



PARLIAMENT OF NEW SOUTH WALES

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

SEVENTH GENERAL MEETING WITH THE
POLICE INTEGRITY COMMISSION

Together with Transcript of Proceedings and Minutes

New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Assembly. Committee on the Office of the Ombudsman and the Police Integrity Commission.

Seventh general meeting with the Police Integrity Commission [: report] / Committee on the Office of the Ombudsman and the Police Integrity Commission. [Sydney, N.S.W.] :The Committee, 2003. – 130 p. ; 30 cm. (Report / Committee on the Office of the Ombudsman and the Police Integrity Commission ; no. 3/53, December 2003).

At head of title: Parliament of New South Wales.
“Together with transcript of proceedings and minutes”.
Chair: Paul Lynch.

ISBN 073476846X

1. New South Wales. Police Integrity Commission.
2. New South Wales. Police Service.
3. Police—New South Wales.
 - I. Title
 - II. Lynch, Paul.
 - III. Series: New South Wales. Parliament. Legislative Assembly. Committee on the Office of the Ombudsman and the Police Integrity Commission. Report ; no. 53/3

353.36 (DDC21)

TABLE OF CONTENTS

MEMBERSHIP & STAFF	III
FUNCTIONS OF THE COMMITTEE	V
CHAIRMAN'S FOREWORD.....	IX
CHAPTER ONE - COMMENTARY	1
1. STATUTORY REVIEW	1
1.1 BACKGROUND	1
1.2 MINISTERIAL STATUTORY REVIEWS	1
1.3 "BEST PRACTICE" CONSULTATION.....	2
2. AUDITS OF THE PROTECTIVE SECURITY GROUP	10
3. REVIEW OF S10 OF THE POLICE INTEGRITY COMMISSION ACT 1996	12
4. OPERATION ABELIA	13
CHAPTER TWO - QUESTIONS ON NOTICE	17
RESPONSES TO QUESTIONS ON NOTICE FOR THE SEVENTH GENERAL MEETING WITH THE POLICE INTEGRITY COMMISSION.....	17
CURRENT INVESTIGATIONS	17
USE OF POWERS	17
SPECIAL REPORTS TO PARLIAMENT.....	20
Project Dresden II: The Second Audit of the Quality of NSW Police Internal Investigations	20
Operation Jetz	24
REPORTS TO PARLIAMENT BY THE INSPECTOR OF THE POLICE INTEGRITY COMMISSION.....	26
Inspector of the Police Integrity Commission's <i>Report on the Practices and Procedures of the Police Integrity Commission</i>	26
MATTERS ARISING FROM THE COMMITTEE'S FIFTH GENERAL MEETING WITH THE INSPECTOR OF THE POLICE INTEGRITY COMMISSION	28
PIC'S PARTICIPATION IN LEGISLATIVE REVIEWS	29
Review of the Police Integrity Commission Act 1996	29
Review of the Police Act 1990	31
MATTERS ARISING FROM THE SIXTH GENERAL MEETING WITH THE POLICE INTEGRITY COMMISSION	31
Questions arising from the Sixth General Meeting with the Police Integrity Commission	31
CORPORATE PLAN AND PERFORMANCE MEASUREMENT FRAMEWORK 2003 - 2006	32
MANAGEMENT	34
QUALITATIVE AND STRATEGIC AUDIT OF THE REFORM PROCESS – REPORT FOR THE THIRD YEAR	36
CHAPTER THREE - QUESTIONS WITHOUT NOTICE	45
TRANSCRIPT OF PROCEEDINGS	45
APPENDICES	83

APPENDIX 1 – COMMITTEE MINUTES	84
APPENDIX 2: ANSWERS TO QUESTIONS TAKEN ON NOTICE	86
APPENDIX 3: PIC PRACTICE GUIDELINES.....	96

MEMBERSHIP & STAFF

Chairperson	Mr Paul Lynch MP, Member for Liverpool
Members	The Hon Jan Burnswoods MLC (Vice-Chairperson) The Hon Peter Breen MLC The Hon David Clarke MLC Mr Geoffrey Corrigan MP, Member for Camden Ms Noreen Hay MP, Member for Wollongong Mr Malcolm Kerr MP, Member for Cronulla
Staff	Ms Helen Minnican, Committee Manager Ms Pru Sheaves, Project Officer Ms Hilary Parker, Committee Officer Ms Jenny McVeigh, Assistant Committee Officer
Contact Details	Committee on the Office of the Ombudsman and the Police Integrity Commission Legislative Assembly Parliament House Macquarie Street Sydney NSW 2000
Telephone	02 9230 2737
Facsimile	02 9230 3052
E-mail	ombopic@parliament.nsw.gov.au
URL	www.parliament.nsw.gov.au

FUNCTIONS OF THE COMMITTEE

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

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

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

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

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

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

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

Functions of Committee

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

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

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

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

- (1) The Minister is to refer a proposal to appoint a person as Ombudsman, Director of Public Prosecutions, Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission to the Joint Committee and the Committee is empowered to veto the proposed appointment as provided by this section. The Minister may withdraw a referral at any time.
- (2) The Joint Committee has 14 days after the proposed appointment is referred to it to veto the proposal and has a further 30 days (after the initial 14 days) to veto the proposal if it notifies the Minister within that 14 days that it requires more time to consider the matter.
- (3) The Joint Committee is to notify the Minister, within the time that it has to veto a proposed appointment, whether or not it vetoes it.
- (4) A referral or notification under this section is to be in writing.
- (5) In this section, a reference to the Minister is;
 - (a) in the context of an appointment of Ombudsman, a reference to the Minister administering section 6A of this Act;
 - (b) in the context of an appointment of Director of Public Prosecutions, a reference to the Minister administering section 4A of the *Director of Public Prosecutions Act 1986*; and

- (c) in the context of an appointment of Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission, a reference to the Minister administering section 7 or 88 (as appropriate) of the *Police Integrity Commission Act 1996*.”

CHAIRMAN'S FOREWORD

The Seventh General Meeting with the Commissioner for the Police Integrity Commission was the first such meeting for the 53rd Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission.

The new Committee examined a number of issues with the PIC Commissioner that have carried over from the end of the last Parliament. These included the PIC's involvement in a number of legislative reviews and the implementation of PIC recommendations by NSW Police.

Legislative review, particularly issues surrounding best practice consultation, form the core of the Committee's report. Two case studies on the review of the *Police Integrity Commission Act 1996* and the review of the *Police Act 1990* are used to illustrate particular consultation issues. These comments on consultation developed from issues raised during the Committee's Sixth General Meeting with the PIC Commissioner.

The Committee also explored new issues, including the PIC's Operation Abelia. Abelia is an integrated inquiry, combining active investigations into police drug use and a research program into effective drug detection and prevention strategies used nationally and internationally. The Committee will follow the progress of Abelia with great interest.

PIC's audits of the Protective Security Group following its incorporation into the Counter Terrorism Coordination Command are also considered in this Report. This will form part of the Committee's inquiry program for 2004.

Implementation of the PIC's recommendations, in particular the recommendation arising from Operation Saigon concerning mandatory blood testing following critical incident, is considered in the Report and is the subject of a recommendation by the Committee.

Issues canvassed in this Report are all important matters of public interest, and the views expressed in the commentary are consensus views shared by the Committee.

Finally, I would like to thank the Commissioner and his staff for their participation in the General Meeting, which is the primary means by which the Committee is able to fulfil its monitoring and review functions under the *Police Integrity Commission Act 1996*. The Committee has traditionally enjoyed a strong working relationship with the PIC, and looks forward to continuing this into the new Parliament.

