

General Purpose Standing Committee No. 3

Inquiry into Aspects of the Department of Corrective Services

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Terms of Reference

That General Purpose Standing Committee No. 3 inquire and report on:

- a) the procedures for the appointment of the Commissioner, Assistant Commissioners and Governors of the Department of Corrective Services, and circumstances relating to these recent appointments.
- b) whether associations between these senior officers in the Department of Corrective Services and prisoners are at all times appropriate, and undertaken with integrity and professionalism and whether proper disciplinary action is initiated when required.

Minutes of Proceedings No. 50, 21 March 2002, Item No. 3

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The Hon John Hatzistergos MLC Australian Labor Party Deputy Chair

The Hon Greg Pearce MLC Liberal Party

The Hon Peter Primrose MLC Australian Labor Party

Ms Lee Rhiannon MLC Greens

The Hon John Ryan MLC Liberal Party*

The Hon Ian West MLC Australian Labor Party

* The Hon John Ryan MLC replaced the Hon Jim Samios for the length of this inquiry.

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Table of Contents

	Chair's Foreword	vii
	Summary of Recommendations	viii
Chapter 1	The Inquiry Process	1
	Terms of reference	1
	Preliminary briefings	1
	Referral to the ICAC	2
	Adverse mention	2
	Disclosure of in camera evidence	3
	Structure of report	3
Chapter 2	Evidence of the Inquiry	5
	Previous allegations regarding Ron Woodham	5
	Allegations of inadequate investigation of allegations within the Department	7
	Selection of a Governor of a Correctional Centre	8
	Apprehended Violence Order	13
	The powers of the Inspector General of Corrective Services	15
	Reference of inquiry to the ICAC	18
	Parliamentary Committees and investigation of matters of misconduct	18
	Referral to Independent Commission Against Corruption	19
Appendix 1	List of Witnesses	22
Appendix 2	Answers to Questions on Notice	24
Appendix 3	Minutes of Proceedings	32
Appendix 4	First advice from the Crown Solicitor's Office	48
	Second advice from the Crown Solicitor's Office	69

Chair's Foreword

General Purpose Standing Committees (GPSC) in the Legislative Council have the power to initiate inquiries in their respective portfolio areas. Earlier this year GPSC No. 3 resolved to undertake an inquiry into aspects of the Department of Corrective Services, following concerns raised with some Committee members about recent senior appointments within the Department, including the appointment of the new Commissioner Ron Woodham.

After holding two initial hearings, the Committee was faced with a dilemma. Evidence had been given to the Committee about inadequate investigation of allegations of cronyism, flawed staff selection processes, work-related practices and of other problems within the Department. However these matters require in depth investigation, preferably on a confidential basis, to establish the truth of any claims made. The Committee decided that a parliamentary inquiry, with its emphasis on hearing evidence in public and without specialist investigative staff, was not the appropriate mechanism to advance an understanding of the issues involved. For this reason, the Committee resolved to recommend that the terms of reference for the inquiry be referred to the Independent Commission Against Corruption (ICAC).

This report seeks to outline the evidence heard by the Committee which led to its decision to recommend referral; and to assist the Legislative Council in its decision to make the referral. This report has been tabled and made public by the Committee, but the referral itself will be decided by the Legislative Council when it resumes sitting in August 2002. The Committee strongly urges that the House adopts this report and refer the inquiry, and all documents provided to the Committee, to the ICAC. The matters raised in this report are sufficiently serious that they should not be left unresolved. These issues need to be investigated independently to a conclusion. The Committee believes the ICAC is the most appropriate agency to do this.

Another matter evident from the inquiry is the limited investigative powers of the Inspector General in his complaint-handling function. The Committee is recommending to the Government to consider amending the two sections of the Crimes (Administration of Services) Act 1999 in relation to the statutory powers of the Inspector General, to permit him or her to pursue investigations referred back to the Department of Corrective Services by the ICAC or the Ombudsman.



Hon Helen Sham-Ho MLC
Committee Chair

Summary of Recommendations

Recommendation 1

Page 20

That the terms of reference of the inquiry by General Purpose Standing Committee No.3 into Aspects of the Department of Corrective Services Report and the evidence and supporting documents received by the Committee during the course of the inquiry be referred to the Independent Commission Against Corruption.

That the ICAC investigate the allegations and issues raised in the evidence regarding the two individual incidents, and whether these form part of a systemic problem within the Department.

Recommendation 2

Page 20

That as part of its inquiry into these matters, the ICAC, in accordance with its Corruption Resistance Review program, assess the strength of the Department of Corrective Services' key corruption resistance measures and make appropriate recommendations.

Recommendation 3

Page 20

That the Government should consider amending s217 and s218 of the *Crimes (Administration of Sentences) Act 1999* so as to permit the Inspector General to pursue investigations referred back to the Department of Corrective Services by the ICAC or the Ombudsman.

Chapter 1 The Inquiry Process

Terms of reference

1.1 General Purpose Standing Committee No 3, at its deliberative meeting on 21 March 2002 resolved to establish the terms of reference for the inquiry, under the powers given to it by the House by paragraph 3 of the resolution of 13 May 1999 establishing the Committee, followed concerns raised by several Opposition and cross bench Committee members about aspects of the Department of Corrective Services. The terms of reference agreed to by the Committee were:

That General Purpose Standing Committee No. 3 inquire into and report on:

- a) *the procedures for the appointment of the Commissioner, Assistant Commissioners and Governors of the Department of Corrective Services, and circumstances relating to these recent appointments.*
- b) *whether associations between these senior officers in the Department of Corrective Services and prisoners are at all times appropriate, and undertaken with integrity and professionalism and whether proper disciplinary action is initiated when required.¹*

Preliminary briefings

1.2 The reference was prompted by concerns raised with individual Committee members from persons both within and outside the Department. The Committee gave careful consideration to the most appropriate approach to adopt in hearing evidence, receiving submissions and assessing material. The Committee considered that its approach should take account of the rights of individuals, and provide procedural fairness to those who may be named, as well as recognising the public interest in accountability of public officials. The Committee was mindful of the sensitive nature of the allegations and that other authorities such as the Independent Commission Against Corruption had considered similar allegations previously. Therefore, upon establishing the terms of reference for the inquiry the Committee determined the most appropriate way to proceed was to ensure that Committee members were appropriately briefed prior to developing a program for the inquiry.

1.3 The Committee resolved to have two preliminary hearings, first with the Minister and the Shadow Minister and then with the Inspector General of Corrective Services. The purpose of those hearings was to allow these office holders to brief the Committee on issues relevant to the terms of reference for this inquiry before proceeding to hold further hearings or calling for submissions.

1.4 Two hearings were held at Parliament House. The first was on 12 April 2002, at which the Hon Richard Amery MP, Minister for Corrective Services, and Mr Michael Richardson MP, Shadow Minister for Corrective Services, gave evidence; the second hearing was held on 2 May 2002, at which Mr Lindsay Le Compte, Inspector General of Corrective Services,

¹ Minutes of Proceedings No. 50, 21 March 2002, Item No. 3.

and Mr Steve Griffin, Director Operations and Review, Office of Inspector General of Corrective Services, gave evidence. These hearings are listed as Appendix One, and transcripts are available through the website for General Purpose Standing Committee No 3 at www.parliament.nsw.gov.au.

- 1.5** During Mr Richardson's evidence and the evidence of Mr Le Compte and Mr Griffin the Committee went in camera for certain evidence. The Committee resolved to publish an amended version of the in camera evidence from Mr Le Compte and Mr Griffin, which removes names, identifying titles and locations from the material. This amended transcript is also available on the Committee's website.
- 1.6** During the course of the evidence from the Hon Richard Amery MP, a number of questions by the Committee were taken on notice. The answers to these questions are published as Appendix Two.
- 1.7** Following the evidence of Mr Lindsay Le Compte, the Committee requested a number of confidential documents in relation to two particular incidents. The documents concerned the matter of an Apprehended Violence Order (AVO) concerning two senior officers of the Department of Corrective Services and another matter relating to a protected disclosure to Mr Le Compte by a Corrective Services Officer (discussed in the next chapter). These documents were supplied by Mr Le Compte to the Committee Secretariat on Monday 13 May 2002 on a confidential basis, and have been held as confidential documents by the Clerk of the Parliaments since that date.

Referral to the ICAC

- 1.8** Following the second hearing the Committee held a deliberative meeting on 2 May 2002. The Committee resolved to refer the allegations and issues raised in the course of the inquiry, and the terms of reference for the inquiry, to the Independent Commission Against Corruption (ICAC), for reasons explained in Chapter 2 of this report. Subsequently the Committee received advice from the Clerk Assistant—Committees that a more appropriate process was for the Committee to recommend referral, with the House then making the referral if it chooses to adopt the report. It is not the Committee's intention, at this stage, to inquire further into these terms of reference following the tabling of this report and making all documentation available to the ICAC, although the situation could be reviewed depending upon the approach taken by the ICAC.

Adverse mention

- 1.9** In hearing evidence from Mr Richardson and Mr Le Compte, evidence was heard regarding inadequate investigation of allegations of possible "corruption" within the Department of Corrective Services. The "corruption" referred to here is not for pecuniary interest but rather refers to failure to follow procedures intended for accountability and transparency, cronyism and unfair use of personal influence in management of the Department.
- 1.10** The evidence taken at the hearings therefore contained comments that could be construed as reflecting adversely on named individuals. In accordance with parliamentary practise in

regard to procedural fairness², the individuals referred to in this way were given the opportunity to respond to such comments. The Committee wrote to former Commissioner Leo Keliher and current Commissioner Ron Woodham alerting them to the adverse mention on 7 May 2002, offering them the opportunity to respond. Both chose to make written responses, addressing in detail the matters raised. These responses were received on 14 June 2002. Commissioner Woodham, through the Department's corporate counsel, has indicated that these statements have been provided on a confidential basis on the understanding that these statements will be referred to the ICAC for further investigation together with other documentation the committee has received.

Disclosure of in camera evidence

- 1.11** On 3 May 2002 an article was published in the *Sydney Morning Herald* which appeared to disclose aspects of the in camera evidence heard on 2 May 2002. It also disclosed the Committee's decision to refer the inquiry to the ICAC. The Chair wrote to all persons present during the in camera hearing regarding their knowledge of the unauthorised disclosure of the in camera evidence, and also wrote to the newspaper regarding the status of the material. At its deliberative meeting on 17 June 2002 the Committee heard an explanation of what occurred and determined that there had not been any substantial interference with its processes.³

Structure of report

- 1.12** Chapter Two of this report contains details of the issues raised in the preliminary hearings and explains the reasons for referring the inquiry to the ICAC.
- 1.13** Appendix One lists details of the hearings.
- 1.14** Appendix Two provides the questions on notice to and answers from the Minister for Corrective Services.
- 1.15** Appendix Three provides the minutes of meetings at which this inquiry was considered.
- 1.16** Appendix Four contains the first and second advices from the Crown Solicitor's Office regarding the powers of the Inspector General.
- 1.17** The Recommendations arising from this inquiry appear at the end of Chapter Two.

² See for example *Odgers Australian Senate Practise* Ninth Edition, Department of the Senate, Canberra pp 423-425.

³ See *Minutes of Proceedings* 17 June 02, Appendix Three.

Chapter 2 Evidence of the Inquiry

This Chapter presents a brief summary of the evidence available to the Committee and to explain the reasons for referring the matter to the ICAC. The main issues raised during the inquiry were:

- the suitability of Mr Ron Woodham as Commissioner;
- two instances in which allegations of inappropriate management within the Department were raised; and
- the adequacy of the powers of the Inspector General in certain circumstances to investigate matters regarding Department management practices.

The Committee has decided to refer the matters to the ICAC because that agency is more appropriate and better equipped to conduct the type of investigation required for the above mentioned issues than a parliamentary committee.

Previous allegations regarding Ron Woodham

2.1 During the course of the hearings Mr Ron Woodham's suitability as Commissioner of Corrective Services was questioned. The issues raised referred to Mr Woodham's conduct during his long service within the Department and allegations and investigations which had focused on Mr Woodham. Mr Richardson, in providing evidence before the Committee on 12 April 2002, referred to these issues, and in particular, to Mr Woodham's time as head of the Internal Investigations Unit.

The first [issue] goes back to 1992/1993 when the Independent Commission Against Corruption reported on the use of informers within the prison system.

...The major issue was that Mr Woodham provided a reference for Mr Bill Cavanaugh, who was serving a substantial amount of time at Parklea Prison and was regarded as the prison heavy, at the top of the pecking order, he was the enforcer, a drug dealer, he ran a gambling racket which earned him approximately \$500 per week within the prison. When you put all that together you got the impression that Mr Cavanaugh was not someone of good repute, to put it mildly.

He was to be transferred to Goulburn Gaol and this put him in fear of his life. He preferred to go to Victoria and face trial on a range of serious charges, kidnapping, aggravated sexual assault, assault, for which he ultimately received 10 years imprisonment, rather than be transferred to Goulburn. Mr Woodham provided a reference for Mr Cavanaugh, which accentuated the positive and made no mention of the role that he had performed as a prison heavy at Parklea. Ian Temby, then ICAC Commissioner, described that letter as being unbalanced and calculated to mislead and Mr Woodham's behaviour as being inappropriate. He found that disciplinary action should be taken against Mr Woodham for two offences relating to the letter and said that he was guilty of corrupt conduct.

I stress this to the Committee. Mr Woodham went to the Supreme Court where Grove J found against the ICAC decision. He [Grove J] said the letter was not false. The previous argument had been that you could lie through omission as well as commission. He said it was the responsibility of the Crown to:

advance admissible adverse material to the sentencing judge. It cannot amount to improper conduct for a public official in a truthful recounting of some known good to refrain from volunteering advance self-cross-examination

2.2 During Minister Amery's appearance it was also raised that concerns regarding Mr Woodham had been raised by the ALP when it was in Opposition, although this was prior to the Supreme Court decision:

Ms LEE RHIANNON: Madam Chair I put in that it is relevant because it is about ALP Policy. The Minister said that he had the support of the Cabinet Members when the decision was made but when you look at the media release in 1993 and when you look at the decision you made there has been a clear change in the position of your Party in regard to Mr Woodham. In 1993 your Shadow Minister said you were calling for the immediate sacking of the Assistant Commissioner for Corrective Services, Mr Woodham.

Mr AMERY: Keep going.

Ms LEE RHIANNON: You would like me to read it all?

The State Opposition today called for the immediate sacking of the Assistant Commissioner for Corrective Services, Ron Woodham. Mr Woodham was found by the ICAC to have acted corruptly. Shadow Minister for Corrective Services Tony Doyle said Mr Woodham's position as the person responsible for gaol security was untenable given the ICAC Inquiry findings

That was the ALP's position in 1993, you made a decision in 2001 to appoint him, when did the position of your Party change was regard to Mr Woodham?

Mr AMERY: There is no position of the Party in relation to Ron Woodham. What you are reading from is a press release of the Shadow Minister for Corrective Services at the time in relation to a finding by the ICAC, which was overturned by a court.⁴

2.3 In his evidence Minister Amery addressed this issue, arguing that he was fully aware Mr Woodham's background when approving his appointment:

Not long into my tenure in the job, I then started looking at a recommendation to go to the Cabinet for the appointment of a new Commissioner. When I looked at the curriculum vitae and so on of the people applying I became very strongly of the view that Ron Woodham should be recommended to Cabinet for appointment. I am very pleased to say that there was unanimous support for his appointment. I am very pleased to say that he was supported in discussion by the two former Ministers for Corrective Services and I have been quite pleased with the fact that his appointment has been given strong support from the prison officers within the system and the fact that he is the first prison officer in the

⁴ Amery Evidence 12 April 2002 p14.

history of the Department to ever achieve the position of Commissioner. It is quite an achievement on his part.

I suppose the Corrective Services Department, like every organisation, has a number of disgruntled employees. They apply for positions over the years and they don't get them. Of course, after the decision is made and they do not get the position, then of course they start attacking the process. I can advise the Committee before we go into any in-depth evidence in that regard that all of the allegations being made against Commissioner Woodham – and I assume we are not going to canvass matters that have already been dealt with by the various authorities, the Independent Commission Against Corruption and courts, but if you are going to canvass that as well, I am quite happy to say that I have been completely briefed and read on all of the people who have had a gripe or a complaint against him over the years, leading up to the allegations that I think have been made public by the Opposition in recent months. I was fully aware of what the Inspector General had been corresponding with the former Commissioner and so on, so I was aware of all of those issues prior to my making those recommendations and coming to a decision that Ron Woodham should be the Commissioner.⁵

- 2.4** The matters raised here are relevant to the Committee's term of reference (b), in relation to associations between senior officers in the Department and prisoners. However, the Committee does not believe the matters referred to by Minister Amery and Mr Richardson in these extracts require further examination, as they have already been resolved in the NSW Supreme Court. Those wishing to understand the material more fully should examine the ICAC report entitled, and the Court case which overturned the ICAC finding of "corruption" against Mr Woodham: *Woodham v Independent Commission Against Corruption* 1993, (NSW Supreme Court, Administrative Law Division).

Allegations of inadequate investigation of allegations within the Department

- 2.5** There are two main work place issues with the Department of Corrective Services about which the Committee heard evidence:

- the selection process for the Governor of a correctional facility, and
- the issuing of an AVO by Mr Woodham against another senior officer.

- 2.6** The two issues raised concerns about workplace practices in the Department and more specifically, issues of propriety. Both have been the subject of investigation, but the evidence of Mr Le Compte and Mr Griffin was that these investigations, for various reasons, have not been carried out appropriately or to a conclusion. Mr Richardson argued that these issues have not previously been adequately investigated, and referred to evidence available that has not been previously considered.

⁵ Amery *Evidence* 12 April 2002 p4

Selection of a Governor of a Correctional Centre

2.7 The issue of the selection of the Governor for Kirkconnell Correctional Centre was first raised by Mr Richardson, who referred to the selection process and a protected disclosure to the Inspector General.

That [selection process] relates to the appointment of new Governors at the Kirkconnell, Berrima and Oberon Correction Centres. An officer ...believed he had been inappropriately denied promotion because of actions taken by Mr Woodham. He made a protected disclosure to the Inspector General of Corrective Services, Lindsay Le Compte.

...After conducting a preliminary enquiry into matters raised the Inspector General determined there were reasonable grounds to suspect corrupt conduct had taken place in relation to the selection process for the position of Governor at Kirkconnell Correctional Centre. That matter was referred to the ICAC in accordance with the Inspector General's obligations, but the ICAC declined to further investigate the matter.

