisory Group (OAG) was raised again in certain submissions to the Inspector's review. In examining this proposal, the Inspector found that there are "untenable risks associated with the imposition of external persons on the OAG".¹⁵ He further noted that the risk would be multifaceted as the position on the OAG would be part time and, as such, the person filling it would not have a full understanding of the PIC's operational and investigative procedures and priorities.¹⁶ The Inspector concluded that an external member of the OAG would bring a heightened risk of disclosure and that such a "risk is sufficient to outweigh any perceived benefit from altering the composition of the OAG."¹⁷ These

¹¹ Ministry for Police, *Report on the Review of the Police Integrity Commission Act 1996* – Discussion Paper, 17 December 2002, p.116.

¹² *ibid*, p.117.

¹³ *ibid*, p.118.

¹⁴ *ibid*, p.5.

¹⁵ Inspector of the Police Integrity Commission, *Report on the Practices and Procedures of the Police Integrity Commission*, June 2003, p.50.

¹⁶ *ibid*.

¹⁷ *ibid*.

findings formed the basis of Recommendation 2 of his report to the effect that the PIC should not engage external assistance on its Operations Advisory Group.

- 1.25 On tabling the Inspector's *Report on the Practices and Procedures of the Police Integrity Commission* in Parliament on 18 June 2003, the Minister for Police, the Hon John Watkins MP, stated that the Commissioner of Police had advised that he held only two concerns about the Inspector's recommendations. The first related to the recommendation that there should be no external membership on the PIC's Operations Advisory Group. (The second matter was the issue of legal professional privilege, which has been discussed above.) The Minister announced that in order to deal with these particular recommendations, he would convene a meeting with the Commissioner for Police and the Commissioner of the Police Integrity Commission in the near future.
- 1.26 The Committee considers that little purpose has been served in reiterating the proposal to have a person external to the PIC serve as a member of the OAG, especially as it has been so roundly dismissed as "an unnecessary and costly additional level of 'oversight'"¹⁸ by both the Ministry for Police and the Inspector of the PIC. The Inspector placed particular emphasis on this point in the Fifth General Meeting, describing the proposal as "an anathema to the conduct of the Police Integrity Commission".¹⁹
- 1.27 The Committee notes that a resolution of these matters may be progressed at the Minister's meeting with the Commissioner for Police and the Commissioner of the Police Integrity Commission.

Corporate Preparation of Reports

- 1.28 One criticism levelled at PIC's Operation Malta was that there was no reference to an individual being responsible for the preparation of the report.²⁰ In the Practice and Procedure Report the Inspector noted that:

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 . . . 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 on which it ultimately makes recommendations.²¹

- 1.29 The Committee concurs with the Inspector's views on the nature and preparation of PIC reports and his interpretation of the role of the PIC. As a permanent commission of inquiry the PIC is substantially different to a court of law. In the Committee's opinion, the implications of this distinction are not readily understood and have contributed significantly to many of the criticisms surrounding the conduct of Operation Malta.

¹⁸ Ministry for Police, op. cit., p.118.

¹⁹ Evidence, 25 June 2003.

²⁰ Police Integrity Commission Amendment (Reports) Bill, Second Reading Speech, Private Members Bill, 29 May 2003, p.1470.

²¹ Inspector of the Police Integrity Commission, *Report on the Practices and Procedures of the Police Integrity Commission*, June 2003, p.78.

JURISDICTION OF THE INSPECTOR OF THE POLICE INTEGRITY COMMISSION

- 1.30 Two complaints investigated by the Inspector during the 2001 - 2002 reporting period involved the actions of NSW Crime Commission officers involved in joint operations with the Police Integrity Commission. These complaints concerned the provision of surveillance material to a television program, without the material first being introduced into evidence at the PIC, and the granting of a listening devices warrant that named a large number of people.
- 1.31 These complaints attracted a large amount of media attention and gave rise to negative comment on the conduct of the Police Integrity Commission during this particular operation. Matters relating to the provision of surveillance material not previously tendered in evidence at the PIC have been thoroughly canvassed during the Committee's Sixth General Meeting with the Police Integrity Commission. The issue of the listening devices warrant was similarly examined. However it was recently reported that this matter is now the subject of a NSW Police internal investigation.²²
- 1.32 Media reporting on Operation Florida – With regard to the matter of the broadcast of material by the Four Corners program, the previous Inspector, the Hon Mervyn Finlay QC concluded that:
- There were valid strategic purposes for the Commission to release material to “Four Corners” and it was a discretionary judgment to exclude other media outlets.
 - The Commission took steps to obtain appropriate undertakings that material would not be put to air that had not been introduced into evidence. However, the system that should have prevented this happening failed. Although not deliberate, the failure was the Commission's responsibility and should not have happened.²³
- 1.33 He recommended:
- 1) That the Commission review the events leading to the publication of the material on the “Four Corners” program on the night of 8 October 2001.
 - 2) That from such review it formulate a mechanism to be put into operation on any such future occasion to reduce the risk of a recurrence of the problem the subject of this report.
 - 3) That such consideration and proposals be advised to the Inspector.²⁴
- 1.34 The PIC held different views to the then Inspector on the interpretation of certain legislative provisions relating to dissemination of listening device product by the PIC and the exact nature of those differences, as identified by the PIC, is attached at Appendix 2 of the Sixth General Meeting Report. At the time the Committee reported to the Parliament in June 2002, the Inspector was awaiting advice from the Crown Solicitor and, in the interim, the PIC had undertaken to operate as recommended by the Inspector. The Inspector subsequently reported in July 2002 that the Crown

²² 'Inquiry into 100-name warrant', The Australian, 9 July 2003, p.2.

²³ Committee on the Office of the Ombudsman and the Police Integrity Commission, *Sixth General Meeting with the Commissioner for the Police Integrity Commission*, June 2002, Appendix 3: Copy of Report by the Inspector of the PIC of Preliminary Investigation, 8th November 2001, Re: Four Corners Program: 8 October 2001, p.18.

²⁴ *ibid.*

Solicitor's advice had been received and, in light of that advice, he had recommended that the PIC develop a guideline for the use of PIC officers to give effect to the Crown Solicitor's advice. As a result, the PIC developed guidelines that the Inspector considers to be an appropriate procedure.²⁵ The Committee will monitor the application and use of the guidelines over the short and long-term.