Paul Lynch, MP
Chairperson

Chapter One - Commentary

1. STATUTORY REVIEW

1.1 Background

Pursuant to its statutory functions under s.31B of the *Ombudsman Act 1974*, and s.95 of the *Police Integrity Commission Act 1996*, the previous Committee on the Office of the Ombudsman and Police Integrity Commission reported to Parliament in June 2002 on its tenth General Meeting with the NSW Ombudsman and the sixth General Meeting with the Commissioner of the Police Integrity Commission (PIC). Both General Meeting reports included comment on aspects of the consultation process undertaken in relation to the statutory review of the *Police Integrity Commission Act*. The previous Committee intended to consider the findings of the review upon its completion and presentation to the Parliament.

Since its appointment, the current Committee also has monitored and considered the statutory reviews being conducted by the Ministry for Police on the *Law Enforcement (Controlled Operations) Act 1997* and the *Police Act 1990*. The Committee's experience in relation to these reviews is examined in detailed later in this section of the Commentary, to illustrate a number of threshold issues concerning the statutory review process that the Committee considers should be drawn to the attention of the Parliament.

1.2 Ministerial statutory reviews

In the New South Wales context, review clauses in legislation were introduced as a policy initiative in 1992. At the time, it was envisaged that review clauses would be included in principal Acts but not in amending Acts. Review clauses would require the Minister administering the Act to review whether:

- the policy objectives which the legislation sought to achieve remain valid; and
- the form of the legislation remains appropriate for securing those objectives.

Reviews would usually occur five years after the date of assent and the Minister was required to report to Parliament on the outcome of the review. The purpose of the review clauses was to ensure that legislation is properly reviewed after being in operation for several years, and to fully consider the need for its continued existence. Such provisions would assist in removing obsolete and ineffectual statutory provisions, and to reduce the quantity of legislation in existence.¹

The scope of the statutory review provisions as they currently stand is relatively unchanged. The focus remains on determining whether the policy objectives of a statute remain valid,

¹ NSW Premier's Department, Memorandum No.92-10, "Review Clauses in Legislation" (Memorandum to all Ministers), 13 May 1992.

and whether the terms of a statute remain appropriate for securing those objectives. However, there is some variation in the timeframes within which reviews are conducted.

At the outset it should be stated that the Committee considers the scope of existing statutory review provisions to be appropriate. It is proper that the Minister with responsibility for administering a piece of legislation should be responsible for policy review and development in relation to that legislation. As currently drafted, statutory review provisions specifically give effect to this aspect of Ministerial responsibility. As a parliamentary body, the Committee is removed from, and outside, the review process, which is a process of the Executive Government. Rather, the Committee has a statutory role to monitor and review the Office of the Ombudsman, the PIC and the Inspector, and possesses the discretion to report to Parliament, with such comments as it thinks fit, on any matter appertaining to each of these bodies, or the exercise of their functions, which the Committee is of the opinion warrants drawing to the attention of Parliament. However, the Committee takes the position that it is able to report on any aspect of a review that relates to the Committee's statutory functions. In particular, the Committee considers that it has a role to report to the Parliament on matters affecting the jurisdiction, functions and powers of the Ombudsman, PIC and the Inspector. This includes reporting on such matters arising from the statutory review process.

Successive Committees overseeing the Ombudsman and PIC have emphasised this point, and have endeavoured to find an appropriate process by which they could monitor the conduct and outcomes of relevant statutory reviews. To date, the Committee has utilised private meetings, or briefings, from the departmental officers with carriage of the reviews for this purpose. Thus far, the Ministry for Police has conducted all of the reviews considered by the Committee. The Committee is pleased to note the recognition given by the Ministry for Police to the views the Committee has expressed in its reports to Parliament. However, there are a number of matters relating to statutory reviews about which the Committee remains concerned.

1.3 “Best Practice” Consultation

In the report on the tenth General Meeting with the Ombudsman, the previous Committee examined the progress of the review of the *Police Integrity Commission Act*, the consultation process involved, and certain key issues relevant to the functions and jurisdiction of the Ombudsman. The report stresses the need for open and meaningful consultation with key stakeholders in the police oversight system, and is critical of delays that occurred in the consultation process. The current Committee has monitored the reviews of the *Law Enforcement (Controlled Operations) Act* and the *Police Act*, in addition to the review of the *Police Integrity Commission Act*.

On the basis of the Committee's examination of these reviews, the Committee considers that it is important to establish principles and standards of consultation that should apply to statutory reviews, and the development of legislative proposals, which have significant implications for independent statutory officers such as the Ombudsman and the PIC. In doing so, the Committee has had regard to the development of policies on legislative consultation processes within related Commonwealth and United Kingdom jurisdictions.

In November 2000, following on from the release of the release of the White Paper on *Modernising Government*² in 1999, the British Cabinet Office released a *Code of practice on written consultation* to apply to consultation documents issued after January 2001.³ The code relates to national consultations, that is consultation processes covering whole areas of a department's responsibility, where views are sought from the public, as distinct from inter-departmental or government consultation. Although it has no legal force, and cannot prevail over statutory or other mandatory external requirements, the code is otherwise considered to be binding on UK Departments and their agencies, unless a departure is required in exceptional circumstances.⁴ It is aimed at promoting an effective and inclusive consultation process, leading to improved policy decision-making.⁵ Significantly, the code is also seen as having a wider relevance to regular and more limited consultations, which are often public.⁶

The consultation criteria contained within the code is as follows:

1. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.
2. It should be clear who is being consulted, about what questions, in what timescale and for what purpose.
3. A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.
4. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others), and effectively drawn to the attention of all interested groups and individuals.
5. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.
6. Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and reasons for decisions finally taken.
7. Departments should monitor and evaluate consultations, designing a consultation coordinator who will ensure the lessons are disseminated.⁷

Within Australia, the Cabinet and Legislation Handbooks, published by Department of Prime Minister and Cabinet, also offer some guidelines on the consultation to occur in the development of legislative proposals.

² *Modernising Government*, Cm 4310, HMSO, March 1999. Chapter 2 of the White Paper deals with policy making. See <http://www.archive.official-documents.co.uk/document/cm43/4310/4310.htm>

³ See http://www.cabinet-office.gov.uk/regulation/Consultation/Code_MSWord.doc. The Code is currently being reviewed and the Cabinet Office released a consultation document, entitled *The Code of Practice on Consultation*, in September 2003. The consultation period concludes in November 2003 and a summary of responses is to be published prior to 24 February 2004. See <http://www.cabinet-office.gov.uk/regulation/Consultation/DraftCode.doc>

⁴ Cabinet Office, *Code of practice on written consultation – Applies to consultation documents issued after 1 January 2001*, November 2000, pp.3, 5.

⁵ *ibid*, pp.3-4.

⁶ *ibid*, p.5.

⁷ *ibid*, p.7.