They did not determine that there was no corrupt conduct. They declined to investigate. What then happened was that Lindsay Le Compte wrote to the then Commissioner of Corrective Services, Dr Leo Keliher, pointing out to him the various anomalies found in connection with selection processes for Governor positions and he states specifically involving Mr Woodham and referred also to the apparent failure on Mr Woodham's part to disclose relevant actual or potential conflicts of interest relating to this particular officer to the selection committee.

He also raised with the Commission the issue relating to Mr Woodham's involvement in referee checks, so once again it is very germane to your terms of reference, in particular relating to applications for the position of Governor at the Kirkconnell Correction Centre.

...The Inspector General then recommended to the Commissioner that he institute a full examination of the issues to determine whether disciplinary action should be taken against Mr Woodham. He also recommended that Mr Woodham undertake a refresher course in selection procedures.⁶ (Mr Le Compte provided more detail on the substance of the allegations made and the process once the matter was referred back to the Department. The selection panel consisted of Commissioner Keliher, Assistant Commissioner Woodham and an external representative of another Department. Irregularities were raised with Mr Le Compte by one of the applicants to the position:

I was approached around mid March last year by a person who wished to make a protected disclosure relating to a selection process for the position of superintendent at three correctional centres. That person was concerned that there were issues relating to the selection process which were adverse to that person and they raised issues about the process itself and who was involved and how it had unfolded⁷

⁶ Richardson Evidence 12 April 2002 p21

⁷ Le Compte Evidence 2 May 2002 p17.

2.8 The circumstances described are complex, and outlined in full in the main transcript of 2 May 2002. Mr Le Compte contended that Mr Woodham did not disclose to the selection panel a pre-existing relationship with the applicant:

The Hon. JOHN RYAN: Can I take Mr Le Compte through his letter, which has already been circulated within the Committee? I am referring to the letter to the person to whom you made the protected disclosure. You said in your letter in the fourth paragraph that there were various anomalies found in connection with the selection process for the governor positions at Kirkconnell, Berrima and Oberon. I suppose you have discussed one of them but I will take you through a couple of others. You said, involving Mr Woodham, "I have referred to the apparent failure on Mr Woodham's part to disclose relevant actual or potential conflicts of interest relating to you to the selection committee." What was the conflict of interest which Mr Woodham had not disclosed?

Mr LE COMPTE: The complainant, as part of the complaint, said to me that the complainant had over a substantial period of time been involved in matters which placed that person in conflict, in his view, with Mr Woodham. That went over a period of years and that person has also raised concerns in this context. We have, from my recollection, the then Commissioner and, prior to that person, the previous Commissioner.

There was another issue which I was informed of which was more recent and that was some concern about this person's involvement with another member of staff of the organisation with whom Mr Woodham had been involved in a personal matter. So what the complainant was saying to me was that there were a number of issues which he had raised with senior people in the organisation and he was concerned that those issues were not adequately addressed in the context of the selection process.

The Hon. JOHN RYAN: I suppose to make life clearer I should explain that the panel which appointed these people consists of three people, two from the Department of Corrective Services and another independent third person who in this instance was a female person, because the panel has to have one female person on it, and it was necessary for Mr Woodham to have disclosed to at least that other person on the panel that he had a conflict of interest with one of the two applicants being considered for two of the positions. Is that essentially what occurred?

Mr LE COMPTE: Yes. The normal processes in these circumstances, and certainly within the Department of Corrective Services, is for any member of a selection panel to disclose to the panel any conflict of interest and for the panel then to address that matter and determine whether or not the person should continue on the panel or some other process should be put in place.

2.9 Mr Le Compte was then asked about an allegation by the person making the protected disclosure that the report of Mr Woodham on the referee checks for the applicants differed from comments actually made by the referee, a Mr Farrell:

The Hon. JOHN RYAN: Are you saying that Mr Woodham failed to ask Mr Farrell at all about the applicant to whom he had written, and he was then given comments about the other successful applicant and he then proceeded to

misrepresent the impact of those recommendations or the reference to the other members of the panel including the individual person?

Mr LE COMPTE: In relation to the first part of that, I do not know whether Mr Woodham spoke to Mr Farrell in relation to the complainant being on the eligibility list for one of the positions. He may or may not have, I do not know. Certainly in the documentation which was provided to me there was no evidence that the referee had provided information in that context. In relation to the person who was the recommended applicant for that particular position, there was an allegation that what Mr Farrell had said was not accurately represented in the notes which appeared in the selection committee documentation.

The Hon. JOHN RYAN: So you examined some notes taken by Mr Woodham?

Mr LE COMPTE: That is correct.

The Hon. JOHN RYAN: And did the notes reflect what Mr Woodham had told the panel?

Mr LE COMPTE: It appeared to be the case because I spoke to Commissioner Kelleher about the matter when it was brought to my attention.

The Hon. JOHN RYAN: He was another member of the same panel, was he not?

Mr LE COMPTE: He was the convener of the panel and the comments that he made to me were consistent with the notes which appear in Mr Woodham's writing in the selection committee reports.

The Hon. JOHN HATZISTERGOS: Was there another witness to these referees' reports? Was Mr Peter Peters a name that you recall?

Mr LE COMPTE: Earlier this year I recall, when I was actually on leave but I came in for another reason, I had a meeting with Mr Woodham and he indicated that there apparently was another person who was present in Mr Woodham's office—I presume, if that is where he made the call from—at the time he spoke to Mr Farrell, but I do not know whether that person he nominated as Peter Peters was actually sitting in the office or could hear the conversation.

The Hon. JOHN HATZISTERGOS: You have not interviewed him in any event?

Mr LE COMPTE: No, because I did not know at that point in time. That was six months after the process had unfolded⁸

2.10 In summary, the claims are that:

- Mr Woodham had a conflict of interest based upon past interactions with one of the applicants for the position;
- He did not declare that conflict to the external person on the interview panel;

⁸ Le Compte Evidence 2 May 2002 p18.

- It is alleged there were discrepancies between what was said by the referee to Mr Woodham and what was reported to the selection committee as the referee's comments on the applicants, and
- The applicant was later offered a position for which he had not applied.⁹

2.11 Mr Le Compte explained that upon receiving the protected disclosure he made preliminary investigations, including interviewing the external person on the panel who confirmed some of the details alleged by the officer making the protected disclosure.¹⁰ He did not interview Mr Woodham¹¹. Mr Le Compte determined that on the basis of the evidence before him there was the potential for conduct which could amount to "corrupt conduct" under the *Independent Commission Against Corruption Act 1988*, and referred the matter to the ICAC for further investigation¹² The ICAC then referred the matter back to the Department on the basis that there was insufficient evidence for the ICAC to determine whether there was corrupt conduct. Mr Le Compte explained:

...when the ICAC makes a decision not to progress a complaint to it by way of corrupt conduct that does not mean that the commission is saying that a department cannot take disciplinary action against an individual. It is simply saying that it is not going to progress any issue relating to corrupt conduct. There is no restriction at all on a department taking its own action against a particular individual as a result¹³

2.12 It was when the matter was referred back to the Department that the issue of the powers of the Inspector General, discussed further in a section below, became a barrier, in the view of Mr Le Compte, to resolving the matters raised. Mr Le Compte began to conduct further investigations, and also recommended that Mr Woodham receive training in selection procedures.¹⁴

2.13 Mr Le Compte stated that the then Commissioner, Mr Keliher, raised concerns with him about whether the Inspector General was exceeding his statutory powers. The advice of the Crown Solicitor was sought jointly by his office and the Department. On the basis of the advice received on 28 November 2001, Mr Le Compte's investigation was halted on the grounds that the advice indicated he was exceeding his powers. Mr Le Compte informed the Committee that no further investigation was undertaken by the Department. He expressed his concern regarding this outcome:

The important issue there is that it may well have been that disciplinary action would not have been taken against Mr Woodham. It might have been taken against other people who had brought information to my attention. What we are left with is a situation where the then commissioner took no action in any way, shape or form and particularly in the context that certain people had appeared

⁹ See Le Compte Evidence 2 May 2002 p17.

¹⁰ Le Compte Evidence 2 May 2002 p20.

¹¹ Le Compte Evidence 2 May 2002 p10.

¹² Le Compte Evidence 2 May 2002 p14.

¹³ Le Compte Evidence 2 May 2002 p10.

¹⁴ Le Compte Evidence 2 May 2002 p9-10.

before me and with full knowledge of the risks involved of wilfully misleading me and provided information which set that process in train. So what I was doing in the context of going back to Dr Keliher was saying to him—and I do recall the discussion I had with him where he said, "Well, one of these people is lying." In that sense what I was saying to him was that "ICAC has determined not to progress the matter. I still think this matter needs to be resolved and I am referring it to you now effectively for the purpose of considering whether you should institute an investigation under the Public Sector Management Act."¹⁵

2.14 The Committee also heard evidence from Mr Richardson of other similar complaints within the Department. He quoted two emails from Departmental officers raising similar concerns about staff selection:

I am a senior officer within the Dept Corrective Services, (some 18 years service) I can tell you that it is common knowledge amongst senior staff about the jobs for the boys attitude within this dept. I am told by senior people that the Knox report only touched the surface. There are plenty of political points to be won and all round cheers from staff in this department if jobs for the boys be eliminated and the perpetrators brought to account for their actions. At present there are officers within this dept, who have tertiary qualifications and have better ideas to run this dept, however because they are not politically correct they do not even get a look in. Keep an eye on the 6 regional commander positions just advertised within the Department. A gross waste of taxpayer monies and most staff will tell you who will get them anyway. Please keep going as you will no doubt meet with stubborn resistance. What scares them most is the press or more importantly bad press. If I can help you in anyway please contact me however please ensure confidentiality as I am too young (40) to have my "career" blacklisted. There are a great number that feel this way, and know that the dept is just bobbing along with no leadership or direction. We feel that we can help, sincerely frustrated.¹⁶

and the second email:

I recently saw on the news that you are calling for an investigation into Mr Woodham appointment. I have the utmost respect for him and although I don't always agree with his work practices and ways of achieving an end I do respect all he has done for the Department.

I do feel, though, that a major investigation be called to uncover the corruption and blatant cronyism that is rampant within the Department.

I have been on the receiving end of this form of corruption on many occasions and have found my career has greatly suffered because I have voiced my displeasure with the treatment I have received. I have faced inactivity and laziness when asking for assistance, I have had my career development interfered with because of petty likes and dislikes and faced interview panels that have no wish to promote the best person for the job, just the person they want or have been told to promote.

This has taken several forms also, such as an applicants referee being the convener of the promotional interview, positions being given to people because of gender

¹⁵ Le Compte Evidence 2 May 2002 p3.

¹⁶ Richardson Evidence 12 April 2002 p22.

and sexual preference and staff being rewarded for working against their fellow staff members for the benefit of a particular person or persons.

These are just my personnel experiences, hearsay tells me it is not isolated to myself but that this disease has infected the whole Department to the point where it is accepted policy and many staff refuse to apply for promotion because they feel they have no chance against a staff member who is in the “click”.¹⁷

Mr Richardson advised the Committee that he had not been in direct contact with the authors of the emails.

Apprehended Violence Order

- 2.15** The Inspector General’s concern about the Department’s failure to progress the investigation was also raised in relation to a second matter. As has been reported publicly, the then Assistant Commissioner Woodham took out an apprehended violence order (AVO) against an officer of his Department, Mr John Smith in May 2000.
- 2.16** The facts situation is complicated, and while outlined in the amended in camera transcript published by the Committee, the identity of persons involved has not been revealed by the Committee because of the sensitive nature of some of the material, which includes allegations of sexual misconduct. The investigations of the claims of sexual misconduct which preceded the application for an AVO were conducted by Department officers. When the earlier investigations into the sexual misconduct allegations were brought to the attention of the Inspector General, Mr Le Compte expressed some concerns as to how the investigation had been conducted.

Mr LE COMPTE: We commenced a process of investigation, but it was not completed because it had not been completed at the time we had the issue about Crown law advice. Getting back to the issue—

The Hon. JOHN RYAN: Were the investigations conducted by Person F sufficiently independent of the oversight and control of Mr Woodham, in your view?

Mr LE COMPTE: There are two issues. Firstly, I was not investigating the matter to determine what had actually taken place between whom. I was looking at the matter in the context of whether the investigation was undertaken appropriately. My view is, on a preliminary basis and without having completed my own investigation, that there are some serious flaws in the way it was undertaken.

The Hon. JOHN RYAN: What are those serious flaws?

Mr LE COMPTE: In the sense that Mr Woodham commenced the investigation himself, and it related to his partner. This was also undertaken in the context that Person D, who was the line manager, if you like, was totally opposed to that approach.

¹⁷ Richardson Evidence 12 April 2002 p22.

... The issue for me was that this matter involved Mr Woodham very closely, and the people conducting the investigation were people who were employees of the department and under the division for whom Mr Woodham was responsible. The other issues are that a number of people who were working in the Z office of the department, who had fielded phone calls in connection with these allegations of contact between Person B and Person A, were not interviewed at all. Two of them were, I take that back. Two were interviewed, but a number of others who, apparently, could have provided information were not interviewed.

The Hon. JOHN RYAN: It is a fact that one of the people who have provided information was a person who admitted assisting Person A to make contact with Person B at his home, and assisted in a manner that was designed to ensure that Person B's wife was not aware of that contact taking place?

Mr LE COMPTE: Yes, I think that is correct, and by clarification, my recollection is that the officer who was the subject of the original allegations had been involved in that process, but when she was being interviewed by Person F and wished to extrapolate on those matters, she was not able to bring forward that information. There was another person who worked—

The Hon. JOHN RYAN: She wanted to make that admission and give that evidence, but she was prevented from doing it?

Mr LE COMPTE: It would seem that she was not able to get that information across in the interview process with Person F. There was another person with Person A in a different correctional centre who said they had made a number of calls and were aware that Person A had made calls between Person B and Person A. Whether they were in a work-related matter or some other connection is another issue. However, that person was not interviewed¹⁸

2.17 Mr Griffin from the Office of the Inspector General, observed:

What I can say is that in terms of investigation process it certainly was not done to its fullest degree. There were certainly a number of witnesses at the Z office who were subsequently interviewed by GIO as a result of a workers compensation claim submitted subsequently by Person B who were indeed interviewed. These people would have provided supportive evidence or information in relation to Person B's allegations that may or may not have ended in a different result in terms of investigation. But the investigation certainly did not proceed along what I thought to be appropriate lines of inquiry¹⁹

2.18 The Committee's primary concern with both the investigation into the sexual misconduct allegations and the staff selection matter is the apparent lack of depth of the investigation into the incidents, failure to collect all relevant evidence and apparent lack of impartiality in the investigations that were conducted. The Committee believes these matters warrant further investigation, particularly as Mr Le CompTE has indicated that he has material on these matters which have not yet been viewed either by the ICAC²⁰ or the Minister.²¹ For

¹⁸ Le CompTE Evidence 2 May 2002 amended transcript p3-4.

¹⁹ Griffin Evidence 2 May 2002, amended transcript p4.

²⁰ Le CompTE Evidence 2 May 2002 amended transcript p.

²¹ Le CompTE Evidence 2 May 2002 p20.

that reason the Committee has determined to make recommendations, which appear below, to refer the matters to the ICAC for further investigation.

The powers of the Inspector General of Corrective Services

2.19 The terms of reference for this inquiry did not specifically address the powers of the Inspector General of Corrective Services, although both terms (a) and (b) include matters which come within the responsibility of that officer. During the inquiry the powers of the Inspector General became an issue, as Mr Le Compte outlined the limitations on his powers to investigate a matter which had been referred back to the Department by the ICAC for further investigation.

2.20 The function of the Inspector General are set out in the *Crimes (Administration of Sentences) Act 1999* (NSW), under s 213:

- (1) *The principal functions of the Inspector-General are (subject to this Part):*
- (a) *to investigate the Department's operations and the conduct of the Department's officers, and*
 - (b) *to investigate and attempt to resolve complaints made by any person relating to matters within the Department's administration, and*
 - (c) *to encourage the mediation and informal resolution of complaints relating to matters within the Department's administration, and*
 - (d) *to train Official Visitors, and*
 - (e) *to examine reports of Official Visitors referred to the Inspector-General by the Minister and to investigate or comment on those reports, and*
 - (f) *to examine reports received from monitors appointed under section 242 and to investigate or comment on those reports, and*
 - (g) *to examine reports received from community advisory councils appointed under section 243 and make recommendations to the Minister in relation to those reports, and*
 - (h) *to investigate any matter within the administration of the Department if directed to do so by the Minister, and*
 - (i) *to promote integrity and professionalism among the Department's officers, and*
 - (j) *to assess the effectiveness and appropriateness of the procedures of the Department, and*
 - (k) *to provide independent monitoring and auditing of contracts entered into between the Department and private contractors, and*
 - (l) *to oversee contracts for community-based post-release services, and*
 - (m) *to make recommendations to the Minister on ways in which the procedures of the Department can be improved, and*

(n) *to facilitate coronial inquiries into deaths in correctional centres.*

2.21 Mr Le Compte explained how these functions related to the terms of reference:

I am also required to investigate the conduct of the department's officers. Within that context, I also have a responsibility to investigate and to attempt to resolve complaints made by any person relating to matters within the department's administration. There are limitations on the power or responsibility of me to investigate complaints, and I will deal with those at the conclusion of this section. Within that context, I have the responsibility to encourage the mediation and informal resolution of complaints relating to matters within the department's administration...

Another important component of the functions is to promote integrity and professionalism among the department's officers. That is an issue with which I have been significantly involved since commencing my operations. Consistent with that, one of the other functions is to assess the effectiveness and the appropriateness of the procedures of the department. That is another important area that I have been working on in conjunction with other agencies as well as with the department itself.²²

2.22 The powers given to the Inspector General to undertake his duties are set out in s215 of the Act, and include the power to recommend the taking of disciplinary action or criminal proceedings against any of the Department's officers and the power to require any of the Department's officers to attend and answer questions or produce documents. However the problem identified by Mr Le Compte during this inquiry is with the limitations on the powers set out in s217 and s218. Section 217 prevents the Inspector General investigating a complaint that could become the subject of a complaint under the *Ombudsman Act 1974* (NSW), unless the Inspector General has entered into prior arrangements with the Ombudsman's office. Section 218 refers to the relationship with the ICAC, and states:

- (1) *The Inspector-General has the same duty to report to the Independent Commission Against Corruption (the **Commission**) any matter that the Inspector-General suspects on reasonable grounds concerns or may concern corrupt conduct within the meaning of the Independent Commission Against Corruption Act 1988 as the principal officer of a public authority has under section 11 of that Act.*
- (2) *The Inspector-General must not exercise functions in relation to any such matter unless authorised to do so by arrangements entered into under this section.*
- (3) *The Inspector-General and the Commission may enter into arrangements regarding:*
 - (a) *matters about which the Commission will notify the Inspector-General where the Commission suspects that an officer of the Department is or may be guilty of misconduct, and*
 - (b) *the handling of matters by the Inspector-General that may involve misconduct of an officer of the Department and that could be dealt with by the Commission under the Independent Commission Against Corruption Act 1988.*

²² Le Compte Evidence 2 May 2002 p4.