1.35 However, for the purposes of the current discussion, it is important to note certain details relating to this incident. In its submission to the previous Inspector during his preliminary enquiries the PIC advised that:

- The tape in question was communicated from the NSW Crime Commission to the PIC, pursuant to s.68 of the TI Act, via a letter dated 9 October 2001;
- PIC records indicate that the tape was not delivered to it until 15 October 2001, one week after the commencement of hearings and the *Four Corners* broadcast;
- The PIC received only one copy of the tape, consistent with procedures during this operation. NSW Crime Commission officers retained a second copy of the tape and as the tape in question was not bar-coded it would suggest that the copy was not that held by the PIC.
- The tape was not specified in the receipts attached to the letters from the PIC to Mr Masters by which TI product was disseminated under the provisions of the TI Act.²⁶

1.36 The PIC submitted further that:

It seems likely that Mr Masters obtained access to the tape from the custody of the NSW Crime Commission, perhaps while Mr Masters and Crime Commission staff were present in the operations room on level 6 of the PIC's premises. The Commission is unaware of the precise circumstances of any such access...²⁷

1.37 The Inspector commented that he was "not satisfied that the [PIC] was a party to a breach of the TI Act" and that he "[did] not consider the functions which [he has] the legislative authority to fulfil require that [he] pursue any enquiries with Mr Masters or the Crime Commission in this regard". He left such enquiries to the PIC as it saw fit.²⁸

1.38 However, the Inspector was clear that although the PIC had introduced a system to avoid publication of Telecommunications Intercept (TI) material that had not previously been introduced into evidence, the system had failed and responsibility for the failure rested with the PIC. To endeavour to ensure the situation did not recur the Inspector recommended that the PIC review the incident, and formulate a mechanism to reduce the risk of a recurrence of the problem, and that he be advised of the review and proposals.²⁹

²⁵ Inspector of the Police Integrity Commission, *Annual Report for the year ended 30 June 2002*, p.25.

²⁶ Committee on the Office of the Ombudsman and the Police Integrity Commission, *Sixth General Meeting with the Commissioner for the Police Integrity Commission*, June 2002, Appendix 3: Copy of *Report by the Inspector of the PIC of Preliminary Investigation*, 8th November 2001, Re: Four Corners Program: 8 October 2001, pp.15-16.

²⁷ *ibid*, p.16.

²⁸ *ibid*, pp.17-18.

²⁹ *ibid*, p.18.

Commentary

1.39 Listening device warrant – Operation Florida – The Inspector reported in his *Annual Report for the year ended 30 June 2002* that the Minister for Police had requested the Inspector, pursuant to s.89(2) of the PIC Act, to report on the matter of a listening device warrant obtained in connection with an investigation which formed part of PIC’s Operation Florida, and to confirm:

1. The warrant was justifiably sought,
2. The seeking of the warrant complied with the relevant legislation,
3. The material obtained by the warrant was used appropriately.

1.40 Following completion of a preliminary investigation, the Inspector advised the Minister that he did not consider the time and expense of any further investigation to be warranted. He concluded that:

- the warrant was justifiably sought;
- subject to one minor irregularity the seeking of the warrant did comply with the relevant legislation;
- and that the material obtained by the warrant was used appropriately.

1.41 In answering the third question, the Inspector stated that:

I have no reason not to accept the advice of the Crime Commission that:

“The material was downloaded from the device worn by SEA and most of it transcribed in draft. Relevant portions were reviewed and certified as correct. It was securely held and used only for the purpose of preparing for PIC hearings, criminal prosecution briefs, and in furtherance of this investigation. We are not aware of any information obtained pursuant to this warrant being used or disseminated for any other purposes”.

I have seen documents recording instances of appropriate dissemination “to the Police Integrity Commission, and to defendants in criminal prosecutions and the D.P.P.”³⁰

1.42 The Inspector stated that he was satisfied that the material had not been used for any other purpose than for evidence in the Operation Florida hearing, general research, intelligence and hearing room preparation. Nor had the PIC disseminated the material to any other agency. He confirmed that the material obtained by the warrant had been used appropriately.³¹

1.43 It is relevant for the purpose of the present discussion to note that the PIC advised the Committee that the material used by the PIC in its Operation Florida hearings was derived from listening device information obtained by the NSW Crime Commission, under warrants obtained by that agency for Operation Mascot. The PIC stated that it was only aware of the names of the issuing Judges for a small proportion of the Mascot warrants and that inquiries in this regard should be directed to the Crime

³⁰ Inspector of the Police Integrity Commission, *Annual Report for the year ended 30 June 2002*, p.21.

³¹ *ibid.*

Commission, which had all the relevant details.³²

1.44 Implications for oversight - The intent of the legislation that provides for the establishment of the PIC, was to create a powerful and flexible, “purpose built” body to detect and investigate police corruption and serious misconduct, including through joint operations with other investigative agencies, as and when the need arose. The role of the Inspector was created to provide for as much transparency and accountability as possible in the necessarily covert exercise of the PIC’s coercive powers.

1.45 The PIC conducts joint operations on occasion with Special Crime and Internal Affairs officers of NSW Police and officers of the NSW Crime Commission. The various mechanisms for police accountability are well known, but NSW Crime Commission officers have no clear line of external oversight. While the NSWCC, like the Independent Commission Against Corruption, has external membership on its Operations Review Committee, unlike the ICAC and other investigative bodies in NSW, it has no other specific external accountability mechanisms.

1.46 This lack of external accountability with respect to the conduct of officers from the Crime Commission and other agencies, engaged in joint operations with the PIC, has significant implications for the activities of the PIC. As the Inspector stated in his response to Question 3 of the Questions on Notice for the General Meeting,

Where an allegation is made which essentially involves conduct by NSWCC officers, but which touches in some way upon the activities of the Police Integrity Commission, there is potential for a diminution of public confidence in the Police Integrity Commission if the matters cannot receive a full investigation.³³

1.47 It is unreasonable for there to be adverse criticism made of the PIC arising from concerns about the conduct of its partners in joint operations. In terms of accountability, impropriety by the PIC’s partners in joint operations may not be able to be investigated by the Inspector. As the Inspector noted in his response to Questions on Notice - the powers of the Inspector of the PIC extend only to reviewing investigative processes of the PIC.

As things presently stand, one cannot say that all possible future circumstances involving disputed facts would permit a full and proper inquiry by the Office of the Inspector.³⁴

1.48 The Committee is concerned about this limitation on the jurisdiction of the Inspector and recommends that the *Police Integrity Commission Act 1996* be amended to provide the Inspector with jurisdiction to investigate alleged improprieties by non-PIC officers, in circumstances where:

- the conduct of a PIC officer also is involved; or
 - there is a connection between the alleged misconduct and the activities of the PIC;
- or

³² Committee on the Office of the Ombudsman and the Police Integrity Commission, *Sixth General Meeting with the Commissioner for the Police Integrity Commission*, June 2002, p.70.