The Cabinet Handbook states that “good policy requires informed decisions”, which in turn “require agreement on facts and knowledge of the opinions of those who have expertise in the subject matter”. The Handbook also comments that as far as possible, any differences on proposals (especially regarding matters of fact) should be resolved in advance of Cabinet consideration or, if resolution is not possible, any differences should be identified and set out in a way that will facilitate informed decision-making. Emphasis is placed on permitting adequate time for proper consultation and planning accordingly. The Handbook specifies certain basic consultation requirements, including that all submissions to Cabinet should be the subject of consultation among departments where the issues concerned impinge upon their core functions.⁸ Also, “best practice” involves consultation as “an integral part of the development of a policy proposal”, in which Ministers and departmental officers, with an interest, should have ample opportunity to contribute to the development of the proposal and to resolve any differences before lodgement of the submission.⁹

The *Legislation Handbook* states that “best practice” in developing legislation requires consultation with relevant parties within government, and where appropriate, outside government.¹⁰ However, it is not considered appropriate for public consultation to occur on proposed legislation:

- (a) which would alter fees or benefits only in accordance with the Budget;
- (b) which would contain only minor machinery provisions that would not fundamentally alter existing legislative arrangements; or
- (c) for which consultation would give a person or organisation consulted an advantage over others not consulted.¹¹

The *Legislation Handbook*¹² further indicates that in the preparation of submissions to Cabinet it is important to balance the need to consult with agencies with a proper interest in the proposal against the risk of a wide circulation that increases the possibility of premature disclosure.¹³ The Committee acknowledges that certain decisions made by Ministers, in relation to the preparation of legislation, are appropriately matters for their judgement, eg whether or not there is a need for a draft exposure bill.

The aforementioned publications derive from different jurisdictions and are quite distinct and separate from review of the operation of existing legislation. Nevertheless, they provide a useful basis for considering some of the guiding principles and standards that should apply to both the government and non-government aspects of the consultation process undertaken in statutory reviews. It is relevant to note that in the case of all three statutory reviews in question, the results of the reviews have been used to assist in the preparation of legislative proposals.

⁸ Department of Prime Minister and Cabinet, *Cabinet Handbook*, fifth edition, amended November 2002, (Commonwealth of Australia), Canberra 2002, p. 21. See <http://www.dpmc.gov.au/pdfs/cabineted5.pdf>

⁹ *ibid*, pp.21-2.

¹⁰ Department of Prime Minister and Cabinet, *Legislation Handbook*, includes update No. 1 of May 2000, (Commonwealth of Australia), Canberra 1999, p.2. At <http://www.dpmc.gov.au/pdfs/LegislationHandbookMay00.pdf>

¹¹ *Legislation Handbook*, *op. cit*, p.3.

¹² *Legislation Handbook*, *op.cit*.

¹³ *Cabinet Handbook*, *op.cit*, p.22.

In view of that the particular nature of the three statutes being considered, all of which involve significant public interest issues, the conduct of their review required to be undertaken in a considered, transparent and comprehensive fashion. The *Police Integrity Commission Act* flowed from the Royal Commission into the NSW Police Service and is a piece of legislation that was introduced with bipartisan support. The jurisdiction of the PIC concerns serious police misconduct and corruption, and PIC's extensive powers are coercive and covert in nature. Such powers have the potential to trespass unduly on personal rights and liberties. Controlled operations fall into the category of covert powers used by law enforcement agencies. The *Law Enforcement (Controlled Operations) Act* provides a legislative scheme whereby law enforcement agencies have authority to engage in what would otherwise be criminal activities, in accordance with the provisions of the Act, for the purpose of detecting and preventing serious crime and corruption. Significantly, controlled operations do not require judicial approval. The *Police Act* is a comprehensive legislative scheme that includes the police complaints system, which is of direct relevance to the functions and powers of both the Ombudsman and the PIC.

Following is an account of the Committee's examination of the process undertaken for the reviews of the *Police Integrity Commission Act 1996* and the *Police Act 1990*, in which particular attention has been given to:

- the consultation planning process;
- the extent of consultation;
- reporting on statutory outcomes.

Recommendations have been included where the Committee felt necessary.

Consultation Case Study 1: Review of the *Police Integrity Commission Act 1996*

On October 2001, the Ministry for Police commenced reviewing the *Police Integrity Commission Act 1996* on behalf of the Minister for Police, in accordance with s. 146 of the Act. A report on the outcomes of the review was due to be tabled in each House of Parliament on or before 21 June 2002. On 17 December 2002, shortly after the last sitting day of the Parliament, a Discussion Paper, reporting on the outcomes of the review, was presented to the Clerk of the Legislative Assembly. The then Minister wrote to the Committee advising that the Discussion paper will "enable all interested parties to comment on the recommendations before the Government introduces amending legislation".¹⁴ The current Committee has continued to monitor the progress of the review and the legislative proposals contained in the Discussion Paper.

The previous Committee's report on the sixth General Meeting with the Commissioner of the PIC dealt with the review of the *Police Integrity Commission Act* in some detail, focussing on the conduct of the review, the rationalisation of the police oversight system, and the prohibition that prevents the PIC from employing current and former NSW police officers. For the purpose of discussing the consultation undertaken by the Ministry for Police, some of the detail from the earlier report is briefly repeated here.

¹⁴ Letter from the Minister for Police, the Hon. M. Costa MLC, to the Chair of the Committee, Mr Paul Lynch MP, 17 December 2002.

Advertising and consultation - The review was advertised in the Daily Telegraph, Sydney Morning Herald and the Australian. The Ministry also invited submissions from a wide range of agencies including: the Police Integrity Commission, the Ombudsman, NSW Police, the Police Association, the Independent Commission Against Corruption, NSW Crime Commission, The Cabinet Office, Attorney General's Department, Premier's Department, Audit Office of NSW, Judicial Commission of NSW, NSW Bar Association and Legal Aid NSW. In total, eleven submissions were made to the review.

On 15 January 2002, NSW Police made a submission proposing wide-ranging changes to the police complaints system. However, in correspondence to the previous Committee in May 2002, the Ministry advised that only changes of a "technical and procedural nature" had been proposed.¹⁵ Some of the proposals for change that were under consideration at the time included: the removal of the prohibition on the employment of former or serving NSW police officers by the PIC; rationalising the police oversight system; and amendments to the provisions of the PIC Act concerning legal professional privilege. The previous Committee considered that these particular issues were of such significance as to warrant reporting to Parliament and it did so in the report on the sixth General Meeting with the PIC.

In terms of the circulation of submissions between stakeholders to the review, the Ombudsman gave evidence to the previous Committee that the Police submission, dated January 2002, was received by the Ministry for Police in February 2002 but was not forwarded to his Office until 22 May 2002. The Office was requested to respond within five days.¹⁶ The PIC had a similarly short turn around – receiving the submission on 13 May 2002 with a response date of 21 May 2002.¹⁷

The Ministry for Police consulted further with NSW Police and the new Commissioner of Police in June 2002. Following this consultation, the NSW Police position changed substantially from that adopted by the previous Commissioner of Police in the submission made in January 2002.

Issues concerning the progress of the review and the proposals made in submissions were discussed in a briefing from the Ministry on 29 May 2002 and again during the Committee's General Meeting with the Ombudsman on 12 June. It was at this stage that the Committee became aware of the approach taken by the Ministry for Police to the consultation process for the review.

The next discussion of issues pertinent to the review of the *Police Integrity Commission Act* occurred as a result of the Inspector's review of the practices and procedures of the PIC. The review by the Inspector, the Hon. M.D. Ireland QC, had been recommended in the Discussion Paper on the review of the Act. Mr Ireland tabled his report on 18 June 2003 but he did not re-examine questions that had arisen in the review eg legal professional privilege. The Inspector later discussed some of the issues arising from the review of the Act with the Committee and his evidence is included in the Committee's report on the fifth General Meeting with the Inspector (September 2003). The General Meeting provided the Inspector with an opportunity to give evidence in public to the Committee on the specific question of

¹⁵ Letter from the Director General, Ministry for Police, Mr L. Tree, to the Chair of the Committee, Mr P Lynch MP, dated 16 May 2002.

¹⁶ Tenth General Meeting with the Office of the Ombudsman, June 2002, p 40.