- (4) *The Inspector-General and the Commission are empowered and required to exercise their functions in conformity with any relevant arrangements entered into under this section.*

2.23

The problem for the Inspector General arose from the situation which occurred with the referral of the matter regarding the selection of a Governor, referred to earlier in this report. The matter was referred back to the Department because there was insufficient information. After the then Commissioner and the Inspector General sought advice on the powers of the Inspector General to resume the investigation, it became apparent that it was for the Department to determine how the matter should be pursued, rather than the Inspector General. Mr Le Compte argued that this advice differed from earlier Crown Solicitor's advice:

In relation to those two areas, by way of clarification on the Crown Solicitor's side, the Crown Solicitor felt initially that if I had entered into arrangements with the Ombudsman and the ICAC, those arrangements would override the other limitations on my functions. Subsequently, in the later advice, the Crown Solicitor thought that he preferred the view that they were subject to the limitations, which means that in effect if I receive a complaint which falls within the jurisdiction of either the Ombudsman or the ICAC, and I refer it to those agencies, and they wish me to deal with the matter, if it falls within the charter of an investigation unit within the department, I must refer it to that investigation unit unless the Minister says I should be directed to undertake the complaint, and that covers both of those agencies.

So, in short, the complaint handling function of the Inspector-General is limited to a situation where I have to hand off all complaints that I receive to either the Ombudsman, the ICAC or the department unless the Minister otherwise determines.²³

2.24

In hearing evidence from Mr Le Compte, it became clear that while there had been allegations of corrupt conduct which he determined warranted further investigation, and that, to his knowledge, no such investigation has been conducted. Furthermore, Mr Le Compte informed the Committee that ICAC had informed him that if, on the basis of the information he had provided, the facts could be substantiated they may involve corrupt conduct.²⁴

2.25

The Committee is concerned that the allegations which had been referred back from the ICAC may not been investigated to a final outcome. The Inspector General has indicated that he is restricted in doing so, and the Department of Corrective Services has previously indicated to the Inspector General that it considers the information does not warrant an investigation.

2.26

Based upon the example provided to it of the powers in operation, the Committee believes the current limitations on the powers of the Inspector General to conduct an investigation under s217 and s218 of the *Crimes (Administration of Sentences) Act* require review. The Committee is aware that the Premier's Department is currently reviewing the Office of the Inspector General, which may also involve a review of statutory powers. However as the Committee intends to refer the terms of reference of this inquiry to the ICAC, it believes

²³ Le Compte Evidence 2 May 2002 p4.

²⁴ Le Compte Evidence 2 May 2002 p4.

that the Government should consider amending the current limitations in s217 and 218, which appear to inhibit the ability of the Inspector General to examine matters of staff appointments (term of reference (a)) and the integrity and professionalism of associations between senior officers and prisoners (term of reference (b)).

Reference of inquiry to the ICAC

Parliamentary Committees and investigation of matters of misconduct

- 2.27** The scrutiny of the conduct of public administration is part of the terms of reference establishing the General Purpose Standing Committees of the Legislative Council. In proceeding with the preliminary hearings of the Inquiry, the Committee considered that certain issues relating to the public administration of the Department of Corrective Services warranted examination. The Committee was mindful of a function of parliamentary committees in allowing citizens to air grievances about government and to bring to light possible mistreatment of citizens by government or their agencies. While the Committee feels that it has provided the appropriate medium for the issues to be raised, it has concluded, following the evidence of the Inspector General, that it is not the appropriate body to continue the investigation considering the nature and complexity of the issues raised.
- 2.28** The nature of the two incidents raised with the committee involving potential misconduct require thorough investigation of a type which parliamentary committees, with their limited investigatory powers, are not equipped to undertake. If the inquiry was to proceed and submissions called, it is possible that other similar incidents would be presented to the Committee, each requiring proper investigation to ensure those mentioned were accorded procedural fairness.
- 2.29** A similar situation was faced by a Senate inquiry into claims of sexual harassment in the Australian Defence Force.²⁵ Many of the matters raised were referred to the Sex Discrimination Commissioner as a more appropriate agency to investigate the veracity of the complaints. To ensure procedural fairness to those named many submissions were kept confidential at least so far as they contained adverse comment on individuals, and much of the evidence was heard in camera, contrary to the usual intent of a parliamentary inquiry to put evidence in the public domain. Commenting on the approach taken, the Senate Committee said:

This approach reflected the Committee's wish to strike a fair balance between receiving information to enable it to fulfil its terms of reference and receiving information that could prejudice the right of individuals to natural justice. It acknowledged the limitations on the capacity of a Parliamentary Committee to assess, within the time-frame for the inquiry and the resources available to the Committee, all the claims and counter claims that are likely to be made in relation

²⁵ Senate Standing Committee on Defence, Foreign Affairs and Trade, *Report into Sexual Harassment in the Australian Defence Force* August 1994.

to individual complaints... and removed the possibility of unsubstantiated allegations being protected by parliamentary privilege.²⁶

- 2.30** Mindful of these types of concerns, General Purpose Standing Committee No 3 resolved on 2 May 2002 that an authority with the appropriate powers and experience should investigate the relevant evidence given to the inquiry. The Committee resolved unanimously that the Independent Commission Against Corruption was the appropriate body to further investigate the issues raised, as that agency had the investigatory functions and resources to ensure these matters were fully examined.

Referral to Independent Commission Against Corruption

- 2.31** As referred to earlier, the Committee recognises that the ICAC has previously decided against conducting an investigation into certain issues referred to during the Inquiry. However, the Committee notes the restrictions on the Inspector General's powers to conduct certain investigations, and that the ICAC has previously informed the Inspector General that if, on the basis of the information he had provided, the facts could be substantiated they may involve corrupt conduct. The Committee has also heard evidence from Mr Le Compte that suggests further information is now available since the Inspector General's previous referral of the matter to the ICAC.
- 2.32** Following the 2 May hearing the Inspector General provided on a confidential basis, at the Committee's request, copies of all files relating to the two matters in which it is claimed there has been an incomplete investigation. To facilitate a referral to the ICAC, the Committee will table, but not publish, all these files in the House, as well as the in camera transcripts of the inquiry and all other confidential material presented to the Committee during the inquiry.
- 2.33** The Committee notes that the focus of the ICAC's activity is to address systemic corruption. However the terms of reference for the Committee's inquiry outline potential systemic problems. The Committee notes the ICAC's recent initiative, the Corruption Resistance Review (CRR) program. This program assesses the strength of an agency's key corruption resistance measures. It then suggests ways to improve organisational integrity and corruption resistance.²⁷ In referring the issues raised during the inquiry to ICAC, the Committee proposes that it also assess the strength of the Department of Corrective Services' key corruption resistance through this CRR program.
- 2.34** In recommending the referral the Committee wishes to clarify the nature of the referral made. Section 73 (1) of the *Independent Commission Against Corruption Act 1988* (NSW) provides that:

Both Houses of Parliament may, by resolution of each House, refer to the Commission any matter as referred to in section 13.

²⁶ Senate Standing Committee on Defence, Foreign Affairs and Trade, *Report into Sexual Harassment in the Australian Defence Force* August 1994 p329.

²⁷ See Independent Commission Against Corruption "Corruption Matters" *ICAC newsletter* No 20, p6.

- 2.35** Once this referral has been made s73(2) makes it the duty of the Commission to fully investigate the matter. The current referral, however, is not made under this section. The referral is recommended by General Purpose Standing Committee No.3, but will not be made directly by the Committee. This report will be tabled in the Legislative Council, and a motion moved that the House adopt the report. The House, if it adopts the report, will then need to choose whether to refer the matter directly or whether to report the matter to the Legislative Assembly for a referral under s73(1). It is not the intention of the Committee to recommend a referral under s73(1). However following the report being tabled that would be a matter for the House.
- 2.36** If the referral is made by the House rather than the Parliament, the ICAC is able to consider the recommendation under s20 of its Act, which provides a discretion to the Commission to conduct an investigation. The Committee urges the ICAC to examine the matters fully, including the issue of the powers of the Inspector General to investigate a matter referred back to the Department by the ICAC.

Recommendation 1

That the terms of reference of the inquiry by General Purpose Standing Committee No.3 into Aspects of the Department of Corrective Services Report and the evidence and supporting documents received by the Committee during the course of the inquiry be referred to the Independent Commission Against Corruption.

That the ICAC investigate the allegations and issues raised in the evidence regarding the two individual incidents, and whether these form part of a systemic problem within the Department.

Recommendation 2

That as part of its inquiry into these matters, the ICAC, in accordance with its Corruption Resistance Review program, assess the strength of the Department of Corrective Services' key corruption resistance measures and make appropriate recommendations.

Recommendation 3

That the Government should consider amending s217 and s218 of the *Crimes (Administration of Sentences) Act 1999* so as to permit the Inspector General to pursue investigations referred back to the Department of Corrective Services by the ICAC or the Ombudsman.

Appendix 1

List of Witnesses

List of Witnesses

12 April 2002 (*Parliament House, Sydney*)

The Hon Richard Amery MP Minister for Corrective Services

Mr Michael Richardson MP Shadow Minister for Corrective Services

2 May 2002 (*Parliament House, Sydney*)

Mr Lindsay Le Compte Inspector General
Department of Corrective Services

Mr Steve Griffin Director, Operations and Review
Office of Inspector General of Corrective Services

Appendix 2

Answers to Questions on Notice

Answers to Questions on Notice

Responses from the Hon Richard Amery MP, Minister for Corrective Services received by the Committee on 1 May 2002 to questions taken on notice during the hearing on 12 April 2002.

Question 1

You indicated (*transcript, page 5*) in reference to the appointment of Commissioner Woodham that you would supply the Committee with three dates:

- the date of your appointment as Minister,
- the date the Commissioner's appointment went to Cabinet, and
- the date of the Executive Council approval.

Answer:

- The date of my appointment as Minister - Wednesday, 21 November 2002.
- The Commissioner's appointment was approved by Cabinet on 18 December 2001.
- The Executive Council approved of Mr Woodham's appointment on 9 January 2002.

A copy of the Government Gazette and letter of appointment are attached. (*Annexure 1*)

Question 2

You informed the Committee that you would identify any academic qualifications that Mr Woodham may have had prior to his appointment as Commissioner (*transcript, page 6*).

Answer:

Mr Woodham has completed the following education and professional training:

- Course for Senior Executive in Management - Australian Police Staff College
- Industrial Management Certificate (TAFE)
- All in-service training course for correctional officers including Senior Prison Officers Course and Chief Prison Officers Course.

The advertisement for the position of Commissioner did not require academic qualifications.

Question 3

In reference to the position of Commissioner and the recommendation of candidates by Cabinet Office, you indicated you would take on notice and inform the Committee whether the Cabinet Office process had been completed and presented to Mr Watkins prior to the change in office (*transcript, page 7*).

Answer:

The following additional information is provided in relation to the filling of the vacancy:

The position of Commissioner was advertised by the Premier's Department on 22 and 25 August 2001. The process was handled by the Director General of Premier's Department, Dr Col Gellatly as part of the standard procedure for the selection of a chief executive officer within the NSW Public Service.

The last day of duty of former Commissioner, Dr Leo Keliher with the Department of Corrective Services was 2 November 2001. At that time, the former Minister John Watkins recommended for the approval of Her Excellency the governor and the Executive Council that Mr Woodham be appointed as Acting Commissioner of Corrective Services for a period of three months, effective from 3 November 2001. The recommendation was approved by the Executive Council and the Governor on 31 October 2001. (*Annexure 2*)

Question 4

You indicated to the Committee (*transcript, page 8 & 16*) that you would be able to supply the Committee with the appropriate documents and details of how the senior positions within the Department of Corrective Services (referred to in the Inquiry's terms of reference) are officially recruited and the process, including the:

- criteria for the selection of the Commissioner and the other relevant senior officers,
- qualifications which are required, and
- process undertaken.

Answer:

Vacant positions in the Public Sector can be filled in a number of ways and the method chosen will depend on whether the position is to be filled permanently or temporarily. The New South Wales Government Personnel Handbook sets out the recruitment, selection and appointment process for filling of vacancies.

The Personnel Handbook can be accessed on the Internet from: <<http://www.premiers.nsw.gov.au>>.

Selection for NSW Government jobs is based on merit.

This means that the person whose skills, knowledge and experience best match the requirements of the advertisement will be selected.

All NSW Government job advertisements describe the role of the position and list 'selection criteria' which describe the skills, knowledge and experience needed to do the job.

"The Public Sector Management Act 1988 sets merit as the criterion for employee selection. The Act describes MERIT as the abilities, qualifications, experience, standard of work performance and personal qualities of applicants considered in relation to the work to be done..." (New South Wales Government Personnel Handbook - 2.2.5).

Information relating to the recruitment and selection process for the Commissioner and other relevant senior officers is as follows:

Commissioner

The advertising and recruitment action for the Commissioner was undertaken by the Premier's Department.

- Selection criteria—

The selection criteria which appeared in the advertisement for Commissioner was as follows: *The successful applicant will demonstrate a record of achievement at chief or senior executive management level including strategic leadership, people and financial management skills to ensure the effective utilisation of resources, for leading staff in the achievement of objectives, and for managing conflicting priorities, time frames and complex issues. Common Selection Criteria also apply.*

A copy of the advertisement for the position of Commissioner is attached. (*Annexure 3*)

- Qualifications—

The advertisement for Commissioner outlines the selection criteria for the position and no additional qualifications are required.

- Process undertaken—

The position was advertised in the Public Service Notices on 22 August 2001 and the press on 25 August 2001. The closing date for applications was 7 September 2001.

Senior Assistant Commissioner, Inmate and Custodial Services

On 31 October 2001 the Executive Council and the Governor approved that Mr Woodham be appointed Acting Commissioner of Corrective Services for a period of three months, effective from 3 November 2001. At that time, Mr Woodham's contracted position was Senior Assistant Commissioner, Inmate and Custodial Services.

The position of Senior Assistant Commissioner, Inmate and Custodial Services was initially advertised within the Department of Corrective Services as an expression of interest for the temporary vacancy.

Following the appointment of Mr Woodham to the position of Commissioner, the position of Senior Assistant Commissioner, Inmate and Custodial Services and other senior executive positions were not permanently filled whilst a re-evaluation of these positions was being undertaken. When the re-evaluation of the position of Senior Assistant Commissioner, Inmate and Custodial Services had been completed the position was then advertised as a permanent vacancy.

- Selection criteria for the temporary vacancy—

The expression of interest required that applicants interested in the vacancy complete a short application to demonstrate their experience and skills in relation to the following selection criteria:

- *Leadership, conceptual, analytical, decision making, negotiation, representational and consultation skills relevant to a correctional operational environment.*
- *Knowledge of current issues within the Department.*
- *Operational and business change management.*
- *Administration of a large and diverse budget.*

- *Commitment to equal employment, occupational health and safety and the principles of cultural diversity.*

The advertisement for the position is attached. (*Annexure 4*)

- Qualifications required for the position—

The advertisement for the position outlines the selection criteria and no additional qualifications are required.

- Process undertaken for the temporary vacancy—

On 19 October 2001 an e-mail was sent to all Corrective Services Board of Management members, SES Officers, Commanders and Regional Directors calling for expressions of interest to act in the position of Senior Assistant Commissioner, Inmate and Custodial Services. The closing date for submitting an expression of interest was 30 October 2001.

Expressions of interest were received from Mr John KIok, Regional Commander, Chief Superintendent, Metropolitan Region (19110/01) and Mr Ken Middlebrook, Commander, Chief Superintendent, Security & Investigations (29/10/01).

The applications for the position were considered by the then Commissioner, Dr Keliher.

On 30 October 2001, then Commissioner Keliher sent a hand written memo to Mr Woodham advising that both officers should be given the opportunity to act in the position - timing to suit the Department, the two officers and Mr Woodham as Acting Commissioner.

On 27 November 2001, a late application for the position was received from Mr Ian McLean, Regional Commander, Chief Superintendent, North West Region. Due to the lateness, no further action was taken with this application.

Mr KIok and Mr Middlebrook have each acted in the position as follows: -

- Mr Klok - 5/11/01 to 16/11/01 and 03/12/01 to date.
- Mr Middlebrook - 19/11/01 to 02/12/01

- Selection criteria for the permanent vacancy—

Selection criteria which appeared in the advertisement for the vacancy was as follows: Extensive knowledge of correctional operations. A proven record of achievement which demonstrates leadership, sound judgement, relevant management expertise at senior executive level and involvement in high level and complex negotiations on a broad range of issues. Extensive management experience in analysing and responding to significant issues in a correctional or similar environment. Excellent communication, consultation and negotiation skills. Demonstrated high level strategic planning, budgetary and human resource management skills. Knowledge and commitment to contemporary correctional philosophies. Demonstrated high level of personal and professional integrity. Common Selection Criteria also apply.

A copy of the advertisement is attached. (*Annexure 5*)

- Qualifications required for the position—

The advertisement for the position outlines the selection criteria and no additional qualifications are required.

- Process undertaken for the permanent vacancy—

The position description was reviewed and updated. The vacancy was advertised in the

Public Service Notices on 3 April 2002, the Corrective Service Bulletin on 4 April 2002 and the press on 6 April 2002. Closing date for applications was 19 April 2002.

Action is now being taken to convene a selection panel so that applications can be considered.

Assistant Commissioner, Strategic Development

Former Commissioner Kelihier identified the need for a Strategic Development Project to be undertaken to position the Department to meet future challenges. The position of Assistant Commissioner, Strategic Development was created as a temporary position which was to exist for a minimum two year period. Ms Brenda Smith who at that time was the Assistant Commissioner, Probation & Parole, was temporarily appointed to the position to manage the project, effective from 19 June 2000.

As part of the recent review of the Senior Executive structure the role of Assistant Commissioner, Strategic Development has now been merged with the duties of the vacant position of Executive Director, Office of the Commissioner following the retirement of the former occupant of the position.