³³ Inspector’s response to Questions on Notice, Question 3, p.2.

³⁴ *ibid.*

Commentary

- the legality or propriety of the PIC's activities is called into question; and,

the conduct is conduct of a type that would normally fall within the Inspector's jurisdiction.

RECOMMENDATION 1:

It is recommended that the *Police Integrity Commission Act 1996* be amended to provide the Inspector with jurisdiction to investigate alleged improprieties by non-PIC officers, in circumstances where:

- the conduct of a PIC officer also is involved; or
- there is a connection between the alleged misconduct and the activities of the PIC; or
- the legality or propriety of the PIC's activities is called into question;

and, the conduct is conduct of a type that would normally fall within the Inspector's jurisdiction.

Chapter Two - Questions on Notice

INSPECTORS ANSWERS TO QUESTIONS ON NOTICE

Below are the Questions on Notice and my answers to them. I note that, in accordance with the general practice, these should be tabled and made public (unless marked confidential) at the General Meeting of the Joint Parliamentary Committee and the Inspector.

In so far as the information so acquired by me is divulged in these answers to the Questions on Notice, I certify that it is necessary to do so in the public interest.

Matters arising from the Annual report for the year ended 30 June 2002

Question 1.

The section of the Annual Report titled "Complaints" notes on page ten that the Inspector received a protected disclosure on 6 November 2001, and that by the agreement of the parties involved, this matter was being dealt with by the Commission with the Inspector providing monitoring. Has this matter been finalised?

Answer: Yes, see answer to Q2 below.

Question 2.

Has the matter resulted in any recommendations to the Commission concerning its managerial practices or procedures?

Answer: The matter in question related to a grievance by a Commission officer concerning the officer's treatment at the hands of two superior officers. It was initially treated by the Commission as a "protected disclosure", but subsequently re-assessed (after relevant issues had been joined) as a personal/managerial conflict. The matter was mediated by the Director, Corporate Services, in concert with the Commission Solicitor, and amicably resolved in final discussions involving the parties, Assistant Commissioner and Commissioner. The officer in question continues in his employment with the Commission. No amendment of the managerial practices and procedures of the Commission was called for.

Jurisdictional issues

Two complaints investigated by the Inspector during this period related to the actions for the NSW Crime Commission while conducting joint operations with the Police Integrity Commission. These complaints were about surveillance material being provided to a television programme without being first adduced into evidence and a listening devices warrant issued by a Justice of the NSW Supreme Court.

These complaints arose while the PIC was conducting joint operations with the NSW Crime Commission, and the complaints relate to the actions of Crime Commission officers.

Question 3.

Is there any benefit to be gained by extending the Inspector's jurisdiction to include complaints concerning the NSW Crime Commission, or other agencies, when they undertake joint operations with the PIC?

Answer: There would be potential benefit in extending the Inspector's jurisdiction to specifically cover alleged improprieties by non-Commission officers, in circumstances where conduct by an officer of the Commission is also involved, or the Commission is otherwise associated with the alleged misconduct.

I note that the PIC may, as a general proposition, investigate the conduct of a civilian where misconduct by a police officer is involved (see for example s.5(1) of the Act), and may also investigate the conduct of a public official otherwise within the ICAC's jurisdiction to investigate, where conduct by a police officer is involved: s.130(2). Conversely, the ICAC may investigate conduct by a police officer where conduct by a public official is also involved: s.129(2).

Part 6 of the Act, from which the functions and powers of the Office of Inspector of the Police Integrity Commission are drawn, makes no similar provision for conduct of non-Commission officers to be investigated where conduct by Commission officers is also involved.

Where an allegation is made which essentially involves conduct by NSWCC officers, but which touches in some way upon the activities of the Police Integrity Commission, there is a potential for a diminution of public confidence in the Police Integrity Commission if the matters cannot receive a full investigation.

For example, the Commission might receive evidence gathered by NSWCC officers in circumstances where an impropriety is alleged to have been involved. While in such instances the Commission, by way of responding to a complaint regarding the propriety of its activities, can perhaps make inquiries of the NSWCC to clarify facts the subject of the allegations, it is another thing to suggest that the powers of the Inspector extend to directly inquiring into the investigative processes of the NSWCC.

While the two matters to which the Committee has referred were able to be fully investigated, it should be noted that the alleged improprieties in both turned on matters of law, rather than disputed facts. As things presently stand, one cannot say that all possible future circumstances involving disputed facts would permit a full and proper inquiry by the Office of the Inspector.

Question 4.

Would there be any significant difficulties associated with oversight of such joint operations?

Answer: In considering this question it is necessary to bear in mind that the role and function of Inspector does not encompass participation in operational decisions. That is to say decisions as to whether a particular operation should be undertaken and the manner and extent of the undertaking. The operations are monitored by the Inspector as they proceed and a complaint to the Inspector may, of course, arise at any time throughout an operation. However, to have participated in operational decisions would compromise the Inspectorate in critically examining matters complained of.

In, the above context no significant difficulties are apparent. The question is rather more one of the powers of the Inspector being sufficient to overcome any difficulties associated with eliciting information relevant to complete investigation of any particular complaint. (cf. s.93 and ss.129 and 130)

The Honourable Morris Ireland QC
Inspector of the Police Integrity Commission

25 June 2003

Chapter Three - Questions without Notice

TRANSCRIPT OF PROCEEDINGS

REPORT OF PROCEEDINGS BEFORE

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE INTEGRITY COMMISSION

At Sydney on Wednesday, 25 June 2003

The Committee met at 6.30 p.m.

PRESENT

Mr P. G. Lynch (Chair)

Legislative Council

The Hon. P. J. Breen

The Hon. Jan Burnswoods

Legislative Assembly

Mr G. Corrigan

Mr M. J. Kerr

Transcript provided by CAT Reporting Services Pty Limited

Questions without Notice

MORRIS DAVID IRELAND, Inspector of the Police Integrity Commission, c/- Inspectorate of the Police Integrity Commission, GPO Box 5215, Sydney, sworn and examined:

CHAIR: Could you please state the capacity in which you appear before the Committee?

The Hon. Mr IRELAND: Yes, I am the Inspector of the Police Integrity Commission appointed by the Governor on the recommendation of the Executive Council. I was appointed on 12 June 2002 for a period of three years.

CHAIR: Did you receive a summons issued under my hand to attend before the Committee?

The Hon. Mr IRELAND: I did, thank you, Mr Chairman.

CHAIR: We have asked some questions on notice. Do you have some answers in writing and is it your wish that they be tabled and become evidence before the Committee?