¹⁷ Advice from PIC, 1 December 2003.

the application of legal privilege to the proceedings of the PIC. The previous Committee outlined its views on this particular question in its report to Parliament on the sixth General Meeting with the PIC, and this Committee concurs with the views expressed in that report. The Committee notes that this question has been referred to the Cabinet Office for consideration.

Legislative proposals - In October 2003 both the Ombudsman and the PIC advised the Secretariat that the Ministry for Police had not consulted them further with regard to the review of the Act.¹⁸ In light of this advice the Committee resolved to meet with representatives of the Ministry on the evening of 19 November 2003 to obtain further information on any discussions and developments that had occurred since the tabling of the Discussion Paper on the review.

At the briefing, the Ministry informed the Committee that further submissions had been received from the Bar Association and Law Society, following the tabling of the Discussion Paper. The Ministry further advised the Committee that the PIC and the Inspector of the PIC had recently received a draft Cabinet Minute proposing legislative changes to the PIC arising from the review. In response to a question taken on notice at the General Meeting, the PIC subsequently confirmed that the draft Cabinet Minute from the Ministry had arrived by fax at 12.11pm on 19 November 2003, only a few hours before the briefing given to the Committee by the Ministry.¹⁹ The Ministry sought a response on the draft Cabinet Minute by 29 November 2003.

In evidence to the most recent General Meeting, the PIC indicated that it had been advised that as a result of further submissions received following the release of the Discussion Paper, several proposals will not be pursued.²⁰ The Ministry has confirmed that the Discussion Paper will not be followed by any further report on the review of the *Police Integrity Commission Act*.²¹ This would indicate that no public account will be given of the reasons why certain proposals from the Discussion Paper have been rejected after further examination. The Committee considers that a report to this effect would have provided a clearer examination of the proposals that had been made during the review of the Act, and the considerations that led to the development of legislative proposals arising from the review.

The Committee will continue to follow the preparation of the legislative proposals arising from the review, leading to their introduction into Parliament. The Committee finds it reassuring that the Ministry has provided both the PIC and the Inspector of the PIC with an opportunity to comment on the draft Cabinet Minute. However, the Committee does have concerns about the conduct of the review and the nature of some of the issues that were considered by the Ministry for Police during the review process.

These concerns are shared by the PIC, which gave evidence at the seventh General Meeting on the conduct of the current review and important considerations in the planning of any future reviews:

¹⁸ Secretariat telephone call to the PIC and the Office of the Ombudsman, 4 November 2003.

¹⁹ Fax from PIC Solicitor, 26 November 2003.

²⁰ QON 25

²¹ Secretariat telephone call to Ministry, 9 April 2003.

. . . it is the Commission's view that the first review process, unnecessarily canvassed issues associated with the Commission's performance and its management and operational practices. The Commission's performance is regularly reviewed by the Parliamentary Committee. The Commission's practices are regularly reviewed by the Inspector and, in some respects, by the Ombudsman and the Audit Office. A further review which canvasses these same issues is unnecessary and a waste of time and money. Responding to these extraneous issues proved burdensome for the Commission. It is the Commission's view that any further review should be confined strictly to broader consideration of the objectives of the Act and the terms of the Act in achieving those objectives. It should not consider the Commission's performance in specific investigations, nor should it consider the Commission's practices or its preferred application of authorised powers.

As to the timing of any further review – if a review is to be fixed in time, and not to be conducted on an 'as necessary' basis as is the usual practice for such reviews – then it would make sense to link the timing of it to the conclusion of a number of outstanding matters. These matters include: the Review of the *Police Act 1990*; the statutory annual review of the powers held by the Commissioner of Police; the Commission's Operation Florida; and, implementation of the recommendations from the first review. Five years from the conclusion of each of these matters would provide more than sufficient time for any issues to arise concerning:

- ❑ changes in the police structure;
- ❑ the activities of the Counter-Terrorism Coordination Command;
- ❑ the new strategic relationship between the Police and the Crime Commission on counter-terrorism; and,
- ❑ the practical application of the *Terrorism (Police Powers) Act 2002*.²²

The Committee intends to discuss the PIC's evidence and proposals with the Ministry for Police. Also, in the absence of a further report by the Ministry for Police on the review of the *Police Integrity Commission Act*, the Committee will give consideration to taking evidence from the Ministry on those matters that were not finalised as part of the review of the Act. The Committee would not canvass the matters that were put forward in the draft Cabinet Minute but would focus on the proposals that were rejected and the reasons for doing so.

Consultation Case Study 2: Review of the *Police Act 1990*

The Minister for Police commenced the review of the Police Act 1990 in August 2002. The Act requires that the review be tabled in Parliament on or before 31 December 2002. Although the Ministry has indicated on more than one occasion that a report on the outcome of the review was imminent, it has yet to produce a report on the outcomes of the review. In the Discussion Paper on the review of the *Police Integrity Commission Act*, the Ministry reported that the review of the *Police Act* would be tabled on 1 January 2003²³. On 9 April 2003 the Ministry informally advised that the review of the Police Act 1990 would probably be tabled at the end of June 2003. At the time of the seventh General Meeting with the PIC in November 2003, the report on the outcomes of the review of the Police Act was nearly 11 months overdue from the statutory reporting deadline.

²² QON 26

²³ *Report of the Review of the Police Integrity Commission Act 1996 – Discussion Paper*, December 2002, p 90.

The Office of the Ombudsman made a written submission to the Ministry in relation to the review of the *Police Act* on 17 October 2002. In December 2002 and January 2003, the Office contacted the Executive Officer to the review to establish the status of the review and was advised that the NSW Police submission had been received and that a report or discussion paper would not be available before the election in March 2003. The Executive Officer later contacted the Office on 5 August 2003 to advise that workshops were being proposed on Parts 8A and 9 of the *Police Act*. He undertook to advise the Office on any workshop in due course.²⁴

The PIC has given evidence that it made a submission to the review of the *Police Act* on 23 October 2002, which largely dealt with the issues raised in Chapter 12 of the Discussion Paper on the review of the Police Integrity Commission Act. The Ombudsman provided the PIC with a copy of the Office's submission to the review but, at the time the PIC prepared its answers for the General Meeting with the Committee, it had not been consulted in relation to any other submissions or proposals. Consequently, the PIC was unable to answer questions put as to whether or not any proposals made during the review would significantly impact on its jurisdiction, functions or operations.²⁵

In November 2003, both the Ombudsman and the PIC advised the Secretariat that they have had no further consultation with regard to the review of the *Police Act*.²⁶

At a briefing with the Committee on 19 November 2003, representatives of the Ministry indicated that a large number of issues had been raised in the review thus far and that these issues were being collated. The Ministry advised that the submissions made in regard to the complaints provisions of the *Police Act*, one of the Committee's primary interests, were in the nature of fine-tuning and this reflected the continual improvements that had been made to the complaints system. The Ministry indicated that it was aware of the Committee's viewpoint on the broader systemic issue of whether or not there should be a single complaint body: a threshold issue still subject to disagreement between certain parties to the review.

During the briefing the Committee was advised by the Ministry that a series of roundtable discussions involving the Ombudsman, PIC and NSW Police were being planned for March 2004 to discuss issues arising from the review. The Committee is uncertain as to the need for such consultation at this stage of the reporting process, particularly in light of previous advice from the Ministry that it would shortly be tabling the report on the review of the Act.