A new position description titled Assistant Commissioner, Office of the Commissioner has been developed and is currently being evaluated.

Ms Smith has been performing the duties of the proposed new position since 4 March 2002.

Assistant Commissioner, Probation & Parole

Prior to Ms Smith's appointment to the position of Assistant Commissioner, Strategic Development, the position of Assistant Commissioner, Probation & Parole had been filled by the Regional Directors, Probation and Parole on a rotational basis. The vacancy occurred as Ms Smith had relieved in the position of Executive Director, Office of the Commissioner while the contracted officer was on extended leave.

These rotational arrangements continued until the position of Assistant Commissioner, Probation & Parole was advertised and an appointment made to the temporary vacancy.

- Selection criteria for the temporary vacancy—

Significant experience in a senior management role, preferably with successful consolidated experience in operational management in corrections or a related field. Thorough knowledge and understanding of corrections and criminology. Current and extensive knowledge of community-based corrections and criminology. Sound experience in policy and planning, program development, financial management and public sector administration. Excellent oral, written communication and interpersonal skills. Conceptual and analytical skills. Tertiary qualifications in a relevant discipline such as business administration, management, social sciences or equivalent experience. Demonstrated commitment and capacity to implement EEC, Oh&S policies and the charter of principles for a culturally diverse society.

A copy of the advertisement for the position is attached. (Annexure 6)

- Qualifications required for the position—

The advertisement outlines the selection criteria for the position and no additional qualifications are required.

- Process undertaken for temporary vacancy—

The temporary vacancy was advertised in the Public Notices and the press. Closing date for applications was 22 September 2000.

There were three applicants and a selection panel for the position was convened by then Commissioner Keliher. Ms Catriona McComish was the successful applicant and was temporarily appointed to the position in an acting capacity for 12 months, effective from 18 December 2000.

Ms McComish's temporary appointment has been extended while the Senior Executive structure is being reviewed.

Ms McComish was originally contracted as the Assistant Commissioner, Inmate Management.

Assistant Commissioner, Inmate Management

This temporary vacancy occurred as a result of the temporary appointment of Ms Catriona McComish as Acting Assistant Commissioner, Probation & Parole.

- Selection criteria for the temporary vacancy—

Significant and proven organisational and management skills at a senior executive level in justice and/or human service delivery agency. Proven experience in the leadership of a large and diverse organisation. Superior problem solving and decision making skills and a proven capacity to determine a range of critical operational and safety issues as they affect offender management. Extensive knowledge and understanding of the critical issues facing correctional services management and inmate development. Successful management and deployment of financial, staffing and facility resources and in budget management. Superior interpersonal skills to lead staff, represent the organisation externally and resolve difficulties and conflicts. High level skills in the preparation and presentation of major departmental reports and keynote addresses. Completion of, or willingness and capacity to undertake degree level qualifications in a relevant area such as health, education, social or behavioural sciences. Post graduate training and qualifications in related disciplines and/or management are highly desirable. Common selection criteria also apply.

A copy of the advertisement for the position is attached. (Annexure 7)

- Qualifications required for the position—

The advertisement for the position outlines the selection criteria and no additional qualifications are required.

- Process undertaken for temporary vacancy—

The temporary vacancy was advertised in the Public Notices on 29 November 2000. Closing date for applications was 5 December 2000.

There were three applicants and a selection panel for the position was convened by then Commissioner Keliher. Mr Luke Grant was the successful applicant and was temporarily appointed to the position in an acting capacity for 12 months, effective from 18 December 2000.

Mr Grant's temporary appointment has been extended while the Senior Executive structure is being reviewed.

Mr Grant's substantive position is Director, Inmate Classification and Programs (Senior Officer Grade 2).

Governor/Superintendent

Since January 2000 there have been 21 selection panels for positions of Governor/Superintendent.

- Selection criteria—

The selection criteria for positions of Governor/Superintendent are generic. This is demonstrated in the advertisement for the position of Governor, Superintendent Grade 2, Cooma Correctional Centre.

A copy of the advertisement is attached. (*Annexure 8*)

- Qualifications—

The advertisement for Governor/Superintendent outlines the selection criteria for the position and no additional qualifications are required.

- Process undertaken—

Permanent vacancies are advertised in the Public Service Notices, Corrective Services Bulletin and the press.

Question 5

You indicated to the Committee that you would determine whether information was available in relation to the number of times Mr Woodham has sat on selection panels for the Governor of a gaol.

Furthermore, in reference to a question by Ms Lee Rhiannon MLC, can you inform the Committee as to the number of selection panels for Governor that Mr Woodham has sat on (from the date Mr Woodham first sat on a panel for a Governor) compared to the total number of selection panels for Governors since that date? (*transcript, page 13 & 16*).

Answer:

Mr Woodham has been a member of selection panels for positions of Governor/Superintendent since the late 1980s.

Recruitment records are available since January 2000.

It should be noted that in accordance with the approved records disposal schedule, recruitment papers can be disposed of after 12 months.

Since January 2000, Mr Woodham has sat on 10 selection panels for Governor/Superintendent including 2 selection panels where he was the convener.

Since January 2000 there have been 21 selection panels for Governor/Superintendent.

Appendix 3

Minutes of Proceedings

Minutes of Proceedings

Minutes No 49

20 March 2002

At Parliament House at 1.10pm

1. Members Present

The Hon Helen Sham-Ho MLC (Chair)

The Hon Henry Tsang MLC

The Hon Ian West MLC

The Hon Peter Primrose MLC

The Hon Greg Pearce MLC

The Hon Jim Samios MLC

Ms Lee Rhiannon MLC

2. Confirmation of minutes

Resolved on motion of Mr Pearce that the minutes of meeting number 48 as amended be confirmed.

3. ***

4. Consideration of proposed reference for inquiry into aspects of the Department of Corrective Services.

The Committee agreed to defer consideration of the terms of reference until the next meeting.

5. Next meeting.

The Committee adjourned at 1.45pm, until 10.30am Thursday, 21 March 2002.

Warren Cahill

Clerk to the Committee

Minutes No 50

21 March 2002

At Parliament House at 10.30am

1. Members Present

The Hon Helen Sham-Ho MLC (Chair)

The Hon John Hatzistergos MLC

The Hon Ian West MLC

The Hon Peter Primrose MLC

The Hon Greg Pearce MLC

The Hon Jim Samios MLC

Ms Lee Rhiannon MLC

2. Confirmation of minutes

Resolved on motion of Hon Greg Pearce that the minutes of meeting number 49 be confirmed.

3. Consideration of proposed reference for inquiry into aspects of the Department of Corrective Services.

Under paragraph 3 of the resolution of 13 May 1999 establishing the Committee, the Committee considered the proposed reference for inquiry into aspects of the Department of Corrective Services.

Resolved on the motion of the Hon Jim Samios that the terms of reference as amended be confirmed. The terms of reference being:

That General Purpose Standing Committee No. 3 inquire into and report on:

- (a) the procedures for the appointment of the Commissioner, and assistant Commissioners and Governors of the Department Corrective Services, and circumstances relating to recent appointments.
- (b) whether associations between these senior officers in the Department of Corrective Services and prisoners are at all times appropriate, and undertaken with integrity and professionalism and whether proper disciplinary action is initiated when required.

4. Invite witnesses

That the Minister for Corrective Services and/or his representative and the Shadow Minister for Corrective Services be invited to attend before the Committee on 12 April 2002 at 10:00am and 11:15 am respectively.

5. Next meeting

The Committee adjourned at 10:45 am.

Warren Cahill

Clerk to the Committee

Minutes No 52

12 April 2002

At Waratah Room, Parliament House at 10.00am

1. Members Present

The Hon Helen Sham-Ho MLC (Chair)

The Hon Amanda Fazio MLC (Hatzistergos)

The Hon Ian West MLC

The Hon Peter Primrose MLC

The Hon Greg Pearce MLC

The Hon John Ryan MLC (Samios)

Ms Lee Rhiannon MLC

2. Substitutions

The Chair advised that she had been advised by the Government Whip that Ms Fazio would substitute for Mr Hatzistergos and that she had been advised by the Opposition Whip that Mr Ryan would substitute for Mr Samios (for the rest of the inquiry).

3. Inquiry into aspects of the Department of Corrective Services

The Committee deliberated.

Resolved, on the motion of Mr Primrose, that the witnesses be invited to give their evidence in public.

Resolved, on the motion of Ms Fazio that the minutes reflect that it was not possible to notify the public of this hearing in the usual manner.

The media, the public and the witness were admitted.

The Minister for Corrective Services, the Hon Richard Amery MP, was invited to give evidence.

Minister Amery tendered the following documents:

- Press Release from Mr Andrew Humpherson MP dated 11 January 2002
- Press Release from Minister for Corrective Services dated 11 January 2002-04-12

The witness withdrew.

Mr Michael Richardson MP, Shadow Minister for Corrective Services, was invited to give evidence.

Mr Richardson tendered the following documents:

- Chapters 5 and 11 of an 1993 ICAC report
- Transcript of Supreme Court judgement Ronald G Woodham v ICAC 25 June 1993
- Correspondence from the Inspector-General of Corrective Services 27 June 2001
- 2 emails from Corrective Services employees

Resolved, on motion of Mr Ryan, that should the Committee decide to publish the correspondence or the 2 emails that they first be checked to ensure all identifying references to the sources of the information be removed.

Mr Richardson requested that the Committee hear evidence in camera.

The media and the public withdrew.

Resolved, on the motion of Mr Ryan, that the Committee hear the evidence in camera.

[Mr West having been required to leave the meeting; Persons present other than Committee: Mr Warren Cahill, Mr Steven Reynolds, Mr Bayne McKissock (Legislative Council staff); Ms Janet McEwen, Ms Bernadette O'Connor (CAT reporting)]

The evidence concluded and the witness withdrew.

The Committee deliberated.

Resolved, on the motion of Ms Fazio, that the terms of reference and details of any future public hearings be placed on the Committee's website.

Resolved, on the motion of Mr Primrose, that the Committee does not proceed further with the inquiry until a deliberative meeting is held after the hearing on 2 May 2002; and that at that meeting the Committee consider whether some or all matters may be more appropriately referred to investigatory agencies.

Resolved, on the motion of Mr Primrose, that the Inspector General of Corrective Services be invited to give his evidence in public on 2 May 2002, but with the option given to all witnesses of requesting certain evidence be heard by the Committee in camera.

Resolved, on the motion of Mr Ryan, that, if necessary, the Inspector General be issued with a summons to appear.

4. Next meeting

The Committee adjourned at 12.45pm until 2.30pm on 2 May 2002 at Parliament House.

Steven Reynolds
Clerk to the Committee

Minutes No 53

2 May 2002

At Jubilee Room, Parliament House at 2.30pm

1. Members Present

The Hon Helen Sham-Ho MLC (Chair)

The Hon John Hatzistergos MLC

The Hon Ian West MLC

The Hon Peter Primrose MLC

The Hon Greg Pearce MLC

The Hon John Ryan MLC (Samios)

Ms Lee Rhiannon MLC

2. Inquiry into aspects of the Department of Corrective Services.

The Committee noted the letter from the Inspector General of Corrective Services, Mr Lindsay Le Compte dated 22 April 2002.

The media, the public and the witness were admitted.

The Inspector General of Corrective Services, Mr Lindsay Le Compte and the Director of Operations and Review, Mr Steve Griffin, were sworn and examined.

Mr Primrose raised an objection to certain evidence being heard in public.

The committee deliberated.

Resolved, on the motion of Mr Primrose, that the Committee hear the evidence in camera.

The media and the public withdrew.

[Persons present other than the Committee: Mr Warren Cahill, Mr Steven Reynolds, Mr Bayne McKissock, Ms Natasha O'Connor, Mr Charles (Legislative Council) Hansard]

The evidence concluded. The media and the public were re-admitted.

The evidence concluded and the witness withdrew.

The Committee deliberated.

3. Confirmation of Minutes

Resolved, on the motion of Mr Ryan, that the minutes of meeting no 52 be confirmed.

4. Issues Arising from 12 April and 2 May Hearings

Publication of Transcripts and tendered documents

Resolved, on the motion of Mr Primrose, that the Committee authorises the Clerk of the Committee to publish the transcript and tendered documents from the public hearing held on 12 April 2002, and the transcript of the public hearing held on 2 May 2002.

The Committee deliberated.

Resolved, on the motion of Mr Ryan, that the Committee authorises the Clerk of the Committee to publish an amended version, with identifying names and position titles removed, of the in camera evidence from the hearing of 2 May 2002

Potential adverse mention of Commissioner Woodham

The Committee deliberated.

Resolved, on the motion of Mr Primrose, that :

- (a) The Committee believes there has been adverse mention of Commissioner Woodham during evidence given by Mr Richardson on 12 April and Mr Le Compte on 2 May 2002; and adverse mention of former Commissioner Keliher by Mr Le Compte on 2 May 2002.; and consequently
- (b) The Chair should write to Mr Woodham and Mr Keliher on behalf of the Committee, offering them the opportunity to respond to the adverse mention either in writing or by way of appearance before the Committee.

The Committee deliberated.

Resolved, on the motion of Mr Primrose, that the Committee conclude its inquiry into the terms of reference by tabling a report referring the matters raised, including transcripts and other documents produced during the Committee's inquiry, to the Independent Commission Against Corruption for their further investigation.

Resolved, on the motion of Mr Ryan, that the ICAC be asked to provide the opportunity for public submissions to be made to assist it with its investigations into these matters. [check wording with John and Peter]

Correspondence

The Committee noted the following correspondence:

Letter dated 24 April 2002 from Minister for Corrective Services regarding hearing on 12 April 2002

Letter dated 22 April 2002 from Inspector General for Corrective Services regarding his appearance

Letter dated 18 April 2002 from Committee Director to Minister for Corrective Services identifying questions on notice arising from the hearing on 30 April 2002

Letter dated 26 April 2002 from Chair to Minister for Corrective Services responding to letter of 24 April 2002.

Letter dated 30 April 2002 from Chair to Inspector General for Corrective Services responding to letter of 22 May

5. Next meeting

The Committee adjourned at 5.01pm until Friday 24 May 2002 at Cabravale Diggers Club, Cabramatta.

Steven Reynolds
Clerk to the Committee

Minutes No 57

17 June 2002

At Room 1108, Parliament House, at 1.00pm

1. Members Present

The Hon Helen Sham-Ho MLC (Chair)
 The Hon John Hatzistergos MLC
 The Hon Ian West MLC
 The Hon Peter Primrose MLC
 The Hon Richard Colless MLC (items 2-3)
 The Hon Greg Pearce MLC
 Ms Lee Rhiannon MLC
 The Hon John Ryan MLC (item 4)

2. Previous Minutes

Resolved, on the motion of Mr West, that the minutes of meetings no 53,54,55 and 56 be confirmed.

3. *****4. Corrective Services Inquiry*****Adverse Mention***

The Committee noted the responses to adverse mention received from Commissioner Woodham and Dr Keliher.

Chair's Draft Report

The Committee deferred consideration of this in light of the responses received from Woodham and Kelliher, and the need to obtain the second Crown Law Solicitor's advice.

Unauthorised Disclosure from 2 May 2002

Mr Ryan tabled his response to the special investigation.

He explained to the Committee that following the hearing on 2 May 2002 he visited the shadow Minister for Corrective Services, Mr Richardson, and briefed him on the Committee's decision to refer the subject matter of the inquiry to the ICAC. He believed it was important for the shadow minister to be aware of the future direction of the inquiry; Mr Ryan said that he was unaware that a report would be prepared as the mechanism for the referral and that by informing Mr Richardson he was technically disclosing a report recommendation. [check this wording with John Ryan] Mr Ryan apologised for his inadvertent disclosure. He advised he was not aware of

any disclosure of in camera evidence, and suggested the *Herald* article may be simply a reporting that there was in camera evidence, rather than any disclosure of its content.

The Committee accepted the explanation and agreed that no further action was required.

5. Next meeting

The Committee adjourned at 1.05pm until 5.30pm on Thursday, 20 June 2002 (Budget Estimates).

Steven Reynolds
Clerk to the Committee

Minutes No 63

1 July 2002

At Room 1108, Parliament House, at 11:00 am

1. Members Present

The Hon Helen Sham-Ho MLC (Chair)
The Hon John Hatzistergos MLC
The Hon Ian West MLC
The Hon Peter Primrose MLC
The Hon James Samios MLC (items 2-4)
The Hon Greg Pearce MLC
Ms Lee Rhiannon MLC
The Hon John Ryan MLC (item 5)

2. Substitutions

The Chair advised that the Opposition whip had informed her that Mr Samios would be representing Mr Colless.

3. Previous Minutes

Resolved, on the motion of Ms Rhiannon, that the minutes of meeting no 57 be confirmed.

4. ***

5. Corrective Services Inquiry

[Mr Samios left the meeting to be replaced by Mr Ryan]

Adverse Mention

The Committee Director tabled an email from Paul Nash, corporate counsel for the Department of Corrective Services, requesting that the responses to adverse mention received from Commissioner Woodham and Dr Keliher remain confidential to the Committee and to the ICAC, should the matter be referred.

Chair's Draft Report

The Chair tabled her revised draft report which, having been circulated, was taken as being read.

Chapter One read.

The Committee deliberated.

Resolved, on the motion of Mr Hatzistergos, that the last sentence of paragraph 1.9 be deleted.

Resolved, on the motion of Mr Ryan, that Chapter One as amended be adopted, subject to clarification of the powers of the Committee to make a referral to the ICAC.

Chapter Two read.

The Committee deliberated.

Resolved, on the motion of Mr Hatzistergos, that the word “corrupt” be deleted from the second sentence of paragraph 2.1.

Resolved, on the motion of Mr Hatzistergos, that the word “workplace” be replaced with “work related” in the first sentence of paragraph 2.5.

Resolved, on the motion of Mr Hatzistergos, that the word “explained” be replaced with “contended” in the second sentence of paragraph 2.9.

Resolved, on the motion of Mr Primrose, that the following final sentence be added to paragraph 2.15:

Mr Richardson advised the Committee that he had not been in direct contact with the authors of the emails.

Mr Hatzistergos moved that that the word “apparent” be deleted wherever it appears in the first sentence of paragraph 2.19, and replaced with “alleged”.

The Committee deliberated.

Question put.

Ayes: Mr Hatzistergos
Mr Primrose
Mr West

Noes Mrs Sham-Ho
Mr Pearce
Mr Ryan
Ms Rhiannon

Question resolved in the negative.