The Hon. Mr IRELAND: Yes, it is, and I tender my written responses to the questions on notice.

Documents tabled.

CHAIR: Do you wish to make an opening statement?

The Hon. Mr IRELAND: Yes, if I may, thank you. Mr Chairman and members of the Committee, thank you for the opportunity to make these opening remarks. In the hope that it may be helpful to new members of the Joint Committee, I shall take this opportunity to outline very briefly the role of the Inspector and the powers of the office and to very shortly report on the operations of the Inspectorate. I shall also make reference to my recent *Report on the Practices and Procedures of the Police Integrity Commission*, which was tabled in Parliament on 18 June 2003.

The position of the Inspector of the Police Integrity Commission derives its authority from the *Police Integrity Commission Act 1996*. The Inspector is appointed by the Governor with the advice of the Executive Council. The Joint Committee on the Office of the Ombudsman and the Police Integrity Commission is empowered to veto the proposed appointment, which is required to be referred to the Committee by the Minister. The office of the Inspector may be a full-time or part-time office, according to the terms of the appointment. A person is eligible, if otherwise qualified, for reappointment, but may not hold the office of Inspector for terms totalling more than five years.

On 12 June 2002 I was appointed by the Governor as the Inspector of the Police Integrity Commission for a period of three years on a part-time basis effective from date of appointment. My appointment followed the retirement of the Honourable M.D. Finlay QC who had completed a five-year maximum term of office as Inspector and retired in accordance with the provisions of the Act.

The Police Integrity Commission is a statutory body primarily responsible for the detection, investigation and prevention of serious police misconduct and corruption in New South Wales and to complete the work of the Royal Commission into the NSW Police Force (as it then was known, now NSW Police). The Inspector's duty under the Act is "to investigate complaints against Commission staff, to audit its operations, effectiveness and compliance with the law" and to report to the Joint Committee on the Office of the Ombudsman and the Police Integrity Commission. The Joint Committee has the function of monitoring and reviewing the exercise by the Commission and the Inspector of their functions. The Inspector is required to report annually to Parliament and may make special reports on any matters affecting the Commission or on any administrative or general policy matter relating to the functions of the Inspector. The Inspector's principal functions as provided by statute 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 Commissioner 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. The Inspector may exercise the functions of the office on the Inspector's own initiative, at the request of the Minister in response to a complaint made to the Inspector or in response to a reference by the Ombudsman, the Independent Commission Against Corruption, the New South Wales Crime Commission, the Joint Committee or any other agency. The Inspector is not subject to the Commission in any respect. To perform its functions, the office of the Inspector has been given extensive powers to investigate any aspect of the Commission's operations or any conduct of officers of the Commission. The Inspector is also empowered to make or hold inquiries for that purpose and has the powers, authority, protections and immunities of a Royal Commissioner. I have not found it necessary to hold a formal inquiry involving hearings during the year to date.

The Inspectorate occupies suitable office premises within the Sydney CBD which are separate from the Police Integrity Commission at 111 Elizabeth Street, Sydney. For the purposes of auditing and monitoring the operations and activities of the Commission, I have available to me a designated office at the Commission where I have a computer providing me with electronic access to all material on file at the Commission with the exception of telephone intercept material which is required by law to be dealt with separately.

Monitoring and related activities include regular—usually weekly—meetings with the Commissioner of the Police Integrity Commission, Mr Terry Griffin and the Assistant Commissioner, Mr Tim Sage, to discuss the issues of the day, longer term strategies and reviewing representative samples of operational files. As the needs arise, I have separate discussion with senior officers of the Commission. The Commissioner and his staff have been fully cooperative. The Commissioner has provided me with unreserved access to any officer of the Commission whom I may wish to interview.

The operations of the Commission observed by me, with one minor exception to which I shall later refer, have been in compliance with the law of the State. During the current year the Inspectorate has dealt with 22 complaints, of which four are ongoing at the present time; one other has reached reporting stage; two are matters which have previously been concluded and are sought by the complainants to be re-agitated; four have not been proceeded with and 11 have been dealt with by way of preliminary inquiry or resolved by exchange of explanatory

correspondence. These matters will be more comprehensively addressed in my annual report for the year ending 30 June 2003.

In December 2002, prior to publication of the Malta report, the Honourable Michael Costa, then Minister for Police, raised with me the question of the practices and procedures of the Police Integrity Commission and the writing of a report directed towards such improvements as might be made. On 12 February 2003 the Minister referred to the office of the Inspectorate this question, noting that the report on the review of the *Police Integrity Commission Act 1996*, which had been conducted by the Police Ministry and tabled in Parliament on 17 December 2002, had referred to "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". Terms of reference were established and these are set out commencing at page 3 of my report.

In the executive summary to the report, 24 recommendations contained in the report are extracted. At first blush this may seem to be a large number of proposed changes. However, that is not so. In seven instances no change to current practices is recommended. They rate a mention because they were put forward, sometimes strongly, in submissions to the inquiry and it was necessary to deal with them specifically. In a number of instances several recommendations relate to the method of introduction of the same change. In fact 13 recommendations relate to five recommended changes. Four recommended changes stand alone. So in effect there are nine changes recommended to be effected by 17 of the recommendations.

In formulating the recommendations it is first paramount to recognise 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 towards 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.

The factors which impacted upon the hearing of Operation Malta are set out in the six numbered paragraphs commencing on page (iv) of the executive summary of the report and I shall not repeat them. Operation Malta was a most unusual, perhaps unique, inquiry involving as it did trenchant criticism of the highest echelon of the New South Wales Police administration. 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 made 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.

Mr Chairman and members of the Committee, in concluding these remarks I would like to emphasise that my report does not address the question of privilege. At paragraph 1.10 on page 5 of my report I note that the review of the Police Integrity Commission Act recommended that investigation of privilege, which impinges upon the operation and function of a number of statutory investigative bodies, should be the subject of a separate inquiry. That passage should not be taken to mean that I share that view. I do not. As presently advised, I consider the provisions of the Act to be appropriate and adequate for the purpose of an investigative arm of the executive government which the Police Integrity Commission is. The construction placed upon the relevant provisions of the Act by the Commissioner, Judge Urquhart QC, in June 2001 and Mr Tim Sage, Assistant Commissioner, in September 2001 were not the subject of appeal to the Court of Appeal, although this was said to be the intended course. Until the Court of Appeal has considered these or other rulings on the question of legal professional privilege arising under the Police Integrity Commission Act or similar legislation affecting law enforcement agencies, it would, in my view, be inappropriate for consideration of change or amendment by any other body to be undertaken.

Thank you, Mr Chairman.