An offer was made by the Ministry for Police to provide the Committee with the proposals that develop out of the round table discussions, before the Ministry finalises its position on these matters. The Committee has accepted the Ministry's offer and will continue to monitor the review process closely. In particular, the Committee will monitor that the parties to the roundtable discussions are fully appraised of the issues to be considered in the talks in order to facilitate an informed and open discussion of the issues. The Committee also will monitor the extent to which the Office of the Ombudsman and the PIC receive regular updates on the progress being made by the Ministry towards completing the report on the review, and whether they are given adequate opportunity to properly comment on the draft report before it is finalised. Should a final report on the outcomes of the review not be forthcoming in a

²⁴ Ombudsman's Answer to supplementary question No. 9.

²⁵ PIC, Answer to QON No. 27.

²⁶ Secretariat telephone call to PIC and Office of the Ombudsman 4 November 2003.

timely manner following the proposed roundtable discussions, the Committee will consider taking evidence from the Ministry on the delay.

2. AUDITS OF THE PROTECTIVE SECURITY GROUP

On 1 July 1998, NSW Police established the Protective Security Group (PSG) to undertake protective services, operational and tactical analysis, intelligence gathering and liaison with relevant agencies in relation to persons who present a risk of politically-motivated violence or terrorism activity. This was seen to be particularly important in the lead up to the 2000 Olympic Games.²⁷

The PSG was to replace the disbanded Special Branch of NSW Police. Special Branch had been heavily criticised by the Wood Royal Commission and was disbanded in 1997. The PIC received a referral to investigate Special Branch from the Royal Commission and reported on the activities of Special Branch in 1998. Both the Royal Commission and the PIC recommended that a new agency, with strict accountability controls, be established in the place of Special Branch.

Subsequently, Part Three of the *Police Act 1990* was amended to provide for the establishment of the PGS, and laid out a regime of strict accountability:

16 Audit of Group

- (1) The Commissioner is required to carry out an annual audit of the operations, policies and procedures of the Group.
- (2) The audit is to include an examination of the following matters:
 - (a) whether the Group as a whole is adhering to its charter and is effectively performing its role as provided in its charter,
 - (b) whether the members of the Group are adhering to its charter,
 - (c) whether proper procedures exist and are being adhered to by the Group in connection with the use and payment of informants,
 - (d) whether proper procedures exist and are being adhered to by the Group for the recording and use of intelligence gathered by the Group.
- (3) An audit is to be made in respect of each calendar year commencing with the year in which this subsection commences.
- (4) A written report of the annual audit is to be furnished to the Police Integrity Commission as soon as practicable after the end of the year concerned.

Section 14(e) of the *Police Integrity Commission Act 1996* states that the Commission must monitor and report on the conduct and effectiveness of the annual NSW Police audits of the PSG.

The PIC's Annual Report for 2000 – 2001 outlines the results of the PIC's assessments of the audit reports on the PSG for 1998, 1999 and 2000 as follows:

- 1998 – after discussions between the PIC and NSW Police following the lodgement of the first audit, a supplementary report was lodged which satisfactorily addressed the audit requirements.

²⁷ Second Reading Speech, *Police Legislation Amendment (Protective Security Group) Bill 1998* 23 June 1998.

- 1999 - the PIC noted that this audit report was a significant improvement on the previous year's report.
- 2000 – NSW Police planned this audit in conjunction with PIC and delivered it April 2001. PIC noted this report improved on that of the previous year.

The PIC's Annual Report for 2001 – 2002 notes that while it had received NSW Police report of their audit of the PSG, they had recently met with NSW Police to clarify some issues surrounding the audit.

The PIC's most recent Annual Report for the 2002 – 2003 period notes that the PSG audit for 2002 is outstanding. According to the PIC, NSW Police provided it with a proposed plan outlining details of the annual audit on 28 April 2003. The audit was initially scheduled to take place in June 2003, but due to delays was eventually done in August 2003. At the time of tabling their Annual Report, the PIC had not received the report on the 2002 PSG annual audit. Consequently, the PIC noted that they had been unable to report on this as required in their annual report. The PIC also noted that, as the PSG had been moved into the Counter Terrorism Coordination Command, it would be "interested to see what impact these changes will have upon the future of the PSG annual audits".²⁸

This is an important area for consideration, as the expanded role of the PSG under the new Counter Terrorism Coordination Command means that it will now have investigation powers and will be working in concert with the NSW Crime Commission under the direction of a management committee that will include delegates from federal agencies. Presently s16 of the *Police Act 1990* provides for the Commissioner for Police to conduct an annual audit of the operation, policies and procedures of the Group, and the PIC is required to monitor and report on the conduct and effectiveness of those audits. However the new arrangements raise the question of whether the Commissioner of Police has sufficient authority to audit operational activities intermeshed with the operations of other state and federal agencies.²⁹

In evidence to the Committee at the General Meeting on 25 November 2003, the Commissioner stated that until the relationship between the activities of the Counter Terrorism Coordination Command (CTCC) and the PSG's charter are formalised, the audits should continue. The Solicitor to the Commission noted the increase in the PSG's powers had increased since its inclusion the CTCC. For example, the PSG can now conduct investigations rather than being confined to gathering evidence. In these circumstances, the PIC's review of the audit reports by the NSW Police takes on added significance.

The PSG was established with bipartisan support, and with clear and rigorous accountability requirements, both in recognition of the powers it holds as well as the wish to avoid the excesses of Special Branch. Therefore, the Committee views with concern the outstanding annual report on the PSG for 2002.

Given that the legislative basis for the PSG falls within the *Police Act 1990*, which is currently being reviewed by the Ministry for Police, it would seem that the review of the Act would be a timely and appropriate opportunity to clarify the accountability requirements of the PSG now that it is located within the Counter Terrorism Coordination Command (CTCC).

²⁸ *Annual Report 2002 – 2003 of the Police Integrity Commission*, p.37.

²⁹ Police Integrity Commission submission to the review of the *Police Act 1990*, p8.

However, the Ministry advised the Committee during a briefing on legislative reviews on 19 November 2003 that the review of the *Police Act 1990* had not looked at clarifying the accountability requirements for the PSG as this issue had not been raised in submissions to the review. This is not the case as the PIC's submission to the review raised, amongst a range of other issues, the PSG's new role and the issue of the sufficiency of the Police Commissioner's powers to audit the activities of the PSG.³⁰

The Ministry advised the Committee that it expected that the issue of the PGS audits would be the subject of ongoing discussions with NSW Police and the PIC. While the review of the *Police Act 1990* is now 12 months overdue, it appears likely that the accountability regime for the PSG may be dealt with outside the review process, with no time frame for completion, or consideration of interjurisdictional arrangements.

CONCLUSION:

In light of the ongoing uncertainty about the accountability arrangements for the Protective Security Group, and the consensus between the Committee and the Police Integrity Commission, that the intended level of oversight intended for the PSG remains valid, the Committee has resolved to conduct an inquiry into the jurisdiction of the PIC's oversight of the PSG. This inquiry will commence in the first half of 2004.

3. REVIEW OF S10 OF THE POLICE INTEGRITY COMMISSION ACT 1996

Section 10(5) of the *Police Integrity Commission Act 1996* specifies that the Commission cannot employ, engage or second serving or former NSW Police. The *Report of the Review of the Police Integrity Commission Act 1996 – Discussion Paper* (the Discussion Paper) considered this employment prohibition. During a briefing given to the previous Committee, the Ministry stated that the PIC, the PIC Inspector, the NSW Crime Commission and NSW Police had recommended that the bar to PIC seconding and employing serving or former NSW Police be lifted. The previous Committee strongly opposed this potential recommendation, and reported their reasons in the Report of the Sixth General Meeting with the Commissioner for the Police Integrity Commission. The Committee reasoned that:

- the current legislative arrangements allow the PIC to work in joint taskforces with NSW Police and the NSW Crime Commission, and provide access to specialist knowledge held by NSW Police officers;
- no significant evidence has been put forward to show that PIC investigations have been impeded by not being able to employ current or former NSW Police officers; and
- no evidence has been presented by any party to show that the employment bar needs lifting.³¹

One of the arguments put forward to support the lifting of the employment prohibition was the performance of NSW Police, in particular officers from Special Crimes and Internal

³⁰ Ibid.