Resolved, on the motion of Mr Hatzistergos, that the word “amend” in the last sentence of paragraph 2.27 be replaced with the words “consider amending”.

Mr Primrose advised the meeting that he had written to the Clerk Assistant Committees seeking clarification of the powers of a Committee to refer a matter to the ICAC, or other agencies, and whether it was more appropriate for the House itself to make a referral.

The Clerk Assistant Committees advised the Committee that the preferred process should be for the Committee to recommend to the House that a referral be made. The House would then need to consider whether it will adopt the recommendation for a referral, and whether to make

the referral itself or seek a joint referral with the Legislative Assembly as outlined under the *ICAC Act*.

Resolved, on the motion of Mr Primrose, that paragraphs 2.28 to 2.37 and paragraphs 1.8 be reviewed by the Clerk Assistant Committees in view of this advice, and rewritten to reflect the approach recommended.

In view of Mr Primrose's motion, the Committee agreed to reconsider the report at a final deliberative.

Resolved, on the motion of Mr Hatzistergos, that in Recommendation 3 the word "amend" be replaced with "consider amending".

Resolved, on the motion of Mr Primrose, that the report when adopted be tabled out of session if required, and distributed to interested parties including the ICAC, but that no referral be made until the House has the opportunity to consider the recommendations of the report.

Resolved, on the motion of Mr Primrose, that any associated documents with the inquiry be tabled but not made public.

6. Next meeting

The Committee adjourned at 1.02pm *sine die*.

Steven Reynolds
Clerk to the Committee

Minutes No 64

10 July 2002

At Room 1108, Parliament House, at 3:30 pm

1. Members Present

The Hon John Hatzistergos MLC (Acting Chair)

The Hon Ian West MLC

The Hon Peter Primrose MLC

The Hon John Jobling MLC (Ryan)

The Hon Greg Pearce MLC

2. Apologies

The Hon Helen Sham-Ho MLC

Ms Lee Rhiannon MLC

The Hon John Ryan MLC

3. Substitutions

The Chair advised that the Opposition whip had informed her that he would be representing Mr Ryan.

4. Previous Minutes

Resolved, on the motion of Mr Primrose, that the minutes of meeting no 63 be confirmed.

5. Corrective Services Inquiry

Correspondence sent

The Committee noted the letter sent by the Chair to the Inspector General of Corrective Services dated 2 July 2002.

Chair's Draft Report

The Chair tabled the revised draft report which, having been circulated, was taken as being read.

Resolved, on the motion of Mr Pearce, that the report as amended be adopted as the report of the Committee, and tabled with the Clerk of the Parliaments; and that the Chair and Committee Clerk be authorised to make any typographical or grammatical errors prior to tabling.

6. ***

7. Next meeting

The Committee adjourned at 3.40pm *sine die*.

Steven Reynolds

Clerk to the Committee

Appendix 4

First and second advices from the Crown Solicitor's Office

First advice from the Crown Solicitor's Office



Crown Solicitor's Office

NEW SOUTH WALES

Your ref:

My ref: COR037.971
T8 Ian Knight

Tel: (02) 9224 5238

Fax: (02) 9224 5244

Email: crownsol@agd.nsw.gov.au

17 March 2000

Mr Lindsay Le Compte
Inspector-General
Department of Corrective Services
PO Box K1313
HAYMARKET NSW 1240

By facsimile: 9219 8126

Dear Mr Le Compte

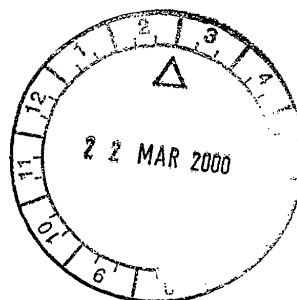
Re: **Powers of Investigation of Inspector-General under the *Crimes (Administration of Sentences) Act 1999***

I enclose my advice in relation to the above matter dated 17 March 2000.

Yours faithfully

I V Knight
Crown Solicitor

encl.



60-70 Elizabeth Street Sydney NSW 2000 ♦ GPO Box 25 Sydney 2001 ♦ DX 19 Sydney

crownsol@agd.nsw.gov.au



Crown Solicitor's Office

NEW SOUTH WALES

Advice

Re: Powers of Investigation of Inspector General under the *Crimes (Administration of Sentences) Act 1999*

1. Background

- 1.1 Generally you seek my advice with respect to the functions of the Inspector General under the *Crimes (Administration of Sentences) Act 1999* ("the *New Act*") which act repeals the *Correctional Centres Act 1952* ("the *Old Act*"). The *New Act* has not yet commenced so provisions relating to the Inspector General in the *Old Act* are still operative. It is expected that the *New Act* will commence operation at the end of the first quarter of this year. The advice you seek is in relation to the *New Act* however I am to refer to corresponding provisions in the *Old Act* to ensure that the advice is current pending the commencement of the *New Act*.

2. Advice sought

- 2.1 You seek my advice in relation to the following questions, your references to "the Act" are a reference to the *New Act*.

Question 1

Is the Inspector-General empowered to conduct preliminary inquiries in order to determine whether to investigate any complaint?

Question 2

Is the Inspector-General empowered to conduct preliminary inquiries in order to determine whether a complaint may fall within the limitations on the Inspector-General's functions contained in section 214 of the Act?

Question 3

Is the Inspector-General empowered to conduct preliminary inquiries in order to determine whether a complaint may fall within the jurisdiction of the Ombudsman or the ICAC?

Question 4

If the answer to either or all of questions 1 to 3 is yes, what is the extent of the preliminary inquiries which may be undertaken, and in undertaking those preliminary inquiries is the Inspector-General empowered to utilise the powers contained in section 215 of the Act?

Question 5

What is the extent of the items which may fall within the exclusion in schedule 1(12)(a) and (b) to the Ombudsman Act and does this include decisions by the Department of Corrective Services in connection with matters such as the appointment, promotion, transfer or discipline of officers of the Department of

Corrective Services and other human resource functions eg leave? You are not suggesting here that the Inspector-General would take the place of GREAT, the Industrial Court or any other agency for appellate or review purposes.

Question 6

Does the limitation on the Inspector-General's functions flowing from the operation of Schedule 1 (12) of the Ombudsman Act prevent the Inspector-General from investigating the practices and procedures adopted by the Department of Corrective Services in relation to the appointment, promotion, transfer or discipline of officers of the Department?

Question 7

If the Inspector-General is empowered to investigate the human resource practices and procedures of the Department of Corrective Services in relation to appointment, promotion, discipline etc, is the Inspector-General empowered, as part of that investigation, to examine or select individual cases or groups of cases for analysis to assess whether the relevant procedures are being followed generally or have been followed in a particular case?

Question 8

What is the interaction between section 214 (1) (b) and 214 (2) eg does the operation of section 214 (2) of the Act mean that the Inspector-General is empowered to investigate individual cases where the Department has made a decision in relation to the appointment, promotion, transfer or discipline etc and the Inspector-General considers it necessary to investigate the matter to determine whether the decision is supported by the facts eg where the Inspector-General wishes to investigate a matter on the basis of allegations that no disciplinary or prosecution action was taken in relation to a particular individual where the facts support such action being taken, or where action was taken and the facts do not support such action?

Question 9

Is the Inspector-General empowered to investigate the conduct of the Department, or individuals in the Department, to ascertain whether persons involved in or related to appointment, promotion or disciplinary matters (not being the person promoted or disciplined) have themselves exercised functions in relation to those matters in a way which may lead to disciplinary or prosecution action being taken against them.

Question 10

What impact does the operation of section 219 of the Act and Schedule 1 (12)(c) of the Ombudsman Act have on the limitation contained in section 214 (1) (b) of the Act and on the questions above?

Question 11

Does the limitation contained in section 214 (1) (b) of the Act prevent the Inspector-General from conducting preliminary inquiries to ascertain whether to refer a matter to the ICAC?

Question 12

If the Ombudsman or the ICAC, pursuant to arrangements with the Inspector-General, refer matters to the Inspector-General for investigation, does the operation of section 214(1) (b), (2) (b) or (3) (a) of the Act operate to prevent the Inspector-General investigating the matter referred or require the Inspector-General to refer the matter to an investigation unit within the Department if the substance of the complaint referred by the Ombudsman or ICAC falls within the charter of any of the Department's investigation units?

Question 13

If the answer to question 11 is yes and the Minister, although requested, does not agree that the investigation be conducted by the Inspector-General or another investigative body, does this situation prevent the matter being referred back to the ICAC or the Ombudsman to undertake the investigation?

Question 14

Does the operation of section 214 (1)(c) of the Act prevent the Inspector-General from investigating the conduct of officers of the Department of Corrective Services employed in the Probation and Parole Service or otherwise employed and acting pursuant to decisions or procedures of the Parole Board or the Review Council?

Question 15

Does the operation of section 214 (1)(c) of the Act prevent the Inspector-General from assessing the effectiveness and appropriateness of the procedures of the Department pursuant to section 213 (1) (j) of the Act, where those procedures may be the subject of consideration by the Parole Board or the Review Council as opposed to being procedures set by those bodies for the operation of those bodies eg hearing procedures?

Question 16

Do the limitation provisions in section 214(1) (b) or (c) of the Act prevent the Inspector-General from investigating matters the subject of a direction by the Minister pursuant to section 213 (1) (h) of the Act (excluding directions pursuant to section 214 (3) (a) of the Act)?"

3. Relevant legislation***Correctional Centres Act 1952***

- 3.1 The *Old Act* is an Act to make provision for the establishment regulation and control of correctional centres and for the custody of inmates and for purposes connected therewith. Part 2A deals with the Inspector-General and was introduced on 12 June 1997 by the *Correctional Centres Amendment (Inspector-General) Act 1997*. These provisions have been substantially re-enacted, except for minor changes, in the *New Act* so I will not set them out here but will refer to them in the body of my advice.

The Second Reading Speeches to the *Correctional Centres Amendment (Inspector-General) Bill* provides some relevant comments as to the purposes and powers of the position¹. The Inspector-General "will have the power to investigate complaints about correctional centres and will work to improve complaint handling generally within the correctional system" (at 7926). He will "primarily be responsible for investigating and making recommendations on matters falling within the administration of the Department of Corrective Services" (at 7926). He will "be able to refer matters to investigation units within the Department of Corrective Services or to other appropriate agencies for consideration or action" (at 7927). In relation to other agencies the Inspector-General will:

"enter into arrangements with the Ombudsman in relation to the investigation of complaints and other matters within the administration of the Department of Corrective Services which could be the subject of a complaint by the Ombudsman. The Inspector General will also enter into arrangements with the Independent Commission Against Corruption regarding the handling of matters that involve the possible misconduct by an officer of the Department of Corrective Services.

It is not proposed that the functions of the Inspector General should overlap with or duplicate existing industrial or staff grievance mechanisms. For this reason the Inspector General's role in relation to employment related matters will be restricted by proposed s.11H in the same way as the Ombudsman ... the Inspector General will not have a role to play in matters involving the Parole Board or the Serious Offenders Review Council. To enable the Inspector General to perform his or her role properly, the Inspector-General has been given certain powers under proposed section 11F. The Inspector-General will be entitled to access records, to visit and examine correctional system buildings and to access inmates."

Crimes (Administration of Sentences) Act 1999

- 3.2 The *New Act*, when it commences, repeals the *Old Act*. Part 10 (which substantially re-enacts Pt.2A of the *Old Act*) provides for the Inspector-General who is a person appointed by the Governor under s.210 of the *New Act*. Division 2 of Pt.10 provides for the functions of the Inspector-General:

"212. Definitions

In this Division:

"Department" includes a correctional centre or periodic detention centre.

"officer of the Department" includes a correctional officer or a person employed for the purposes of a management agreement.

¹ See *Hansard*, Legislative Assembly, Second Reading Speech pages 7926-7927, 8093-8105, 23 April 1997.

213. Principal functions of Inspector-General

(1) The principal functions of the Inspector-General are (subject to this Part):

- (a) to investigate the Department's operations and the conduct of the Department's officers, and
- (b) to investigate and attempt to resolve complaints made by any person relating to matters within the Department's administration, and
- (c) to encourage the mediation and informal resolution of complaints relating to matters within the Department's administration, and
- (d) to train Official Visitors, and
- (e) to examine reports of Official Visitors referred to the Inspector-General by the Minister and to investigate or comment on those reports, and
- (f) to examine reports received from monitors appointed under section 242 and to investigate or comment on those reports, and
- (g) to examine reports received from community advisory councils appointed under section 243 and make recommendations to the Minister in relation to those reports, and
- (h) to investigate any matter within the administration of the Department if directed to do so by the Minister, and
- (i) to promote integrity and professionalism among the Department's officers, and
- (j) to assess the effectiveness and appropriateness of the procedures of the Department, and
- (k) to provide independent monitoring and auditing of contracts entered into between the Department and private contractors, and
- (l) to oversee contracts for community-based post-release services, and
- (m) to make recommendations to the Minister on ways in which the procedures of the Department can be improved, and
- (n) to facilitate coronial inquiries into deaths in correctional centres.

(2) The functions of the Inspector-General relating to the investigation of complaints may be exercised:

- (a) on the Inspector-General's own initiative, or
- (b) at the request of the Minister, or
- (c) in response to a complaint made to the Inspector-General, or
- (d) in response to a reference by the Ombudsman, the Independent Commission Against Corruption or any other agency.

(3) The Inspector-General has such other functions as are conferred or imposed on the Inspector-General by or under this or any other Act or law.

(4) The Inspector-General may delegate to any officer of the Inspector-General the exercise of any of the Inspector-General's functions, other than this power of delegation.

214. Limitations on Inspector-General's functions

(1) The Inspector-General's functions are not exercisable in relation to the following matters:

- (a) any matter that is the subject of a special inquiry referred to in section 230,
- (b) any complaint about the conduct of a public authority that is listed in Schedule 1 to the *Ombudsman Act 1974* as being excluded from the operation of that Act,
- (c) any complaint about a decision, procedure or member of the Parole Board or the Review Council.

(2) Subsection (1) (b) does not affect the power of the Inspector-General to recommend the taking of disciplinary action or criminal proceedings against any of the Department's officers.

(3) If the Inspector-General receives a complaint that falls within the charter of any of the Department's investigation units, the Inspector-General:

- (a) must refer the complaint to the investigation unit, unless directed to deal with the complaint by the Minister, and
- (b) if so directed, must notify the Commissioner of that fact.

(4) Nothing in subsection (3) prevents the Inspector-General from:

- (a) monitoring the way in which a complaint is dealt with by an investigation unit within the Department, or
- (b) recommending that the Minister direct investigation of a complaint by the Inspector-General or another investigative body, or
- (c) requiring a copy of any report prepared by an investigation unit in relation to a complaint referred to it by the Inspector-General and making recommendations in relation to the report.

215. Powers of Inspector-General

(1) For the purpose of exercising the Inspector-General's functions, the Inspector-General:

- (a) may at any time visit and examine any of the Department's premises, and
- (b) may require any of the Department's officers to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Department's operations or the conduct of the Department's officers, and

(c) may require any of the Department's officers to attend before the Inspector-General to answer questions or produce documents or other things about any matter relating to the Department's operations or the conduct of the Department's officers, and

(d) may refer any matter relating to the Department's operations or the conduct of the Department's officers to any of the Department's investigation units or to any other appropriate agency for consideration or action, and

(e) may recommend the taking of disciplinary action or criminal proceedings against any of the Department's officers, and

(f) may undertake systematic inspections of correctional centres and periodic detention centres.

(2) For the purpose of exercising the Inspector-General's functions, the Inspector-General:

(a) is entitled to be given full access to all of the Department's records and to take or have copies made of any of them, and

(b) is entitled to be given full access to all offenders held in custody by officers of the Department and to question those offenders and obtain information from them.

(3) The Inspector-General has power to do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of the Inspector-General's functions.

(4) Any specific powers conferred on the Inspector-General by this Act are not taken to limit by implication the generality of this section.

216. Discretion of Inspector-General to investigate complaints

(1) The Inspector-General may, at any time and for any reason, decide not to investigate a complaint or to discontinue the investigation of a complaint.

(2) Without limiting the generality of subsection (1), the Inspector-General may decide not to investigate a complaint or to discontinue the investigation of a complaint if the Inspector-General considers:

(a) that the complaint is frivolous, vexatious or not in good faith, or

(b) that the subject-matter of the complaint is trivial, or

(c) that the conduct complained of occurred at too remote a time to justify investigation, or

(d) that an alternative and satisfactory means of redress is or has been available to the complainant, or

(e) that the complainant has no interest or an insufficient interest in the conduct complained of.

(3) This section does not apply to any matter that is referred to the Inspector-General for investigation or other action under Part 5 of the *Independent Commission Against Corruption Act 1988*."

- 3.3 Division 3 of Pt.10 provides for the relationship of the Inspector-General with other agencies. It provides:

"217. Relationship with Ombudsman regarding investigations

(1) The Inspector-General must not investigate a matter that could become the subject of a complaint under the *Ombudsman Act 1974* unless the Inspector-General has entered into arrangements with the Ombudsman under this section.

(2) The Inspector-General and the Ombudsman may enter into arrangements regarding:

(a) matters the subject of a complaint, inquiry, investigation or other action under the *Ombudsman Act 1974* about which the Ombudsman will notify the Inspector-General, and

(b) matters about which the Inspector-General will notify the Ombudsman that could be made the subject of such a complaint, inquiry, investigation or other action, and

(c) the handling of such complaints, inquiries, investigations or other matters by the Inspector-General that could be dealt with by the Ombudsman under that Act.

(3) The Inspector-General and the Ombudsman are empowered and required to exercise their functions in conformity with any relevant arrangements entered into under this section.

218. Relationship with ICAC regarding investigations

(1) The Inspector-General has the same duty to report to the Independent Commission Against Corruption (the "**Commission**") any matter that the Inspector-General suspects on reasonable grounds concerns or may concern corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* as the principal officer of a public authority has under section 11 of that Act.

(2) The Inspector-General must not exercise functions in relation to any such matter unless authorised to do so by arrangements entered into under this section.

(3) The Inspector-General and the Commission may enter into arrangements regarding:

(a) matters about which the Commission will notify the Inspector-General where the Commission suspects that an officer of the Department is or may be guilty of misconduct, and

(b) the handling of matters by the Inspector-General that may involve misconduct of an officer of the Department and that could be dealt with by the Commission under the *Independent Commission Against Corruption Act 1988*.

(4) The Inspector-General and the Commission are empowered and required to exercise their functions in conformity with any relevant arrangements entered into under this section.”