CHAIR: Just on that last point, in your review of the PIC in your inquiries about Malta, was there any reason proffered as to why the police service did not pursue an appeal?

The Hon. Mr IRELAND: No. It was foreshadowed, but no steps were taken and the hearing then proceeded on the basis of privilege not being available for those documents.

CHAIR: As a matter of principle, it must be a better course to explore all the possible legal avenues before recourse is had to changing legislation almost willy-nilly?

The Hon. Mr IRELAND: Indeed.

CHAIR: Having read the Malta report and your report, I have a sense that part of the problem with Malta stemmed from the inquiry being treated too much as a court and too little as a commission. All the issues about witnesses being called, no control over the evidence and the issues about representation strike me as things that are very reminiscent of a court rather than a commission. Is that an analysis that would find any favour with you?

The Hon. Mr IRELAND: I agree with that analysis, Mr Chairman.

CHAIR: Do you think that the problems in Malta have been seen in other PIC inquiries or is this such a unique set of circumstances that it is unlikely to be replicated?

Questions without Notice

The Hon. Mr IRELAND: I suspect that seeds of the same malady may be present in other proceedings, but nothing like to the extent experienced in Malta, which was quite unique and I suspect, Mr Chairman, unlikely to ever be repeated again by the very nature of the complaint.

CHAIR: In the section about legal representation in your report you do not indicate whether anything is being done about the counsel who seems to have had a conflict and you have indicated that you would make no other comment for legal reason. As much out of curiosity as anything else, I am wondering what all of that means?

The Hon. Mr IRELAND: There are proceedings, there are complaints on foot, and that is why I considered it inappropriate to go down that path or make any comment which might impinge upon those inquiries.

Mr KERR: As a matter of procedure, Mr Chairman, there were questions and answers given on notice. I wonder if they might be made available for anybody who wants to read those?

CHAIR: They have been tabled as part of the proceedings.

The Hon. Mr IRELAND: They were tabled in multiple copies.

Mr KERR: Thank you. I noticed that you read from a written document earlier. I wonder if I might have a copy of that document?

The Hon. Mr IRELAND: I don't have a copy, they are my notes, my address, but by all means--

Mr KERR: Perhaps they could be made available for copying. You would have no objection to that course?

The Hon. Mr IRELAND: No, I have no objection to it. I may have one - yes, there is a copy that is fit for photocopying.

Mr KERR: Is your Report on the Practices and Procedures of the Police Integrity Commission available on line at any web site?

The Hon. Mr IRELAND: It is not, no, it has not been put up on a web site. Copies of it have been made available to some 20 organisations and individuals who have made application to my office, but I have also furnished to Parliament a copy which is fit for reproduction - I mean a looseleaf copy which is not bound so it can be reproduced - and I understand that that facility is available.

Mr KERR: Well, it might be, but your report is an important document and the public do have a right to know, in the same way that they can go on line and get court cases. Would you be prepared to make it available on line at a web site?

The Hon. Mr IRELAND: Certainly, Mr Kerr, there is no difficulty about that at all.

Mr KERR: I am wondering whether you might have read Peter Ryan's biography?

The Hon. Mr IRELAND: No, I have not. Is that the first edition? I understand there is a second one out. Is that right?

Mr KERR: Well, I will show it to the witness. That is the document I am referring to.

The Hon. Mr IRELAND: Yes, I identify the picture on the front of it.

Mr KERR: At page 288 the book states:

"In March 2001 the PIC began its Operation Malta public hearings into the affair. It was scheduled to last eight days",

and in fact it says in the book that it ended up lasting a year, but I think it in fact lasted two years, didn't it?

The Hon. Mr IRELAND: I think that is more accurate.

Mr KERR: "Generating nearly 5,833 pages of transcript; 7,000 documents; 51 witnesses and costing an estimated \$8 million." It would have to be said that the estimation of eight days was unduly modest, I think, and the matter did considerably go off the rails.

The Hon. Mr IRELAND: Is that a question?

Mr KERR: Yes, it would be correct to say that the matter did considerably go off the rails?

The Hon. Mr IRELAND: Yes, I think that view is open, certainly.

Mr KERR: Do you know Judge Paul Urquhart?

The Hon. Mr IRELAND: I have met him only on two occasions, and that only since I was requested to undertake the report.

Mr KERR: Was that for the purposes of obtaining his views on the report?

The Hon. Mr IRELAND: Yes. Well, to give him an opportunity to express his views.

Mr KERR: Are you able to say what his views were?

The Hon. Mr IRELAND: He was one of the parties who made submissions.

Mr KERR: Was there a viewpoint in his submission?

The Hon. Mr IRELAND: Well, no doubt there were many viewpoints.

Mr KERR: What were some of those viewpoints?

Questions without Notice

The Hon. Mr IRELAND: Well, I couldn't - I wouldn't carry them in my head. There were 20 submissions and some of them ran to more than 100 pages.

Mr KERR: I am happy to put some of these questions on notice. Would you be prepared to supply the Committee with the submission?

The Hon. Mr IRELAND: No. I wouldn't have thought that that is something that I am authorised to do. I would have thought that section 56 of the Police Integrity Commission Act would have application.

Mr KERR: It may, but in any event that is something you might consider.

The Hon. Mr IRELAND: Well, I will give consideration to it, certainly, but the distribution of the submissions would not be something that would ordinarily be done.

CHAIR: Could I perhaps intervene and say I am not necessarily sure we fulfil our functions by pursuing that. Having said that, if the Inspector wants to consider it--

Mr KERR: Yes, I am only asking for the witness to give consideration to it and to act in the public interest.

The Hon. Mr IRELAND: Yes. It would be appropriate, I think, if you were to make that request of me, it should be done in writing.

Mr KERR: I think we can attend to that.

CHAIR: We can consider that after the hearing.

The Hon. Mr IRELAND: Yes.

Mr KERR: But you can appreciate the public interest in knowing the views of the person that conducted the inquiry?

The Hon. Mr IRELAND: Yes, but whether or not the whole of the views of a person making submissions are expressed in their submissions or whether they go to specific aspects that require answering by that person is a good point, I think, and an important factor in determining whether, seen in isolation as a document standing on its own feet, the person in question should be required to adopt it as a comprehensive appreciation of the matter in question.

Mr KERR: Well, it would only be taken as a submission and added to the totality of an immense public record on this subject.

The Hon. Mr IRELAND: Yes.