³¹ For a full discussion of the employment prohibition, see *Sixth General Meeting with the Commissioner for the Police Integrity Commission June 2002*, pp.xii – xv.

Affairs (SCIA), who conducted the initial investigations that resulted in the PIC's Operation Florida. The latter operation focused on drug dealing and other types of corruption amongst police officers on the Northern Beaches. The PIC Commissioner gave evidence at the Seventh General Meeting with the Committee that the Commission will report on Operation Florida during the first half of 2004.

The Discussion Paper on the review of the *Police Integrity Commission Act 1996*, at page 51, made the following recommendation in relation to this matter:

Whilst the majority of the agencies consulted during the review process support the Police Integrity Commission's submission [to lift the employment bar], the concern of the Committee cannot be lightly dismissed, given the Committee's statutory responsibility for monitoring and reviewing the manner in which the Commission exercises its functions.

It is recommended that the bar at section 10(5) not be removed at this time, but that the Commission be given the opportunity to have this matter further reviewed by the Minister for Police and the Parliamentary Joint Committee after the Commission's Operation Florida investigation has been fully assessed.

CONCLUSION:

In accordance with the Committee's oversight functions, in particular monitoring and reviewing the functions of the Commission, it is appropriate that the Committee has carriage of the review of the employment prohibition contained in s.10(5) of the Police Integrity Commission Act 1996. Further, it would be inappropriate for the Parliamentary oversight committee to conduct the review in conjunction with the Minister. Consequently, the Committee has resolved to conduct an inquiry into whether prohibiting the PIC from employing former or current NSW Police has utility as an anti-corruption measure. This inquiry will commence in early 2004.

4. OPERATION ABELIA

On 6 November 2003, the PIC commenced hearings into the use of illegal drugs and the abuse of prescription drugs by police. Operation Abelia is an integrated inquiry, combining active investigations into police drug use and a research program into effective drug detection and prevention strategies used nationally and internationally. Abelia will consider options for officers who refuse to be tested, testing student police officers before and after recruitment, as well as increasing the number of random drug tests.

The Commissioner gave evidence before the Committee that the NSW Police Commissioner made a public statement on the opening day of Abelia hearings, and has been actively supporting the inquiry. The Commissioner further noted that the Commission intends to conduct a series of round table discussions with both NSW Police and the Police Association in relation to policy and procedural issues as they are identified during the inquiry.

The support of NSW Police and the Police Association for Operation Abelia is a positive development, and the Committee awaits the results of this innovative inquiry with great interest.

The use of illegal drugs by police officers has been a feature of a number of PIC inquiries. Probably the most notable amongst these was Operation Saigon, which examined the activities of police in the eastern suburbs and the events surrounding the shooting of Roni Levi. One of the PIC's recommendations arising from Saigon was mandatory blood tests for officers involved in critical incidents.³² The PIC's Annual Report for 2001 – 2002 indicates that NSW Police supports this recommendation.

The PIC Annual Report for 2002 – 2003 notes that in November 2002, following the appointment of a new Police Commissioner, the Police Commissioner's Executive Team again considered the issue of mandatory blood testing and reaffirmed its support for this measure on 18 October 2002. A submission was sent by NSW Police to the Minister for Police recommending legislative amendments to both the *Police Act 1990* and the *Police Regulation 2000* to allow for the introduction of this form of drug testing.³³

This submission was again made to the Ministry for Police in December 2002 for consideration in its review of the *Police Act 1990* and the *Police Regulation 2000*. In the NSW Police July 2003 report on the progress made towards implementing PIC's recommendations, NSW Police reported that a response in relation to this submission is expected following the finalisation of the Ministry's review of the *Police Act 1990*.³⁴

The Ministry for Police briefed the Committee on the progress of a number of legislative reviews, including the *Police Act 1990* on 19 November 2003. During this briefing, the Ministry advised that it was up to the PIC to progress the outstanding recommendations from Operation Saigon, and that the review of the *Police Act 1990* would not be dealing with this matter. The Ministry further advised that a number of recommendations from Operation Saigon concerning drug testing had been referred back to the PIC for consideration in Operation Abelia.

However, the Police Integrity Commissioner gave evidence that while aspects of drug use by police officers, as discovered during Operation Saigon, will be considered in Operation Abelia, no recommendations have been formally referred to the PIC by the Minister for Police or the Ministry for Police.

Blood testing of police involved in critical incidents is an important procedure that provides detailed evidence about the level of impairment the presence of a drug could cause. This kind of detail cannot be obtained by urine testing (as currently used by NSW Police) or hair sample testing, both of which only indicate the presence of a drug³⁵. Blood testing after critical incidents allows the suspicion of illicit drug use and the potential level of impairment to be immediately dealt with. This would be a powerful tool in swiftly and effectively investigating critical incidents.

The Committee views it as a matter of concern that the PIC's recommendation for mandatory blood testing, agreed to by two successive Police Commissioners, has been awaiting legislation for three years. Furthermore, advice from the Ministry for Police that this

³² A critical incident is one where the death of a member of public occurs as a result of police action.

³³ PIC Annual Report 2002 – 2003, p. 36.

³⁴ Ibid.

³⁵ For detailed discussion of the merits of blood versus urine and hair tests, see the Police Integrity Commission's *Operation Saigon*, pp 119 – 125.

recommendation has not been considered in the review of the *Police Act 1990* is of great concern, as the Ministry had received two separate submissions from NSW Police requesting legislative change to the *Police Act 1990* and must have known that this matter requires attention. It is clear from the PIC Annual Report for 2002 – 2003 that NSW Police expected this matter to be dealt with in the review of the *Police Act 1990*. The Committee is of the view that consideration of this issue is a matter of priority, and given that such testing requires legislative amendment to be given effect, it is most appropriately considered in the review of the *Police Act 1990*.

RECOMMENDATION:

The Committee recommends that the Ministry for Police finalise the matter of mandatory blood testing following critical incidents as part of the review of the *Police Act 1990*.

Chapter Two - Questions on Notice

RESPONSES TO QUESTIONS ON NOTICE FOR THE SEVENTH GENERAL MEETING WITH THE POLICE INTEGRITY COMMISSION

CURRENT INVESTIGATIONS

- 1. What is the status of the PIC's current investigations and what were the major outcomes of investigations that were finalised since the last General Meeting?*

There were 59 full and preliminary investigations open during the last financial year, including 11 major³⁶ investigations. The Committee is referred to the Summary Review of Operations contained in the Annual Report 2002-2003 which contains details of Commission outcomes for major investigations finalised during the year. A number of investigations remain ongoing and outcomes will be reported on finalisation.

At the time of writing there are 52 full and preliminary investigations open, including 13 major investigations.

USE OF POWERS

- 2. What is the statistical data on the use of the PIC's covert and coercive powers since its establishment, with particular reference to controlled operations, assumed identities, telecommunications interception, listening device warrants and search warrants? What trends have been observed in relation to the use of the PIC's powers, for example, the length of time where assumed identities are active?*

Please see Appendix A for the statistical data on the use of Commission powers.