- 3.4 Division 4 of Pt.10 deals with other miscellaneous matters concerning the Inspector-General. Section 221 provides:

“221. Obstruction of Inspector-General

A person must not:

- (a) without reasonable excuse, wilfully obstruct, hinder, resist or threaten the Inspector-General, or any officer of the Inspector-General, in the exercise of the Inspector-General's functions under this Act, or
- (b) without reasonable excuse, refuse or wilfully fail to comply with any lawful requirement of the Inspector-General or an officer of the Inspector-General, or
- (c) wilfully make any statement that is false or misleading in a material particular to the Inspector-General, or any officer of the Inspector-General, in the exercise of the Inspector-General's functions under this Act.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.”

4. Advice as to questions 1-4 - power to conduct preliminary inquiries

- 4.1 Questions 1 to 4 deal with the power of the Inspector-General to conduct “preliminary inquiries” so it is appropriate to deal with them together. You do not say what you mean by “preliminary inquiries”.

Section 215(1) of the *New Act* sets out powers of the Inspector-General for the purpose of exercising the Inspector-General's functions. Section 215(2) sets out entitlements to access to records and offenders for the same purpose. “Function” is defined in s.3 as including “a power, authority or duty”. The powers and entitlements in s.215 do not include an express power to conduct “preliminary inquiries”, unlike for example, s.13AA of the *Ombudsman Act 1974* which provides:

- “(1) The Ombudsman may make preliminary inquiries for the purpose of deciding whether to make particular conduct of a public authority the subject of an investigation under this Act.
- (2) The inquiries may be made whether or not any person has complained to the Ombudsman about the conduct under section 12.”

Section 215(3) provides that the Inspector-General “has power to do all things necessary to be done for or in connection with, or reasonably incidental to the exercise of the Inspector-General's functions”. Section 215(4) provides that any specific powers conferred on the Inspector-General by the *Act* are not taken to limit by implication the generality of s.215.

Section 216(1) confers on the Inspector-General the power to decide at any time and for any reason not to investigate a complaint or to discontinue the investigation of a complaint. Section 216(2), which does not limit the generality of s.216(1), provides for specific circumstances in which the Inspector-General may decide not to investigate a complaint or to discontinue the investigation of a complaint. Such instances include where the Inspector-General considers that “the complaint is frivolous, vexatious or not in good faith” (s.216(2)(a)), that “the conduct complained of occurred at too remote a time to justify investigation” (s.216(2)(c)) or that there is or has been an alternative and satisfactory means of redress to the complainant (s.216(2)(d)).

The powers of the Inspector-General under ss.11F, 11G and s.11I of the *Old Act* are substantially the same as those just discussed in the *New Act*.

Question 1

- 4.2 In relation to question 1, I think the Inspector-General may exercise the powers in s.215(1) and the entitlements in s.215(2) for the purpose of deciding whether he should not investigate or should discontinue the investigation of a complaint under s.216(1).

The power in s.216(1) of deciding not to investigate a complaint or to discontinue the investigation of a complaint is a “function” of the Inspector-General within the meaning of s.215 with the result the powers and entitlements in s.215 may be exercised for the purpose of exercising the power in s.216(1).

Thus the Inspector-General may do each of the things in paras (a)-(f) of s.215(1) and paras (a)-(b) of s.215(2) for the purpose of deciding whether he should not investigate a complaint or should discontinue an investigation of a complaint.

I also think it would be open to the Inspector-General to seek but not compel information from any person on the basis that is something which any natural person may do (*Clough v Leahy* (1905) 2 CLR 139 per Griffith CJ, at 156) and it is not precluded by the *New Act* or on the basis the power to do so is conferred by the incidental power in s.215(3).

Question 2

- 4.3 You do not say what sorts of “preliminary inquiries” might be needed in order to determine whether the Inspector-General’s functions are not exercisable in relation to a matter because of s.214.

To the extent any “preliminary inquiry” is necessary, I consider the Inspector-General may do any of the things in s.215(1) and (2) as it would be done for the purpose of exercising a function of the Inspector-General. He could also seek information from any person.

Question 3

- 4.4 The Inspector-General must not investigate a matter that could become the subject of a complaint under the *Ombudsman Act 1974* unless the Inspector-General has entered into arrangements with the Ombudsman (s.217(1)). The Inspector-General must not exercise functions in relation to any matter the Inspector-General suspects on reasonable grounds concerns or may concern corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* ("the *ICAC Act*") (s.218(1) and (2)) unless authorised to do so by arrangements with ICAC.

As the Inspector-General must not exercise his functions with respect to complaints that could be dealt with by the Ombudsman or that may concern corrupt conduct, except where arrangements are in place with those agencies, I consider the Inspector-General may do any of the things in s.215(1) and (2) and may seek information from any person to determine whether a complaint falls within the jurisdiction of the Ombudsman or ICAC and if so whether it is the subject of an arrangement.

Question 4

- 4.5 For the purpose of exercising the Inspector-General's functions involved in questions 1-3, the Inspector-General may do the things specified in s.215(1) and (2). He may also do all things necessary to be done for or in connection with or reasonably incidental to, the exercise of the particular function. I have expressed the opinion that like any natural person the Inspector-General may seek information relevant to the exercise of a particular function. I do not consider the "incidental" power conferred by s.215(3) confers powers of compulsion upon the Inspector-General.

The doing of the things in s.215(1) and (2) and "incidental" things must, of course, be referable to the exercise of some function by the Inspector-General.

5. Advice on the Limitations of the Inspector-General's Functions

- 5.1 It seems appropriate to group questions 5 to 11 together as they specifically deal with limitations on the Inspector-General's functions. Section 214(1)(b) provides that the Inspector-General's functions are not exercisable in relation to "any complaint about the conduct of a public authority that is listed in Sch. 1 of the *Ombudsman Act 1974* as being excluded from the operation of that *Act*". Clause 12 of Sch.1 to that *Act* excludes conduct of a public authority relating to:-

- “(a) the appointment or employment of a person as an officer or employee, and
 - (b) matters affecting a person as an officer or employee,
- unless the conduct:

- (c) arises from the making of a protected disclosure (within the meaning of the *Protected Disclosures Act 1994*), or
- (d) relates to a child abuse allegation or child abuse conviction (within the meaning of Part 3A of this Act), or to the inappropriate handling or response to such an allegation or conviction."

"Conduct" is defined in s.5(1) of the *Ombudsman Act 1974* to mean "(a) any action or inaction relating to a matter of administration, and (b) any alleged action or inaction relating to a matter of administration". "Administration" is defined in that section to include "administration of an estate or trust whether involving the exercise of executive functions of government or the exercise of other functions". "Public Authority" is also defined in s.5 to mean, inter alia, any person appointed to a public office by the Governor, any Department or any public servant employed in a Department or any person in the service of the Crown or of any statutory body representing the Crown. I consider that the Department and officers of the Department fall within the definition of "public authority".

Section 11H(1)(b) of the *Old Act* is the equivalent provision to s.214(1)(b) of the *New Act*.

Question 5

- 5.2 You request my advice on the extent of the items which fall within cl.12(a) and (b) of Sch.1 to the *Ombudsman Act 1974*. The Inspector-General may not exercise his functions with respect to complaints about the conduct of the Department or an officer of the Department that falls within cl.12(a) and (b). I note that such conduct will not be excluded conduct if it arises from the making of a protected disclosure to the Inspector-General, or relates to a child abuse allegation or conviction or to the inappropriate handling or response to such an allegation or conviction (cl.12(c) and (d), Sch.1, *Ombudsman Act 1974*).
- 5.3 I have previously advised that the word "employment" in cl.12(a) is coloured by the word "appointment" and is intended to mean "the act of taking a person into one's service" and not "the state of being employed". In my view, decisions by the Department in connection with the appointment of an officer of the Department fall within cl.12(a) and any complaint concerning such a decision may not be investigated by the Inspector-General.
- 5.4 The construction of cl.12(b) is not without its difficulties. I have previously advised that conduct of a Department in investigating an allegation that a person has misconducted himself while acting as an officer or employee was a "matter affecting a person in his capacity as an officer or employee" (CS Ref: EDU057.1622, 11 December 1997). That advice noted that the word "affect" can be used in different senses.

“It may mean to “influence”, “alter” or “shape” (per Winn LJ in *Re Bluston, Bluston v Dawes* (1966) 3 All ER 220 at 225-226) or “touch”, “relate to” or “concern” (per McTiernan J in *Shanks v Shanks* (1942) 65 CLR 334 at 337). The former sense seems somewhat inappropriate in the context of a person being affected by the matter and I incline to the view that the latter wider construction was intended.”²

In the Second Reading Speech to the *Ombudsman Bill 1974* it was stated, at page 778 of the NSW Parliamentary Debates, 29 August 1974, that:

“The Law Reform Commission recommended that the Ombudsman should, as the New Zealand counterpart is, be given jurisdiction in matters arising out of the employer-employee relationship that is, in relation to such matters as the terms and conditions of employment, including matters relating to appointments, promotions, pay, discipline and other personnel matters. When I refer to the employer-employee relationship, I mean a relationship between the Government as the employer- that is, a public authority- and the employees of that authority. I am not referring to the employer-employee relationships in the outside community. In this regard it is felt that the office of the Ombudsman was not created to deal with industrial disputes such as the payment of an allowance, the granting of special leave the payment of a specified wage and other allied matters. Accordingly, item 12 of the schedule to the bill will specifically preclude the Ombudsman from inquiring into complaints about things alleged to have been done by or on behalf of an employer of an employee in his capacity as an employer.”

I have previously advised that matters which relate to or concern a person as an officer or an employee include disciplinary proceedings and any investigation preliminary to disciplinary proceedings for the purposes of cl.12(b). (CS Ref: EDU057.1622, para 3.8)

In my view a decision by the Department in connection with the promotion, transfer or discipline of officers and human resource functions such as the granting of leave can be said to be “conduct” relating to “matters affecting a person as an officer or employee”. This means that a complaint concerning a decision about these matters may not be investigated by the Inspector-General. To conclude otherwise may mean the duplication of disciplinary inquiries which may be carried out pursuant to Pts 5 and 6 of the *Public Sector Management Act 1988*. As indicated in the Second Reading speeches, this is a result to be avoided.

I do not think it appropriate to exhaustively list the extent of matters that may not be investigated by the Inspector-General by virtue of cl.12(a) and (b) of Sch.1 to the *Ombudsman Act 1974*. Much will depend on the facts of each case for investigation. My advice in relation to the following questions will indicate the scope of the matters that may be investigated to some extent.

² CS ref: 86/4/459, 19 December 1986.

Question 6

- 5.5 I have previously advised that for conduct to be excluded by virtue of the operation of cl.12(b) it must be referable to a particular person (CS Ref: EDU057.1622, para 3.9). That was my preferred view, based on the language used, but it is arguable that the clause is not so confined. Consistent with my view, the Inspector-General is not excluded from investigating the practices and procedures of the Department in relation to the appointment, promotion, transfer or discipline of officers of the Department provided that it is on a general level and not in relation to particular officers.

Question 7

- 5.6 Given my preferred view, I do not consider that in investigating human resource practices and procedures generally the Inspector-General could examine or select individual or groups of cases for analysis to assess whether relevant procedures are being followed if such analysis would involve the Inspector-General examining the conduct of the Department with respect to a particular person. To the extent the practices and procedures of the Department in relation to appointment, promotion or discipline, can be investigated without investigating the conduct of the Department with respect to a particular person it is open to the Inspector-General to do so. The Inspector-General is not precluded from consolidating factual data from individual cases. What he cannot do is investigate in any way conduct of the employer in relation to an individual.

Question 8

- 5.7 Section 214(1)(b) of the *New Act* prevents the Inspector-General from exercising any functions in relation to any complaint about the conduct of a public authority with respect to conduct listed in Sch.1 to the *Ombudsman Act 1974*. Section 214(2) of the *New Act* provides that s.214(1)(b) does not affect the power of the Inspector-General to recommend the taking of disciplinary action or criminal proceedings against any of the Department's officers. Section 11H(1)(b) and s.11H(2) of the *Old Act* are in exactly the same terms as these provisions.

Section 214(2) confirms that the Inspector-General may still exercise his power to recommend the taking of disciplinary action or criminal proceedings with respect to the conduct of a Departmental officer (except in the case of the conduct referred to in s.214(1)(b) which could not be investigated). Section 214(2) has nothing to say about power to investigate conduct.

In your question you suggest two scenarios; firstly whether the Inspector-General has the power to investigate individual cases where the Department has made a decision in relation to appointment, promotion and transfer of another person and secondly whether the Inspector-General has the power to investigate a matter on the basis of allegations that no disciplinary or prosecution action was taken in relation to an individual where facts suggest it should have been. As to the first scenario, I do not consider that the Inspector-General can investigate individual cases where the

Department has made a decision in relation to the appointment, promotion, transfer or discipline of another person to determine whether that decision is supported by facts. This is because the Inspector-General is exercising investigation powers with respect to excluded conduct under s.214(1)(b) and is not exercising a power of recommendation.

I also do not consider that the Inspector-General can investigate a matter on the basis of allegations that no disciplinary or prosecution action was taken against an individual by the Department or a Departmental officer. Again the Inspector-General would be purporting to exercise a power of investigation which is denied to him by s.214(1)(b).

Question 9

- 5.8 Basically this scenario envisages the Inspector-General examining the conduct of the Department or Departmental officers with respect to the proper exercise of functions of another officer and whether disciplinary or prosecution action should be taken against that officer. In my view, such an investigation is excluded because it deals with conduct of a public authority (ie the Department or an officer) in relation to a "matter affecting a person as an officer or employee", namely whether the exercise of certain functions by a person as an officer or employee warranted disciplinary or prosecution action.

Question 10

- 5.9 Section 219 of the *New Act* provides that the Inspector-General is the principal officer of a public authority for the purposes of the *Protected Disclosures Act 1994*. Section 219 of the *New Act* re-enacts s.112 of the *Old Act*. Section 219 does not have any impact on the limitation contained in s.214(1)(b) and on the above questions. It simply provides a reference in the *Protected Disclosures Act* includes in the case of the Department the Inspector-General.

Section 214(1)(b) of the *New Act* and Schedule 1, cl.12(c) of the *Ombudsman Act 1974* together have the effect that the functions of the Inspector-General may be exercised with respect to a complaint concerning the conduct of a public authority that arises from the making of a protected disclosure. In relation to the questions previously advised upon, this means that where the conduct to be investigated arises from a protected disclosure made to the Inspector General, then the Inspector-General may exercise his functions even if the conduct relates to the appointment or employment of a person as an officer or employee or matters affecting a person as an officer or employee.

Question 11

5.10 I assume your reference in this question to the Inspector-General referring a matter to ICAC is a reference to the Inspector-General's duty to report a matter to ICAC in s.218 of the *New Act*. Section 218(1) provides that the Inspector-General has the same duty to report to ICAC any matter that the Inspector-General suspects on reasonable grounds concerns or may concern corrupt conduct within the meaning of the *ICAC Act* as the principal officer of a public authority has under s.11 of the *ICAC Act*. Section 11K(1) of the *Old Act* is on the same terms. Section 11 of the *ICAC Act* provides:

"11. Duty to notify Commission of possible corrupt conduct

(1) This section applies to the following officers:

- (a) the Ombudsman,
- (b) the Commissioner of Police,
- (c) the principal officer of a public authority,
- (d) an officer who constitutes a public authority.

(2) An officer to whom this section applies is under a duty to report to the Commission any matter that the officer suspects on reasonable grounds concerns or may concern corrupt conduct.

(3) The Commission may issue guidelines as to what matters need or need not be reported.

(4) This section has effect despite any duty of secrecy or other restriction on disclosure.

(5) ..."

Corrupt conduct includes conduct that:

- adversely effects or could adversely effect, directly or indirectly, the honest or impartial exercise of official functions by any public official, group or body of public officials or any public authority
- constitutes or involves the dishonest or partial exercise of any public official's functions
- constitutes or involves a breach of public trust by a public official or former public official
- involves the misuse of information or material acquired by a public official or former public official in the course of his or her official functions (s.8(1) *ICAC Act*).

Section 8(2) sets out specific types of corrupt conduct by a person such as official misconduct, (eg fraud in office, nonfeasance, misfeasance etc), bribery, blackmail etc.

- 5.11 As s.218(1) provides it is a duty of the Inspector-General to report to ICAC corrupt conduct in certain circumstances, that duty is a function for the purposes of s.215 of the *New Act* with the result the things in s.215(1) and (2) may be done for the purpose of exercising that duty. The Inspector-General also has powers incidental to that duty pursuant to s.215(3).

I consider that s.214(1)(b) does not exclude the Inspector-General from exercising such powers. Section 214(1)(b) prevents the Inspector-General from investigating a complaint with respect to the conduct listed in Sch.1 of the *Ombudsman Act 1974*, it does not prevent the Inspector-General from exercising a power for the purpose of exercising the duty in s.218.

6. Advice concerning arrangements made with the Ombudsman and ICAC

- 6.1 Questions 12 and 13 relate to arrangements made with the Ombudsman under s.217 of the *New Act* and ICAC under s.218 of the *New Act*.

Question 12

- 6.2 Your question asks a number of questions and I shall deal with each in turn. I note that your reference to the provision "s.214(2)(b)" is not correct as that provision does not exist.

The first question seems to ask whether the Inspector-General is prevented from investigating a matter referred to him by the Ombudsman or ICAC, pursuant to arrangements with those agencies, the substance of which matter also falls within conduct that the Inspector-General is excluded from investigating under s.214(1)(b), namely those listed items in Sch.1 of the *Ombudsman Act 1974*.

Section 217(2)(c) of the *New Act* provides that the Inspector-General and the Ombudsman may enter into arrangements including "the handling of such complaints, inquiries, investigation or other matters by the Inspector-General that could be dealt with by the Ombudsman under the *Ombudsman Act 1974*".

Section 218(2) provides the Inspector-General must not exercise functions in relation to matters where the Inspector-General suspects on reasonable grounds concerns or may concern corrupt conduct unless authorised to do so by arrangements entered into under s.218. Section 218(3) provides that the Inspector-General and ICAC may enter into arrangements including "the handling of matters by the Inspector-General that may involve misconduct of an officer of the Department and that could be dealt with by the Commission under the *Independent Commission Against Corruption Act 1988*".

6.3 I consider that the express grant of power contained in s.217(2)(c) and (3) of the *New Act* permits the Inspector-General to handle the complaints etc referred to in s.217(2)(c) despite the general limitation imposed by s.214(1)(b). The prohibition in s.218(2) upon the exercise by the Inspector-General of functions in relation to matters of corrupt conduct is expressly excluded in the case of arrangements under s.218.