Mr KERR: The book says:

"While Police Minister Paul Whelan later told Parliament that Ryan had spoken out of frustration, Ryan claims that Urquhart called him directly. 'I'll never forget how his voice was

shaking with rage', says Ryan. 'He said, "How dare you? You say we couldn't organise a chook raffle". I suggested he get a transcript of the radio interview. I hadn't mentioned the PIC in that comment, but he said, "You make a retraction". I said, "Is that a threat?" He said, "You do it, Commissioner, or you will see".'

Now there is a well-known saying that justice not only has to be done but has to be seen to be done - well, a well-known saying in the Cronulla electorate. Would it have been better in your view for Judge Urquhart to perhaps appoint another Commissioner to hear this hearing?

The Hon. Mr IRELAND: I haven't given any consideration to that question, Mr Kerr, and I would want to know much more detail and factual foundation before I accepted or expressed a view about that subject.

Mr KERR: Certainly, but you can see why it would perhaps cause concern?

The Hon. Mr IRELAND: Well, first of all, the integrity of the proposition that you are putting - it is not a transcript we are looking at here.

Mr KERR: No, it is not.

The Hon. Mr IRELAND: It is a publication of an autobiography, did you say?

Mr KERR: No, biography.

The Hon. Mr IRELAND: I see, so it is not even signed by the author, which seems to give some concern to some people.

CHAIR: Written by a journalist.

Mr KERR: That is not necessarily adverse to its credibility. This is also on page 289:

"Ryan was forced to sit and fume for an astonishing sixteen months after the press conference first aired damning allegations."

Well, that is clearly a statement of fact; it is corroborated by other material.

The Hon. JAN BURNSWOODS: Apart from it being a physical impossibility to fume for 16 months without blowing up.

The Hon. Mr IRELAND: Perhaps without evaporating.

Mr KERR: That may be a substantial point, but if I might continue:

"Until he was finally invited to have his say at the PIC on 4 March 2002. Even then he was alerted by a journalist as to the date he was to appear; he hadn't even been told".

Simply asking a general question, witnesses should be afforded courtesy in terms of when they are to appear and given notice before any Commission inquiry. Would that be your view?

Questions without Notice

The Hon. Mr IRELAND: Certainly. Mr Kerr, I wouldn't like to be held to this view, but my recollection seems to be that one long adjournment was in fact at the request of Mr Ryan.

Mr KERR: Yes, but I am simply going to the aspect of advice as to when you would appear before a commission.

The Hon. Mr IRELAND: Yes, I agree with that.

Mr KERR: Finally, on page 290 this appears:

"The damage Ryan felt had been done ever since that 'chook raffle' comment: 'I think there'd been certain elements within the PIC - not Judge Urquhart, I never thought he was involved, but other people there who had been out to get me. This Malta inquiry is a payback'."

Did you see any evidence that the Malta inquiry was a payback?

The Hon. Mr IRELAND: Nothing comes to mind.

Mr KERR: Just turning to your report, at page 78, 4.94, "In terms of the PIC's reporting obligations under the Act it is clear there is nothing in the Act that would require the Commissioner alone or the presiding officer to prepare the report". It is also conversely true that there is no prohibition in the Act that would prevent the Commissioner or the presiding officer from preparing it and being responsible for it. Would that be the case?

The Hon. Mr IRELAND: Well, that is a rolled-up question. There are two aspects of it. There is certainly nothing in the Act that precludes the presiding officer from writing a report, no.

Mr KERR: That is the question I wanted answered, thank you. At page 102, 5.69, "Most notable in terms of additional delays were the number of adjournments that were granted to suit counsel's convenience and on occasion to suit witnesses", and then you go through an analysis of those. Those delays were quite substantial, but nevertheless the basis of those delays would be encountered in Royal Commissions and a number of other inquiries and has not led to the extent of delay that we saw in Malta. Would that be correct in your observation?

The Hon. Mr IRELAND: Well, my experience with other inquiries is, I must say, very limited, but I wouldn't be at all surprised if that were true, Mr Kerr.

Mr KERR: Also I think in answer to the Chairman's question you said that this had been conducted too much like a court-based action rather than a commission of inquiry, and I think in your introductory remarks you were at length to say there was a distinction between the proceedings. On page 104, 5.74 states that "it is apparent from the submissions received by this inquiry what little regard was had to section 20 of the Act insofar as it relates to the non-adversarial nature of proceedings", and in fact it was the Commission that conducted those proceedings, wasn't it?

The Hon. Mr IRELAND: Yes.

Mr KERR: In effect, you would be saying that they should have had far more regard to section 20 of the legislation in the conduct of that inquiry?

The Hon. Mr IRELAND: I would agree with that, and reasons of course are given.

Mr KERR: Yes, I appreciate that. At page 106 of the report in 5.83:

"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".

From your discussions and from the submission you received from Judge Urquhart, did he in fact have an input into the Malta report?

The Hon. Mr IRELAND: I am unable to answer that question; I really don't know. I do reiterate that the draft report was forwarded to him and I observed the timeframe when that took place, when the draft report was furnished to him and when it was finally published, and it was a considerable period of time.

Mr KERR: Yes, but we don't know whether he in fact did avail himself of that opportunity. Is that the situation?

The Hon. Mr IRELAND: That is correct.

CHAIR: I would just interpose: The reality is that the only way to answer the question is to ask Judge Urquhart.

Mr KERR: Yes, I think we have taken it as far as we can here. Just turning to the executive summary (i) and your recommendations--

The Hon. Mr IRELAND: I believe your copy of the report would have a typographical error there. I think the spelling of "Malta" shows a slight area of dyslexia, but it is amazing how these things don't strike the eye.

Mr KERR: Certainly. On recommendation (i), of course it is important that, as you say, the PIC has a broad mandate to investigate police conduct.

The Hon. Mr IRELAND: I'm sorry, I thought you were referring to (i).

Mr KERR: The executive summary.

The Hon. Mr IRELAND: I note we have two numbered (i), one in the table of contents and one in the executive summary.

Mr KERR: In recommendation (i) you talk about the mandate and the freedom from interference, but of course it has to be, so far as possible, given the public interest and given what it does, as transparent and accountable as possible?

The Hon. Mr IRELAND: Yes, I agree with that.

Mr KERR: I was wondering if you could provide the Committee with the foundation for recommendations (ii) and (iii)?

The Hon. Mr IRELAND: Yes. There were suggestions - they will appear from the report in the part of the report immediately preceding the recommendation, but there were recommendations which called for the presence of members of external bodies to be part of the OAG, in fact, the Operations Advisory Group which determines the activities, the investigations, of the PIC.

Mr KERR: Recommendations (viii), (ix) and (x) concern the conflict of interest with counsel which was, I think, on the report, a substantial reason for the delay in Malta?