The statistics show that, for the most part, use of powers tended to remain relatively static for the 6½ years that the Commission has been operational. The statistics are more notable for sharp increases or decreases during a particular year within the whole period than for trends one way or the other. The exceptions are assumed identities and telecommunications interception ('TI').

The reasons for the decline in new authorisations for assumed identities are discussed in the response to Question 4. In regard to the specific matter raised, ie length of time where assumed identities are active, no trends are readily discernable. The length of time an identity is active can vary significantly, from several days to a number of years depending on the purpose for which the assumed identity is obtained.

³⁶ Investigations involving sustained use of resources: more than one investigator full time and the use of special powers and physical and/or electronic surveillance.

The statistics for TI show an increase from around 20 warrants per year in the period July 1998 to June 2001, to 36 and 81 warrants in the following two years.

It is most likely that this upward trend in the use of TI relates to the kind of work being undertaken by the Commission at the time, the extent to which joint task forces are involved, relative priority and resourcing. Operations such as Warsaw, Belfast, Mosaic and Malta, each achieved a high priority and substantial resourcing within the Commission. However, these operations were not of a kind where TI would assist. Other matters such as Jetz and Florida were of a kind where TI would assist, and intercepts were conducted in regard to these operations, but by other agencies. These warrants are not reflected in the Commission's statistics. Several major investigations were conducted by the Commission during 2002-2003 which were of a kind where TI would assist and the Commission conducted the intercepts. Hence the increased number of warrants obtained for 2002-2003.

3. What was the nature of the PIC's objections to the recommendations contained in the Law Reform Commission's Interim Report on the review of surveillance, released in 2001? (as referred to in the PIC's Annual Report for 2001-2002, p.66)

The Commission has long held grave concerns about the Law Reform Commission's ("LRC") review of this critically important area of law. Those concerns were communicated to the Ministry for Police by the Commission's letter dated 10 August 2001, the whole of the contents of which were endorsed by the then Inspector of the Police Integrity Commission, the Hon M D Finlay QC.

The Commission considers the proposed legislative model to be flawed in two fundamental ways.

Firstly, the definitions of "surveillance" and "surveillance device", and therefore the potential scope of the activities to be regulated, are misconceived. They encompass all manner of surveillance conducted by the use of any "instrument, apparatus or equipment", and consequently regulate an extremely broad range of investigative activities by requiring the obtaining of a warrant from a superior court judge (in the case of covert surveillance) or compliance with surveillance principles (in the case of overt surveillance).

The Commission does not suggest that the privacy considerations which the LRC was anxious to see take primacy in the proposed legislative model are unimportant. However, in specifically rejecting an approach which strove to achieve an appropriate balance between personal privacy and the legitimate needs of law enforcement, the LRC's model pays insufficient heed to the public interest inherent in ensuring that crime and corruption is capable of being investigated in an effective and efficient manner. Much of what the Commission does in the exercise of its functions in the public interest would fall within the definition of "surveillance" under the LRC proposals, and would require the grant of a warrant to carry out. It is not putting it too strongly to say that the Commission would effectively be hamstrung if the LRC's model becomes law.

Secondly, the proposed warrants and accountability schemes, and in particular the reporting requirements in relation to covert surveillance, are in many respects inappropriately onerous and impractical.

The Commission has many additional concerns in relation to the LRC's reasoning and individual recommendations, and how they will work in practice. Some of these concerns were set out in a lengthy Table, which was furnished to the Ministry. This table, and the submissions, can be provided if required.

4. *There has been a significant decline in the number of assumed identity approvals granted, from 26 in the year ending 30 June 2000, to 5 in the year ending 30 June 2002. What is the reason for this decline?*

The Commission has a total of 51 assumed identities in use. Assumed identities are used by staff that are designated as investigators (staff that are former serving police officers) and technical and physical surveillance staff. A number of assumed identities are also used by administration staff in connection with payments of rent and services for covert premises. Some staff will have up to 3 or more assumed identities.

Financial Year	Approvals Granted	Revoked	Varied
1999	33	7	2
1999/2000	26	7	2
2000/2001	4	2	Nil
2001/2002	5	9	2
2002/2003	10	2	Nil
2003 – to date	13	2	Nil

Where turnover in staff with assumed identities is high, then the number of applications, approvals and revocations for use of assumed identities increases. If staff turnover is low, then the number of assumed identities decrease. It is the case for the Commission that turnover of staff with assumed identities has been low.

The slight increase in approvals for assumed identities in 2002-2003 and in the current financial year, corresponds with a requirement for certain Commission staff to be issued with firearms permits. Names, and other personal details of permit holders are held in NSW Police databases and available to all police. Assumed identities are therefore used in these cases.

5. *A significant decrease has occurred in the number of protected disclosures received by the PIC, from 27 in the year ending 30 June 2001, to 17 in the year ending 30 June 2002. What explanation is there for this decrease and has the trend continued?*

The protected disclosures statistics are as follows:

Year Ending	Protected Disclosures
30 June 2000 (first year of reporting)	27
30 June 2001	12
30 June 2002	17
30 June 2003	21

The reason for the figure for 1999-2000 being high in comparison to the following two years is not known. If anything, with the figure for 2002-2003 at 21, it could be argued that there has been a slightly upward trend in the last three years. However, given that the numbers are relatively small it may not be statistically valid to draw any conclusions about trends at this time.

SPECIAL REPORTS TO PARLIAMENT

Project Dresden II: The Second Audit of the Quality of NSW Police Internal Investigations

6. *What overall conclusions can be drawn about the quality of NSW Police internal investigations from Dresden and Dresden II?*

Dresden concerned the audit of internal investigations which commenced during the period January 1997 to June 1998. Dresden II concerned the audit of investigations which commenced during the period July 1998-June 2001.

In broad terms, Dresden II found an improvement in the quality of investigations from the first to the third year of the audit. The report noted a number of improvements made by the NSW Police, both in response to Dresden and at their own initiative. Some areas require further attention if results are to continue to improve.

Dresden II reported an increased number of "unsatisfactory" investigations (up 4.2% from Dresden) and a corresponding decrease in the number of satisfactory and very satisfactory investigations (down by 2.1% and 2.3% respectively). Dresden II also noted an increase in the overall number of very unsatisfactory investigations

At first glance these results appear somewhat disappointing. However, Dresden II also noted an improvement in the quality of investigations from the first to the last year of the audit. Very satisfactory investigations rose from 0.9% to 11.1% and very unsatisfactory fell steadily from 5.7% to 0.0%, as did unsatisfactory investigations from 25.5% to 22.2% (albeit with a sharp peak in year two to 31.9).

Dresden II found an overall improvement in the quality of investigations in a number of areas including:

- Increased use of investigation plans (as recommended in Dresden) – from 4% in Dresden I to 39% in Dresden II.
- Increased use of complaints histories of officers the subject of complaints (as recommended in Dresden); – from 7% in Dresden to 15.3% in Dresden II. The Commission notes that this is an area that still needs improvement.
- Increased use of appropriate investigation techniques such as call charge records, electronic or physical surveillance, interviewing and property checks (as recommended, in part, in Dresden) – from 15.7% in Dresden to 28.7% in Dresden II.

Areas which the Commission recommended require further attention by NSW Police include:

- Officers being tasked with investigating other officers from within the same LAC. The Commission identified a possible link between investigations assessed as “unsatisfactory” and investigations conducted within the same LAC as the subject officer.
- Officers junior in rank to the subject officer investigating complaints.
- The increased number of inappropriate recommendations made in response to investigations with adverse findings – from 8.8% in Dresden I to 23.3% in Dresden II.
- Delays in investigations.