6.4 The second part of question 12 seems to ask where the Inspector-General is to handle a matter pursuant to arrangements with either the Ombudsman or ICAC whether he must refer that matter to one of the Department's investigation units if it falls within the charter of that investigation unit.

Section 214(3)(a) of the *New Act* provides that if the Inspector-General receives a complaint that falls within the charter of the Department's investigation unit then the Inspector-General must refer the complaint to the investigation unit unless directed to deal with the complaint by the Minister. Section 11H(3) of the *Old Act* is equivalent to the new provision.

"Investigation unit" and "charter" are not defined in the *New Act*. You instruct that an investigation unit of the Department is one of a number of administrative units within the Department comprising Departmental officers who are responsible principally for security and investigations within the Department. You instruct that the charter of such a unit can be said to be the objectives, functions and duties of that unit which are determined administratively by the Minister. I am not provided with any further details as to such charters.

Both ss.217(3) and 218(4) empower and require the Inspector-General to exercise his functions in conformity with arrangements made with the Ombudsman or the ICAC respectively. Such arrangements provide for complaints to be handled by the Inspector-General (s.217(2)(c) and s.218(3)(b)). The prohibition on investigation of complaints received by the Inspector-General that fall within the charter of any of the Department's investigation units does not apply in the case of the handling of matters the subject of an arrangement.

Question 13

6.5 As my answer to question 12 is no it is unnecessary for me to answer this question.

7. Other matters concerning the Inspector-General's functions

7.1 I shall deal with the final questions 14 to 16 together.

Question 14

- 7.2 Section 214(1)(c) of the *New Act* provides that the Inspector-General may not exercise his functions with respect to “any complaint about a decision, procedure or member of the Parole Board or the Review Council”. Section 11H(1)(c) is the equivalent provision in the *Old Act*. In my view, s.214(1)(c) does not preclude investigation of the conduct of Departmental officers acting pursuant to decision or procedures of the Parole Board or the Review Council except to the extent investigation of that complaint requires investigation of a decision, procedure or member of the Parole Board.

Question 15

- 7.3 Section 213(1)(j) of the *New Act* provides that the principal functions of the Inspector-General, subject to Part 10, are “to assess the effectiveness and appropriateness of the procedures of the Department”. Section 11E(1)(j) is the equivalent provision in the *Old Act* and is on exactly the same terms. This means that s.213(1)(j) will be limited by other provisions in Part 10 that deal with the Inspector-General’s functions.

Section 214(1)(c) of the *New Act* does limit the functions of the Inspector-General but only with respect to complaints about decisions or procedures of the Parole Board or the Review Council. I do not consider that s.214(1)(c) operates to prevent the Inspector-General from assessing the effectiveness and appropriateness of the Department’s procedures as opposed to procedures of the Parole Board or Review Council. Even where those procedures of the Department are subject to consideration by the Parole Board or Review Council, I do not consider that the Inspector-General is so prevented.

Question 16

- 7.4 Section 213(1)(h) of the *New Act* provides that one of the principal functions of the Inspector-General is, subject to Part 10, “to investigate any matter within the administration of the Department if directed to do so by the Minister”. The equivalent provision in the *Old Act* is s.11H(1)(h) which is in exactly the same terms.

Section 213(1)(h) will be limited by any other provisions in Part 10 that deals with the Inspector General’s functions. Sections 214(1)(b) and (c), being within the Part, clearly provide that the Inspector-General’s functions are not exercisable in relation to the matters provided for in those sections. The effect of this is that the Inspector-General could not exercise his functions to investigate matters referred to him by the Minister pursuant to s.213(1)(h) to the extent it could be said the function was being exercised in relation to any complaint within para.(b) and (c) of s.214(1). Section 213(1)(h) does not operate by reference to complaints but to “any matter within the administration of the Department”. I suppose, however, that it is possible that “any matter within the administration of the Department” directed to be investigated could

Crown Solicitor's Office NEW SOUTH WALES

20

relate to a complaint in para.(b) or (c) of s.214(1). To that extent the matter of administration could not be investigated by the Inspector-General.

Signed:


I V Knight
Crown Solicitor

Prepared for: Department of Corrective Services

Date: 17 March 2000

Client ref: Mr Lindsay Le Compte

CSO ref: COR037.971

Second advice from the Crown Solicitor's Office



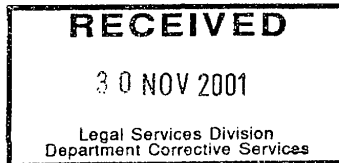
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NEW SOUTH WALES

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28 November 2001



Mr Lindsay Le Compte
Inspector-General of Corrective Services
PO Box K1313
HAYMARKET NSW 1240

By facsimile: (02) 8204-6302

Dear Lindsay

Re: Powers of Investigation of Inspector-General under the *Crimes (Administration of Sentences) Act 1999*

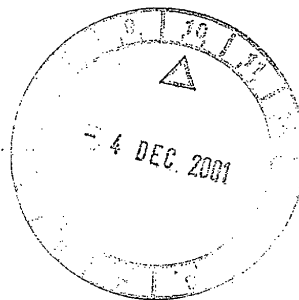
I enclose herewith my advice in relation to the above matter dated 28 November 2001.

Please do not hesitate to contact me if you require further assistance.

Yours faithfully


I V Knight
Crown Solicitor

encl



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Crown Solicitor's Office

NEW SOUTH WALES

Advice

Re: Powers of investigation of Inspector-General under the *Crimes (Administration of Sentences) Act 1999*

1. Advice sought

1.1 I am asked to advise the Inspector-General of Corrective Services and the Commissioner of Corrective Services on the following questions in relation to the *Crimes (Administration of Sentences) Act 1999* (the *Act*) which they have agreed upon:

- “1. Does the prohibition in s.214(1) of the Act on the exercise of the Inspector-General's functions in relation to the matters in paras (a) – (c) preclude such exercise where such exercise is provided for in an arrangement under s.217(2) or s.218(2)?
2. Does the obligation imposed upon the Inspector-General by s.214(3)(a) to refer the specified complaint to the investigation unit apply in circumstances where an arrangement under s.217(2) or s.218(2) provides otherwise?
3. What is the extent of the Inspector-General's duty under s.218(1)?
4. If a matter is clearly one to which s.214 of the *Act* applies, is the Inspector-General empowered to do anything other than inform the complainant that the matter is outside his jurisdiction and suggest any alternative courses of action?

In particular:

- (a) Is the Inspector-General empowered to undertake preliminary enquiries or exercise any other powers or functions in relation to a complaint that clearly falls within the charter of any of the Department's investigation units before referring the complaint to the relevant investigation unit in accordance with s.214(3)(a)?
- (b) If a complaint is about a matter to which s.214(1) applies or is a complaint which must be referred to an investigation unit in accordance with s.214(3)(a) and the Inspector-General suspects the matter may concern corrupt conduct, is he empowered to undertake preliminary enquiries or exercise any other powers or functions for the purpose of determining whether he should report the matter to the ICAC under s.218(1) or should he just report the matter?

- (c) If a protected disclosure is made to the Inspector-General in relation to a matter to which s.214(1) applies or which is required to be referred to an investigation unit in accordance with s.214(3)(a), is the Inspector-General empowered to:
- (i) undertake preliminary enquiries or exercise any other powers or functions in relation to the matter or does s.219 do no more than enable protected disclosures to be made to the Inspector-General?
 - (ii) undertake preliminary enquiries using s.215 powers to determine whether the protected disclosure falls within an arrangement under s.217(2) or s.218(2)?
- (d) Is the Inspector-General empowered to do any of the things specified in s.215 in relation to matters in respect of which s.214 provides that his functions are not exercisable?
5. For the purposes of s.214(1)(b) of the Act, what conduct is referred to in paras (a) and (b) of cl.12 of Schedule 1 to the *Ombudsman Act*?
 6. Does the qualification in para (c) of cl.12 of Schedule 1 to the *Ombudsman Act* empower the Ombudsman to investigate conduct within paras (a) and (b) if the complaint is made as a protected disclosure or does it only mean the Ombudsman can investigate a complaint about conduct which arises from the making of the protected disclosure, for example, conduct constituting a reprisal for having made the protected disclosure?"
- 1.2 In preparing this advice I have had the benefit of submissions on the questions from the Inspector-General and the Commissioner and their comments on each other's submissions.

2. Legislation

Sections 213 to 219 of the *Act* provide:

"213. Principal functions of Inspector-General

- (1) The principal functions of the Inspector-General are (subject to this Part):
- (a) to investigate the Department's operations and the conduct of the Department's officers, and
 - (b) to investigate and attempt to resolve complaints made by any person relating to matters within the Department's administration, and

- (c) to encourage the mediation and informal resolution of complaints relating to matters within the Department's administration, and
 - (d) to train Official Visitors, and
 - (e) to examine reports of Official Visitors referred to the Inspector-General by the Minister and to investigate or comment on those reports, and
 - (f) to examine reports received from monitors appointed under section 242 and to investigate or comment on those reports, and
 - (g) to examine reports received from community advisory councils appointed under section 243 and make recommendations to the Minister in relation to those reports, and
 - (h) to investigate any matter within the administration of the Department if directed to do so by the Minister, and
 - (i) to promote integrity and professionalism among the Department's officers, and
 - (j) to assess the effectiveness and appropriateness of the procedures of the Department, and
 - (k) to provide independent monitoring and auditing of contracts entered into between the Department and private contractors, and
 - (l) to oversee contracts for community-based post-release services, and
 - (m) to make recommendations to the Minister on ways in which the procedures of the Department can be improved, and
 - (n) to facilitate coronial inquiries into deaths in correctional centres.
- (2) The functions of the Inspector-General relating to the investigation of complaints may be exercised:
- (a) on the Inspector-General's own initiative, or
 - (b) at the request of the Minister, or
 - (c) in response to a complaint made to the Inspector-General, or
 - (d) in response to a reference by the Ombudsman, the Independent Commission Against Corruption or any other agency.
- (3) The Inspector-General has such other functions as are conferred or imposed on the Inspector-General by or under this or any other Act or law.

(4) The Inspector-General may delegate to any officer of the Inspector-General the exercise of any of the Inspector-General's functions, other than this power of delegation.

214. Limitations on Inspector-General's functions

(1) The Inspector-General's functions are not exercisable in relation to the following matters:

- (a) any matter that is the subject of a special inquiry referred to in section 230,
- (b) any complaint about the conduct of a public authority that is listed in Schedule 1 to the *Ombudsman Act 1974* as being excluded from the operation of that Act,
- (c) any complaint about a decision, procedure or member of the Parole Board or the Review Council.

(2) Subsection (1) (b) does not affect the power of the Inspector-General to recommend the taking of disciplinary action or criminal proceedings against any of the Department's officers.

(3) If the Inspector-General receives a complaint that falls within the charter of any of the Department's investigation units, the Inspector-General:

- (a) must refer the complaint to the investigation unit, unless directed to deal with the complaint by the Minister, and
- (b) if so directed, must notify the Commissioner of that fact.

(4) Nothing in subsection (3) prevents the Inspector-General from:

- (a) monitoring the way in which a complaint is dealt with by an investigation unit within the Department, or
- (b) recommending that the Minister direct investigation of a complaint by the Inspector-General or another investigative body, or
- (c) requiring a copy of any report prepared by an investigation unit in relation to a complaint referred to it by the Inspector-General and making recommendations in relation to the report.

215. Powers of Inspector-General

(1) For the purpose of exercising the Inspector-General's functions, the Inspector-General:

- (a) may at any time visit and examine any of the Department's premises, and
- (b) may require any of the Department's officers to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to

the Department's operations or the conduct of the Department's officers, and

- (c) may require any of the Department's officers to attend before the Inspector-General to answer questions or produce documents or other things about any matter relating to the Department's operations or the conduct of the Department's officers, and
 - (d) may refer any matter relating to the Department's operations or the conduct of the Department's officers to any of the Department's investigation units or to any other appropriate agency for consideration or action, and
 - (e) may recommend the taking of disciplinary action or criminal proceedings against any of the Department's officers, and
 - (f) may undertake systematic inspections of correctional centres and periodic detention centres.
- (2) For the purpose of exercising the Inspector-General's functions, the Inspector-General:
- (a) is entitled to be given full access to all of the Department's records and to take or have copies made of any of them, and
 - (b) is entitled to be given full access to all offenders held in custody by officers of the Department and to question those offenders and obtain information from them.
- (3) The Inspector-General has power to do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of the Inspector-General's functions.
- (4) Any specific powers conferred on the Inspector-General by this Act are not taken to limit by implication the generality of this section.

216. Discretion of Inspector-General to investigate complaints

- (1) The Inspector-General may, at any time and for any reason, decide not to investigate a complaint or to discontinue the investigation of a complaint.
- (2) Without limiting the generality of subsection (1), the Inspector-General may decide not to investigate a complaint or to discontinue the investigation of a complaint if the Inspector-General considers:
- (a) that the complaint is frivolous, vexatious or not in good faith, or
 - (b) that the subject-matter of the complaint is trivial, or
 - (c) that the conduct complained of occurred at too remote a time to justify investigation, or

- (d) that an alternative and satisfactory means of redress is or has been available to the complainant, or
- (e) that the complainant has no interest or an insufficient interest in the conduct complained of.

(3) This section does not apply to any matter that is referred to the Inspector-General for investigation or other action under Part 5 of the *Independent Commission Against Corruption Act 1988*.

217. Relationship with Ombudsman regarding investigations

(1) The Inspector-General must not investigate a matter that could become the subject of a complaint under the *Ombudsman Act 1974* unless the Inspector-General has entered into arrangements with the Ombudsman under this section.

(2) The Inspector-General and the Ombudsman may enter into arrangements regarding:

- (a) matters the subject of a complaint, inquiry, investigation or other action under the *Ombudsman Act 1974* about which the Ombudsman will notify the Inspector-General, and
- (b) matters about which the Inspector-General will notify the Ombudsman that could be made the subject of such a complaint, inquiry, investigation or other action, and
- (c) the handling of such complaints, inquiries, investigations or other matters by the Inspector-General that could be dealt with by the Ombudsman under that Act.

(3) The Inspector-General and the Ombudsman are empowered and required to exercise their functions in conformity with any relevant arrangements entered into under this section.

218. Relationship with ICAC regarding investigations

(1) The Inspector-General has the same duty to report to the Independent Commission Against Corruption (the "**Commission**") any matter that the Inspector-General suspects on reasonable grounds concerns or may concern corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* as the principal officer of a public authority has under section 11 of that Act.

(2) The Inspector-General must not exercise functions in relation to any such matter unless authorised to do so by arrangements entered into under this section.

(3) The Inspector-General and the Commission may enter into arrangements regarding:

- (a) matters about which the Commission will notify the Inspector-General where the Commission suspects that an officer of the Department is or may be guilty of misconduct, and
- (b) the handling of matters by the Inspector-General that may involve misconduct of an officer of the Department and that could be dealt with by the Commission under

the *Independent Commission Against Corruption Act 1988*.

(4) The Inspector-General and the Commission are empowered and required to exercise their functions in conformity with any relevant arrangements entered into under this section.

219. Functions of Inspector-General under Protected Disclosures Act 1994

A reference in the *Protected Disclosures Act 1994* to the principal officer of a public authority includes, where the public authority concerned is the Department, a reference to the Inspector-General."

3. Advice as to question 1

- 3.1 This question raises the issue of whether an arrangement under ss.217 or 218 may provide for the Inspector-General to exercise his functions in relation to a matter contrary to s.214(1).
- 3.2 The principal functions of the Inspector-General are set out in s.213 and are expressed to be "subject to this Part" ie. Part 10 which contains ss.210-219.
- 3.3 Section 214 is headed "Limitations on Inspector-General's functions" and sub s.(1) prohibits the exercise of his functions in relation to the matters and complaints specified in paras (a)-(c) thereof.
- 3.4 Section 217(1) is itself a limitation. It prohibits the Inspector-General from investigating a matter that could become the subject of a complaint under the *Ombudsman Act 1974* but removes that prohibition where the Inspector-General has entered into arrangements with the Ombudsman under s.217. The arrangements which may be entered into are arrangements regarding the matters and the handling of complaints etc specified in paras (a) – (c) of s. 217(2). The Inspector-General and the Ombudsman are empowered and required by s. 217(3) to exercise their functions in conformity with any relevant arrangements under s. 217.
- 3.5 Section 218(2) is also a limitation. It prohibits the Inspector-General from exercising functions in relation to any matter that the Inspector-General suspects on reasonable grounds concerns or may concern corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* (the *ICAC Act*) but removes that prohibition where the Inspector-General is authorised to do so by arrangements entered into under s. 218. The arrangements that the Inspector-General and the Commission may enter into are arrangements regarding the matters etc in paras (a) – (b) of s. 218(3) and the Inspector-General and the Commission are empowered and required by s. 218(4) to exercise their functions in conformity with any relevant arrangements.
- 3.6 I have previously advised the Inspector-General in the following terms:

"Your question asks a number of questions and I shall deal with each in turn. I note that your reference to the provision 's.214(2)(b)' is not correct as that provision does not exist.

The first question seems to ask whether the Inspector-General is prevented from investigating a matter referred to him by the Ombudsman or ICAC, pursuant to arrangements with those agencies, the substance of which matter also falls within conduct that the Inspector-General is excluded from investigating under s.214(1)(b), namely those listed items in Sch.1 of the *Ombudsman Act 1974*.

Section 217(2)(c) of the *New Act* provides that the Inspector-General and the Ombudsman may enter into arrangements including 'the handling of such complaints, inquiries, investigation or other matters by the Inspector-General that could be dealt with by the Ombudsman under the *Ombudsman Act 1974*'.

Section 218(2) provides the Inspector-General must not exercise functions in relation to matters where the Inspector-General suspects on reasonable grounds concerns or may concern corrupt conduct unless authorised to do so by arrangements entered into under s.218. Section 218(3) provides that the Inspector-General and ICAC may enter into arrangements including 'the handling of matters by the Inspector-General that may involve misconduct of an officer of the Department and that could be dealt with by the Commission under the *Independent Commission Against Corruption Act 1988*'.

I consider that the express grant of power contained in s.217(2)(c) and (3) of the *New Act* permits the Inspector-General to handle the complaints etc referred to in s.217(2)(c) despite the general limitation imposed by s.214(1)(b). The prohibition in s.218(2) upon the exercise by the Inspector-General of functions in relation to matters of corrupt conduct is expressly excluded in the case of arrangements under s.218."