The Hon. Mr IRELAND: Yes.

Mr KERR: Did your inquiries reveal when the PIC should have first been aware that that conflict was going to arise?

The Hon. Mr IRELAND: I think very early in proceedings. The date doesn't really come to mind, but I think at least before the hearing actually commenced.

CHAIR: Could I interpose and say that I think in the report you said that Mr Brammer wrote to the Commission in March 2001.

The Hon. Mr IRELAND: Yes, I had in mind April, but March 2001. Certainly he wrote.

Mr KERR: He did, but just in terms of trying to place it, before the public hearing commenced there were private hearings?

The Hon. Mr IRELAND: Yes.

Mr KERR: Would that conflict have been apparent in terms of those proceedings?

The Hon. Mr IRELAND: Well, it was certainly apparent to Mr Brammer and he brought it to the attention of the Commission and the Commissioner took the view, as I understand it, that this was a matter which should be dealt with by counsel, who have Bar rules which govern such situations. He relied on counsel, and I believe in that regard counsel assisting as well as counsel representing, to resolve that issue. As events transpired that was not a good decision.

Mr KERR: And, as you say, that was apparent at a very early stage?

The Hon. Mr IRELAND: I believe so.

Mr KERR: In relation to recommendation (xv), the PIC should formulate practice guidelines for, amongst other things, legal representation, conflict of interest, placement of evidence before the PIC and the production of documents. That seems to be a basic commonsense recommendation.

The Hon. Mr IRELAND: I am glad it gets such a blessing.

Mr KERR: I don't claim to be an expert, but I have to say that the PIC has now been operating for some years and that seems so basic that it should have turned its mind to it at the commencement of its career. Would you agree with that?

The Hon. Mr IRELAND: Yes, but when things are going along smoothly you do those things which you consider to be necessary and when the stormy seas arise you have to deal with those conditions and I think that that is why Malta, being such a unique case, was redolent with occasions when problems, which previously didn't have to be dealt with, suddenly had to be dealt with.

Mr KERR: Problems of legal representation, conflict of interest, placement of evidence and production of documents are not unique problems to any commission or court and I would have thought they were fairly well charted waters.

The Hon. Mr IRELAND: Well then you weren't sitting on the Bench with Judge Urquhart.

Mr KERR: No. Could I turn to recommendation (xvii)? That recommendation, of course, will depend on the quality of control by the presiding officer at any inquiry I take it?

The Hon. Mr IRELAND: I think that the inquiry really is in the hands of two people rather than one and that is the presiding officer and counsel assisting, so that both of them really need to keep the hearing on track.

Mr KERR: Yes. The State Parliament has been told that Operation Malta was probably the most important inquiry undertaken by the Commission since its inception. Would you agree with that on the knowledge that you have?

The Hon. Mr IRELAND: I doubt the assessment, I must say, but it depends entirely on your point of view. It was a very important matter. It was very high profile. It was structured that way by the complainants. It was never going to be allowed to be dealt with in any quiet and controlled manner, so it was important certainly - very important - but then police integrity, which wasn't really in issue here, is a very, very important public interest also and I wouldn't like to make a comparison because it is like comparing apples and oranges.

Mr KERR: I appreciate that it may not have been the most important; it was certainly very important.

The Hon. Mr IRELAND: I agree with that.

Mr KERR: These allegations, had they been sustained by the Commission, would have touched on police integrity, I take it?

The Hon. Mr IRELAND: Well, that is perhaps one view.

Mr KERR: Yes, but obviously a person of integrity doesn't try to prevent a reform process that the government of the day undertakes?

The Hon. Mr IRELAND: Yes.

Mr KERR: State Parliament has been told that the whole process has devastated the lives of many people who appeared before the Commission and it has also been put in State Parliament that surely there is a basic principle that, when a person sits in judgment or reaches conclusions about allegations and picks and chooses which witnesses to believe in, in whole or in part, the person's identity in making the judgment should be revealed.

CHAIR: Could I ask that you identify the source of that?

Mr KERR: Yes, I am relying on a speech that was given by the member for Epping in State Parliament in relation to a second reading of the Police Integrity Commission Amendment Reports Bill.

The Hon. Mr IRELAND: It is the very beginning of that statement I think that is significant. It refers to sitting in judgment, which is what the PIC doesn't do.

Mr KERR: When you say it doesn't sit in judgment, didn't it make a judgment in relation to those allegations?

The Hon. Mr IRELAND: No, it didn't. You see, what--

Mr KERR: Well, the word "judgment" we perhaps should define first.

CHAIR: Perhaps the Inspector could answer the question.

The Hon. Mr IRELAND: You see, you are touching on one of the significant distinctions that has to be drawn with regard to the Police Integrity Commission and, by contrast, a judge sitting in trial or a court and that is that the PIC does not make binding findings of fact or impose penalties. It is required by the Act to form opinions and to, at best, make recommendations. Now that is a significant and important distinction and it is the distinction which runs right through the procedures of the Police Integrity Commission, and that is why questions such as privilege are so different when you are dealing with an inquiry rather than when you are dealing with a court where consequences are so different.

Mr KERR: Well, what do you say is the difference between an opinion and a judgment in relation to these proceedings?

The Hon. Mr IRELAND: Well, one is the expression which does no more than found a recommendation. The other is a binding finding of fact which effects penalties upon people.

Mr KERR: Well, in terms of the consequences to people, consequences can be devastating. I mean the opinion that the Commission expressed in relation to Mr Brammer was detrimental to his reputation. Would you agree with that?

The Hon. Mr IRELAND: Certainly that is one view, yes.

Mr KERR: And the opinion that these allegations were without substance was devastating to the reputation and credibility of the complainants, wasn't it, by an ordinary person forming a decision?

The Hon. Mr IRELAND: That also is one view.

Mr KERR: Certainly the view was expressed by the member for Epping that many reputations were trashed during the hearing and in the final report, and that is an opinion that is on the public record now. Mr Urquhart's term was extended by Parliament so that he could complete the inquiry. That is your understanding, isn't it?

The Hon. Mr IRELAND: Yes.

CHAIR: I don't think that is right. I think it wasn't parliamentary action at all; it was an appointment as an Assistant Commissioner.

Mr KERR: In any event, the instrument was executed by the then Acting Commissioner, Mr Sage, which gave Mr Urquhart the power to continue the hearing. Were you aware that that instrument specifically excluded the power of Judge Urquhart to write the report?

The Hon. Mr IRELAND: I was made aware of that when I read the Hansard of Mr Tink's second reading speech.

Mr KERR: You have read that?

The Hon. Mr IRELAND: Yes.