The present request for advice necessarily requires me to review that advice.

- 3.7 At the outset it seems to me that advice is incorrect to the extent it says that the express grant of power contained in s. 217(2)(c) and (3) permits the Inspector-General to handle the complaints etc referred to in s. 217(2)(c) despite the general limitation imposed by s. 214(1)(b). The provisions of s. 217 operate by reference to matters that are or could be the subject of a complaint etc under the *Ombudsman Act*. Conduct of a public authority that is listed in Schedule 1 to the *Ombudsman Act* as being excluded from the operation of that Act cannot be or become the subject of a complaint under that Act and thus the question of s 217 authorising an arrangement contrary to s. 214(1)(b) does not arise.
- 3.8 The task of advising on the extent of the arrangements which are intended to be authorised by ss. 217 and 218 is made difficult by the fact that there is no express provision in either s. 214 or ss. 217 and 218 providing for the effect if any of the

limitations in s. 214 on what may be authorised by an arrangement under ss. 217 or 218.

- 3.9 In favour of the view that arrangements under ss. 217 and 218 can authorise the Inspector-General to exercise functions contrary to s. 214(1)(a) and (c), and contrary to s. 214(1)(b) in the case of s. 218, it can be argued that ss. 217 and 218 deal only with the exercise of the functions which the Inspector-General has under the *Act* and that such functions strictly speaking do not include limitations on their exercise in particular cases which are imposed by other sections of the *Act*. It can also be argued that the limitations in s. 214(1) are general limitations which yield to the specific power conferred by s. 217(2) and s. 218(3) to make arrangements in the case of conduct regulated by the *Ombudsman Act* and the *ICAC Act* and the power and requirement in ss. 217(3) and 218(4) to exercise functions in conformity with the arrangements.
- 3.10 Against that view it can be argued that ss. 217 and 218 operate by reference to the functions of the Inspector-General including the limitations imposed on their exercise by the *Act* and thus any arrangement must provide for the exercise of any function consistent with any limitation imposed on that function elsewhere in the *Act*. It can be argued that ss. 217 and 218 are themselves also limitations on the exercise of functions of the Inspector-General and that in providing for the relaxation of the limitation they impose they do not purport to relax other limitations imposed by other sections. While it might be understandable that the Legislature would wish to provide for the Ombudsman and the ICAC to make arrangements for the Inspector-General to handle complaints etc which fall within their area of regulation, it does not follow that the Legislature would intend that they be able to also make arrangements which are contrary to limitations it has specified should apply in relation to the exercise by the Inspector-General of his functions. If arrangements can be made contrary to limitations imposed by the Act on the exercise of his functions by the Inspector-General it means the Inspector-General would be able to investigate a matter which was also the subject of a special inquiry under s. 230 and a complaint about a decision, procedure or member of the Parole Board or the Review Council. It is perhaps more likely that the Legislature would not have intended that the Inspector-General could by means of an arrangement with the Ombudsman or the ICAC overcome, in the case of complaints to which those sections apply, the limitations in s. 214. It can also be argued that ss. 217(3) and 218(4) take the matter no further on the basis they are predicated upon the making of valid arrangements and might by their reference to "functions" be referring to the functions which the Inspector-General has as limited by the *Act*. Finally, it could be argued that it would have been a simple matter to either qualify s.214 by providing expressly that it applies except in the case of an arrangement under s. 217 or 218 or to provide in ss. 217 and 218 that an arrangement under those sections operates notwithstanding anything in s. 214.

- 3.11 I have derived no assistance on this point of construction from the Second Reading speech for the Bill for the *Act*.
- 3.12 On balance, I now prefer the view that ss. 217 and 218 do not authorise an arrangement which is contrary to the limitations on the exercise of the functions of the Inspector-General imposed by s. 214.

4. Advice as to question 2

- 4.1 I have previously advised the Inspector-General in relation to s. 214(3)(a) as follows:

“The second part of question 12 seems to ask where the Inspector-General is to handle a matter pursuant to arrangements with either the Ombudsman or ICAC whether he must refer that matter to one of the Department’s investigation units if it falls within the charter of that investigation unit.

Section 214(3)(a) of the *New Act* provides that if the Inspector-General receives a complaint that falls within the charter of the Department’s investigation unit then the Inspector-General must refer the complaint to the investigation unit unless directed to deal with the complaint by the Minister. Section 11H(3) of the *Old Act* is equivalent to the new provision.

‘Investigation unit’ and ‘charter’ are not defined in the *New Act*. You instruct that an investigation unit of the Department is one of a number of administrative units within the Department comprising Departmental officers who are responsible principally for security and investigations within the Department. You instruct that the charter of such a unit can be said to be the objectives, functions and duties of that unit which are determined administratively by the Minister. I am not provided with any further details as to such charters.

Both ss.217(3) and 218(4) empower and require the Inspector-General to exercise his functions in conformity with arrangements made with the Ombudsman or the ICAC respectively. Such arrangements provide for complaints to be handled by the Inspector-General (s.217(2)(c) and s.218(3)(b)). The prohibition on investigation of complaints received by the Inspector-General that fall within the charter of any of the Department’s investigation units does not apply in the case of the handling of matters the subject of an arrangement.”

Again, the present request requires me to review that advice.

- 4.2 Section 214(3)(a) also imposes a limitation on the exercise of his functions by the Inspector-General. It requires the Inspector-General to refer a complaint that falls within the charter of an investigation unit of the Department to that unit unless he is directed to deal with it by the Minister. Where a complaint is referred to an investigation unit as required, the Inspector-General may still do the things specified in s. 214(4).

- 4.3 It seems to me that much the same arguments which apply in relation to whether an arrangement under s. 217 and 218 may be contrary to s. 214(1) apply in relation to s. 214(3)(a).
- 4.4 While the issue of whether a complaint which comes within the area regulated by the Ombudsman or the ICAC should be dealt with by a unit of the Department concerned or some other person might be thought to be one which the Legislature might intend to leave to be determined by an arrangement agreed to by the Ombudsman or the ICAC, s. 214(3)(a) does seem to reflect a clear policy decision that in the case of the Department of Corrective Services the Department's investigation unit should have referred to it complaints received by the Inspector-General which come within its charter and that he is only to deal with such complaints where there is a Ministerial decision that he do so.
- 4.5 On balance, I now prefer the view that ss. 217 and 218 do not authorise an arrangement which is contrary to the limitation on the exercise of the Inspector-General's functions imposed by s. 214(3)(a).

5. Advice as to question 3

- 5.1 The duty which the Inspector-General has under s. 218(1) is said by that sub section to be the same duty to report to the ICAC any matter that the Inspector-General suspects on reasonable grounds concerns or may concern corrupt conduct within the meaning of the *ICAC Act* "as the principal officer of a public authority has under section 11 of that Act".
- 5.2 Section 11 of the *ICAC Act* provides:

"11. Duty to notify Commission of possible corrupt conduct

- (1) This section applies to the following officers:
- (a) the Ombudsman,
 - (b) the Commissioner of Police,
 - (c) the principal officer of a public authority,
 - (d) an officer who constitutes a public authority.
- (2) An officer to whom this section applies is under a duty to report to the Commission any matter that the officer suspects on reasonable grounds concerns or may concern corrupt conduct.
- (3) The Commission may issue guidelines as to what matters need or need not be reported.
- (4) This section has effect despite any duty of secrecy or other restriction on disclosure.

(5) The regulations may prescribe who is the principal officer of a public authority, but in the absence of regulations applying in relation to a particular public authority, the principal officer is the person who is the head of the authority, its most senior officer or the person normally entitled to preside at its meetings.”

- 5.3 It will be seen that s. 11(2) of the *ICAC Act* imposes a duty on a principal officer of a public authority to report to the Commission any matter that the principal officer suspects on reasonable grounds concerns or may concern corrupt conduct.
- 5.4 The Inspector-General must therefore have reasonable grounds for suspecting a matter concerns or may concern corrupt conduct before he is under a duty to report it. Corrupt conduct is any conduct which falls within the description of corrupt conduct in either or both of sub ss. (1) and (2) of s. 8 of the *ICAC Act* but which is not excluded by s. 9 (see s. 7(1)).

6. Advice as to question 4

- 6.1 If a matter is clearly one to which s. 214 of the *Act* applies, the effect of s. 214(1) is that the Inspector-General's functions (except the power referred to in s. 214(2)) are not exercisable in relation to it. Presumably, the Inspector-General is not precluded by the *Act* from informing an interested person that his functions are not exercisable in relation to the matter and indicating who may have jurisdiction in relation to the matter.

As to situation (a)

- 6.2 If a complaint received by the Inspector-General clearly falls within the charter of any of the Department's investigation units, sub s. (3) of s. 214 sets out what the Inspector-General must do but provides in sub s. (4) that nothing in sub s. (3) prevents the Inspector-General from doing the things specified in paras (a) – (c) of sub. s.(4).
- 6.3 As it is assumed the complaint clearly falls within the charter of an investigation unit, there would, of course, be no need to make preliminary enquiries or exercise other powers in order to determine whether the complaint fell within such a charter. On receipt of such a complaint it seems the Inspector-General must either refer it to the investigation unit (and monitor the way it is dealt with and/or require a copy of any report made and make recommendations) or recommend that the Minister direct investigation of the complaint by the Inspector-General or another investigative body. In order to exercise the function of deciding whether to recommend the Minister direct investigation by the Inspector-General or another investigative body, it would, in my opinion, be open to the Inspector-General to make “preliminary enquiries”, to exercise the powers in s. 215 (1) and (2) and to do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of that function (s. 215(3)). Those things can only be done, however, in the exercise of the function of deciding

whether to make a recommendation to the Minister and not in the exercise of some other function in relation to such complaints.

As to situation (b)

- 6.4 In most cases it is unlikely that the Inspector-General would, on the basis only of the receipt of such a complaint, have reasonable grounds for suspecting that a matter may concern corrupt conduct.
- 6.5 If, however, it is assumed such a complaint could give rise to reasonable grounds for such a suspicion, I do not consider that the Inspector-General may undertake "preliminary enquiries" or exercise other powers or functions in order to determine whether he should report the matter to the ICAC. There would be no need to do so; once the Inspector-General has the suspicion, he is under a duty to report the matter.
- 6.6 If such a complaint does not give rise to reasonable grounds for the required suspicion, then I do not consider that the Inspector-General is able to make "preliminary enquiries" or exercise any of his powers or functions under the *Act* in order to determine if reasonable grounds exist. The exercise of any of his functions is prohibited in the case of matters within s. 214(1) and he may only exercise limited functions in relation to a complaint to which s. 214(3)(a) applies and none of those functions are relevant.

As to situation (c)(i)

- 6.7 A reference to the principal officer of a public authority in the *Protected Disclosures Act 1994* includes, in the case of the Department, a reference to the Inspector-General (s.219 of the *Act*). As a result, a disclosure by a public official to the Inspector-General of information that shows or tends to show corrupt conduct, maladministration or serious and substantial waste of public money by the Department or any of its officers, and otherwise complies with the requirements of the *Protected Disclosures Act*, will be a protected disclosure (s.14(1)).
- 6.8 The *Protected Disclosures Act* contemplates that a public official (which would include the Inspector-General) to whom a disclosure has been made may obtain information during investigation (if any) of the matter concerned. Section 26 of that Act provides:

"26. Referral of disclosures by public officials

(1) A public official may refer any disclosure concerning an allegation of corrupt conduct, maladministration or serious and substantial waste made to the public official under Part 2 to an investigating authority or to another public official or a public authority considered by the public official to be appropriate in the circumstances, for investigation or other action.

(2) *The public official may communicate to the investigating authority, the other public official or the public authority any information the public official has obtained during investigation (if any) of the matter concerned."*

Whether a particular public official has the power to investigate a disclosure made to that public official will depend upon the statutory provisions applicable to that public official.

- 6.9 As I have said, s.214(1) of the *Act* provides the Inspector-General's functions are not exercisable in relation to any of the matters in paras (a) – (c) thereof. The Inspector-General's functions include those in s.213(1) and such other functions as are conferred or imposed by or under the *Act* or any other Act (s.213(3)). Thus, even if the *Act* or the *Protected Disclosures Act* could be taken to confer a power to investigate disclosures, the more specific provision in s.214 would preclude the exercise of that power in relation to a disclosure which relates to any of the matters or things in paras (a) – (c) of s.214(1).
- 6.10 As the Inspector-General may not exercise any of his functions under the *Act* or any other Act, in relation to any of the matters in paras (a) – (c) of s.214(1), it would seem that, where a disclosure constitutes such a matter, all that the Inspector-General can do is advise the public official that he is unable to investigate it and refer the disclosure for investigation pursuant to s. 26(1). Presumably, a disclosure could be a complaint within the meaning of s. 214(1). Where a disclosure relates to a matter to which s.214(3)(a) applies, all the Inspector-General could do is refer the matter to the investigation unit (unless directed to investigate it by the Minister). Again, presumably, a disclosure could be a complaint within the meaning of s. 214(3)(a).

As to situation c(ii)

- 6.11 This question assumes that a protected disclosure which relates to a matter to which s.214(1) applies or which is required to be referred to an investigation unit in accordance with s.214(3)(a) may fall within an arrangement under s.217(2) or s.218(3). I have previously expressed a preference for the view that an arrangement under s.217(2) or s.218(3) cannot provide for the Inspector-General to exercise any of his functions contrary to the limitations in s. 214(1) and 214(3)(a). That being the case, the occasion to use s.215 powers to determine whether such a protected disclosure falls within an arrangement under s.217(2) or s.218(2) cannot arise.

As to (d)

- 6.12 The Inspector-General is only empowered to do the things in s.215 for the purpose of exercising the Inspector-General's functions. Where it is not clear that a matter is one to which s.214 applies it would be open to the Inspector-General to use a relevant power in s.215 to assist in clarifying whether the matter is one to which s.214 applies.

That would be to use the power for the purpose of exercising the Inspector-General's functions. As soon as it becomes clear the matter is such a matter, the Inspector-General could not use the powers in s.215. I have discussed above the situation where it is clear that a matter is one to which s.214 applies.

7. As to question 5

- 7.1 Section 214(1)(b) provides the Inspector-General's functions are not exercisable in relation to any complaint about the conduct of a public authority that is listed in Schedule 1 to the *Ombudsman Act 1974* as being excluded from the operation of that Act. Clause 12 of Schedule 1 to that Act excludes from the operation of that Act:

- "12. Conduct of a public authority relating to:
- (a) the appointment or employment of a person as an officer or employee, and
 - (b) matters affecting a person as an officer or employee, unless the conduct:
 - (c) arises from the making of a protected disclosure (within the meaning of the *Protected Disclosures Act 1994*), or
 - (d) relates to a child abuse allegation or child abuse conviction (within the meaning of Part 3A of this Act), or to the inappropriate handling or response to such an allegation or conviction."

- 7.2 I adhere to the following advice which I have given on another occasion in relation to paras (a) and (b) of cl. 12:

"I have previously advised that the word "employment" in cl.12(a) is coloured by the word "appointment" and is intended to mean "the act of taking a person into one's service" and not "the state of being employed". In my view, decisions by the Department in connection with the appointment of an officer of the Department fall within cl.12(a) and any complaint concerning such a decision may not be investigated by the Inspector-General.

The construction of cl.12(b) is not without its difficulties. I have previously advised that conduct of a Department in investigating an allegation that a person has misconducted himself while acting as an officer or employee was a "matter affecting a person in his capacity as an officer or employee" (CS Ref: EDU057.1622, 11 December 1997). That advice noted that the word "affect" can be used in different senses.

"It may mean to "influence", "alter" or "shape" (per Winn LJ in *Re Bluston, Bluston v Dawes* (1966) 3 All ER 220 at 225-226) or "touch", "relate to" or "concern" (per McTiernan J in *Shanks*

v Shanks (1942) 65 CLR 334 at 337). The former sense seems somewhat inappropriate in the context of a person being affected by the matter and I incline to the view that the latter wider construction was intended.”¹

In the Second Reading Speech to the *Ombudsman Bill 1974* it was stated, at page 778 of the NSW Parliamentary Debates, 29 August 1974, that:

“The Law Reform Commission recommended that the Ombudsman should, as the New Zealand counterpart is, be given jurisdiction in matters arising out of the employer-employee relationship that is, in relation to such matters as the terms and conditions of employment, including matters relating to appointments, promotions, pay, discipline and other personnel matters. When I refer to the employer-employee relationship, I mean a relationship between the Government as the employer—that is, a public authority—and the employees of that authority. I am not referring to the employer-employee relationships in the outside community. In this regard it is felt that the office of the Ombudsman was not created to deal with industrial disputes such as the payment of an allowance, the granting of special leave the payment of a specified wage and other allied matters. Accordingly, item 12 of the schedule to the bill will specifically preclude the Ombudsman from inquiring into complaints about things alleged to have been done by or on behalf of an employer of an employee in his capacity as an employer.”

I have previously advised that matters which relate to or concern a person as an officer or an employee include disciplinary proceedings and any investigation preliminary to disciplinary proceedings for the purposes of cl.12(b). (CS Ref: EDU057.1622, para 3.8)

In my view a decision by the Department in connection with the promotion, transfer or discipline of officers and human resource functions such as the granting of leave can be said to be “conduct” relating to “matters affecting a person as an officer or employee”. This means that a complaint concerning a decision about these matters may not be investigated by the Inspector-General. To conclude otherwise may mean the duplication of disciplinary inquiries which may be carried out pursuant to Pts 5 and 6 of the *Public Sector Management Act 1988*. As indicated in the Second Reading speeches, this is a result to be avoided.

I do not think it appropriate to exhaustively list the extent of matters that may not be investigated by the Inspector-General by virtue of cl.12(a) and (b) of Sch.1 to the *Ombudsman Act 1974*. Much will depend on the facts of each case for investigation.”

¹ CS ref: 86/4/459, 19 December 1986.

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17

Advice as to question 6

- 7.3 In my opinion, the qualification in para (c) of cl. 12 of Schedule 1 does not empower the Ombudsman to investigate conduct within paras (a) and (b) if the complaint is made as a protected disclosure. Conduct coming within paras (a) and (b) may only be investigated by the Ombudsman if that conduct arises from the making of a protected disclosure. That being the case, conduct within para (b) which constitutes a reprisal for having made a protected disclosure could be investigated.

Signed:



I V Knight
Crown Solicitor

Prepared for: Inspector –General and Commissioner of Corrective Services

Date: 28 November 2001

Client ref: Lindsay Le Compte, Paul Nash

CSO ref: COR037.1177 I V Knight