Mr KERR: Did you have any opinion, having read it, of that speech and the matters raised?

The Hon. JAN BURNSWOODS: Should we ask him to leave the room?

The Hon. Mr IRELAND: I decline to answer that question. If I did, it was a personal opinion. I do not agree with the amendment, if that is what you are asking me.

Mr KERR: No. I withdraw the question. In relation to commissions of inquiry, a former judge of the Supreme Court was the Honourable Michael Helsham. Did you know the judge?

The Hon. Mr IRELAND: I did.

Mr KERR: He conducted an ICAC inquiry and gave evidence before the Parliamentary Committee in relation to his conduct of it and he suggested that it would have been better having a three-tiered approach for the commission he conducted. Perhaps I might give you a document to have a look at at your convenience and you might indicate whether any of the material raised there would be of assistance in terms of conduct by the PIC. Could I do that?

The Hon. Mr IRELAND: In what regard? I think you ought to confine the ambit of your question really. I mean let me assure you the office of the Inspector is a busy place, and especially when one has to write reports, and this looks like quite a weighty document you

Questions without Notice

have there. I just don't know what it is you are asking me to draw from what has fallen from Justice Helsham.

Mr KERR: What I would be asking would be if there was any application?

The Hon. Mr IRELAND: Any application for anything--

Mr KERR: No, his views in relation to the conduct of the PIC.

The Hon. Mr IRELAND: Well, I think you should - I would never accept submission from counsel in court on that basis, Mr Kerr.

Mr KERR: There is a difference.

The Hon. Mr IRELAND: Yes, but if you want me to answer then you've got to tell me the question. I am not going to take hold of a document and search through it and try and rack up something helpful from the views expressed by the late judge. If you would care to formulate a question and support it with the document, I would be more than happy to give it consideration.

Mr KERR: Well, perhaps I might provide it to you on that basis.

The Hon. Mr IRELAND: I think that would be a good idea.

Mr KERR: In relation to the PIC, the public perception is that the PIC was set up to deal with serious allegations about police conduct and to have those dealt with--

The Hon. Mr IRELAND: Well, perhaps misconduct.

Mr KERR: I am sorry, yes, misconduct, and to have those dealt with speedily as an ongoing Royal Commission. That is still, in your view, an obtainable goal?

The Hon. Mr IRELAND: I would hope so, yes.

Mr CORRIGAN: I think I know what the answer to this question is, but I would appreciate it if you would tell me: On page 4 of your opening statement, your address to us tonight, you said "The operations of the Commission observed by me, with one minor exception to which I shall later refer, have been in compliance with the law of the State". Could you just crystallise what that minor exception is?

The Hon. Mr IRELAND: Yes, that is a matter that I think should be dealt with in private.

CHAIR: We will do that at the conclusion of the meeting. The submission from the Police about the Operations Advisory Group is I think one of the two things that are outstanding from your recommendations that have not been accepted by the Police Service and the PIC, and I think it is the Police Service rather than the PIC that is the problem. Do you perceive that the Police Service suggestion that there be external assistance to the OAG was a knee-jerk reaction to the worsening of conditions between the Police and the PIC or do you think there is a substantive argument that the Police want to pursue?

The Hon. Mr IRELAND: I can't identify a substantive argument and my observations of the operation of the PIC lead me to the view that such a procedure would be anathema to the conduct of the Police Integrity Commission. The introduction of an outside person in the group which is really focusing the whole thrust of the PIC has this obvious disadvantage: That person can never be on top of all of the matters that the group considers, and unless you are on top of the whole of the matters then your opinion is greatly depreciated, so the introduction of outside observation or participation by somebody who does not know precisely what is going on in every detail is dangerous in the extreme in an activity such as the investigations conducted by the PIC.

CHAIR: And it flows logically from that that your concerns do not relate just to a police person being an external element but to any person?

The Hon. Mr IRELAND: Quite so.

(Evidence continued in camera)

(The witness withdrew)

(The Committee adjourned at 7.40 p.m.)

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Appendix 1 Committee Minutes

APPENDIX 1- MINUTES



PARLIAMENT OF NEW SOUTH WALES
COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND POLICE INTEGRITY COMMISSION

Minutes of Proceedings of the Committee on the Office of the Ombudsman and Police Integrity Commission

Wednesday 28 May 2003 at 6.30pm

Room 1254, Parliament House

Members Present

Mr Breen, Ms Burnswoods, Mr Clarke, Mr Corrigan, Ms Hay, Mr Kerr and Mr Lynch.

In attendance

Jenny McVeigh, Helen Minnican, Hilary Parker, Pru Sheaves

...

General Business

The Chairperson

...

- flagged future Committee activities such as visits to the agencies and general meetings with the Ombudsman, the Inspector of the PIC and the PIC Commissioner.

...

The Committee adjourned at 6.55 pm until Wednesday 18 June 2003 at 6.30 pm.

Chairperson

Committee Manager



PARLIAMENT OF NEW SOUTH WALES
COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE INTEGRITY COMMISSION

Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission

Wednesday 18 June 2003 at 6.30pm
Room 1254, Parliament House

Members Present

Ms Burnswoods, Mr Clarke, Mr Corrigan, Mr Kerr and Mr Lynch

Apologies

Mr Breen, Ms Hay

In attendance

Jenny McVeigh, Helen Minnican, Hilary Parker, Pru Sheaves

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3. Inquiry Program

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- ii. General Meeting with the PIC Inspector.

The Committee agreed to hold the General Meeting at 6.30pm, Wednesday 25 June 2003, providing the Inspector was available to attend. The Inspector was to be invited to make an opening statement at the public hearing on his recent report entitled *Report on the practices and procedures of the Police Integrity Commission*.

The Committee adjourned at 6.55 pm until Wednesday 25 June 2003 at 6.30 pm.

Chairperson

Committee Manager



Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission

Wednesday 17 September 2003 at 6.30pm
Rooms 814/815 , Parliament House

Members Present

Mr Lynch (Chair), Ms Burnswoods (Vice-Chair), Mr Breen, Mr Corrigan, Ms Hay and Mr Kerr

Apologies

Apologies were received from Mr Clarke

...

iii. Consideration of Draft Report: Fifth General Meeting with the Inspector of the Police Integrity Commission

Resolved, on the motion of Mr Corrigan, seconded by Mr Breen:

That the draft report be the Report of the Committee and that it be signed by the Chair and presented to the House, together with the minutes of evidence.

That the Chair, Committee Manager and Project Officer be permitted to correct stylistic, typographical and grammatical errors.

...

The Committee adjourned at 7.16pm sine die.

Chairperson

Committee Manager