7. Have NSW Police responded to the recommendations contained in Dresden II?

NSW Police responded to the recommendations in Dresden II on 27 August 2003. Of the eleven recommendations, NSW Police indicated it: supported 4; supported 6 with variation; and supported 1 in principle.

The Commission has prepared and forwarded to NSW Police formal comments on its response. It is anticipated representatives of the two agencies will meet in the near future to discuss some issues requiring further clarification.

Pursuant to section 99(2)(c) of the Act, the Commission will publish in its 2003-2004 Annual Report an evaluation of the NSW Police response to the Dresden II recommendations.

8. Dresden found that the age profile of officers most likely to be the subject of Category I complaints was 26 – 30 years. In Dresden II this rose to 31 – 35 years. Could this be the same group of officers?

The Commission did not specifically consider this question in conducting the second Dresden audit. In noting that the age groups in receipt of the highest percentage of complaints differed between the two audits, the Dresden II report indicated that the comparison of the age groups provided on page 21 did not take into consideration the relative size of the age groups from which the results were extracted.

Given the limitations of the available information, and the existence of a number of variables – such as fluctuations in the actual size of age groups over time – the Commission is reluctant to offer a view on this subject.

9. *Does the ratio of male officers the subject of Category 1 complaints and female officers the subject of Category 1 complaints reflect the general ratio of male to female officers in NSW Police?*

The ratio of male to female officers the subject of Category 1 complaints in Dresden and Dresden II is approximately 8.7:1. As of 30 June 2002, there were 13,716 serving police officers in NSW – 10,614 male and 3,102 female. The ratio of male to female officers in NSW Police was, therefore, approximately 3.5:1.

An inference might be drawn from these statistics that male officers are more than twice as likely to be the subject of a Category 1 complaint as female officers. However, caution is urged. Dresden did not take into account the distribution of males and females by age, rank or within duty types, nor did it consider the ratio of males to females in the NSW Police during each year of the audit. The Commission is unable to draw any conclusions about the propensity for females and males to attract Category 1 complaints with any degree of accuracy. Clearly it is reasonable to make the general statement that male officers are more likely to attract Category 1 complaints than female officers, but it is not possible, based on the data collected for Dresden II, to assert with any degree of accuracy how much more likely this will be the case.

10. *Dresden gave a brief profile of complainants (Section C of Appendices, Project Dresden 2000). Did the complainants profile remain the same for Dresden II?*

Unfortunately the Commission did not profile complainants in Dresden II and is therefore unable to advise whether the profile remained the same.

11. *One of the biggest trends noted in Dresden II was the increase in the number of times the Commission disagreed with the recommended action arising from a sustained complaint. What types of actions were recommended and what difficulties did the Commission have with the recommendations? Are there any particular reasons for the increase in inappropriate managerial action?*

In general, there were two main areas in which the Commission disagreed with the recommended action arising from a sustained complaint. The Commission did not agree that a penalty applied was consistent with the misconduct disclosed. The Commission also disagreed when alternative managerial or disciplinary action was not pursued when other more serious action was rejected or failed. In these cases, it was often the intervention by the Ombudsman which led to managerial action being taken.

It is not possible to pinpoint the reasons for the increase in inappropriate managerial action. It may be that training provided to investigators of internal complaints and those involved in the decision making processes was not sufficient at the time. NSW Police have since established a working party to review the provision of section 181D of the Police Act and have implemented several new initiatives designed to assist investigators to make appropriate recommendations regarding adverse findings. These initiatives include the Decision Making Framework, the Benchmarking Tool and the establishment of the Complaints Management

Unit. The Commission believes that these changes are important steps towards addressing deficiencies in formulating recommendations regarding adverse findings. Where prosecutions or 181D actions do not proceed, it is now the intention that reviewable and non-reviewable disciplinary action will automatically be considered.

12. Dresden II also found that the number of unsatisfactory investigations had increased by about 5%. What could be the reason for this?

The increase in unsatisfactory recommendations came about largely due to a sharp increase in unsatisfactory assessments in 1999-2000. If this year is removed from overall calculations then the increase is much smaller at about 2%. The reasons for the sharp increase during this year are not clear, although it might be noted that during 1999-2000 (and part of the following year) the NSW Police were substantially distracted preparing for the security of the Olympic Games.

13. Dresden II found that complaints against detectives had almost halved. What factors are responsible for this trend?

The reasons for complaints against detectives halving from Dresden to Dresden II are, again, not clear. Dresden II did not consider any trends in the overall population of officers performing these duties during the audit period.

14. Page 24 of Dresden II notes that some LACs that steadily reduced the number of officers involved in Category 1 complaints from Dresden to Dresden II were Drug and Organised Crime Strike Force Program, Castlereagh and Burwood. What factors have contributed to this improvement?

Drawing conclusions about trends from Dresden at the Command level is somewhat problematic.

The aim of Dresden was to examine the quality of complaint investigations across the whole of the NSW Police and not individual Commands. For this reason a random sample of complaints was obtained by selecting every fourth complaint received by the NSW Police from a random starting point. This sampling strategy does not specifically stratify to enable comparisons among, or to comment on trends within, Commands. The numbers of complaints, by Command, are too small. Also, the sample from any individual Command may not be representative of the actual total complaints in the Command, even though the overall sample is representative of complaints across the whole of the NSW Police. A sampling technique selecting a proportion of all complaints in a Command might be more appropriate for drawing conclusions about Commands.

15. In Recommendation 5 the Commission asks NSW Police to consider the mandatory supply of an Involved Officer's complaint history to the Investigator/s responding to the Category 1 complaint, unless there are exceptional circumstance. In what circumstances would it be inappropriate to supply an officer's complaints history?

Questions on Notice

The Commission did not have a specific circumstance – or set of circumstances – in mind when it framed this recommendation. However, it accepts that circumstances may arise where, for example, the confidentiality or sensitivity of the information contained in an officer's complaint history is such that it would be inappropriate to make it available to the investigator.

It should be noted that the Commission recommended that:

- complaint histories should be withheld from investigators only in exceptional circumstances;
- those circumstances should be documented by NSW Police; and
- in most circumstances if a complaint management team considered it inappropriate to release such information to the complaint investigator, the matter should be assigned to another investigator.

A further safeguard is offered by the NSW Police policy concerning Complaint Management Teams (CMTs). Under these arrangements, CMTs must view the complaint history of each officer the subject of a complaint.

16. The report on Dresden II mentions ongoing monitoring, particularly of the impact of the c@ts.i system on managing internal complaints. Does the Commission anticipate producing Project Dresden III, and will it cover a similar time frame to Dresden and Dresden II?

The Commission intends conducting a third audit of the quality of NSW Police investigations into serious police misconduct. Planning is yet to be undertaken, however, it is expected that the third audit will cover a similar period to Dresden II with a sample of investigations selected from 1/7/01 (when the Dresden II sample finished) to 30/6/04. The sample is expected to be selected and the audit conducted from late 2004 to early 2005 so that a suitable sample of completed investigations can be selected and to allow the necessary time for the impact of the new NSW Police Complaints Management Teams, and associated systems and processes, to be reflected in results.

Operation Jetz

17. Operation Jetz recommended reviewable management action under s.173 of the Police Act 1990 against nine officers. Does the Commission know if this action has been taken?

In its 2002-2003 Annual Report, the Commission reported that NSW Police:

- a. supported the taking of reviewable action in relation to six officers;
- b. did not support the taking of reviewable action in relation to two officers and would be, instead, considering less serious non-reviewable action; and

- c. was unable to pursue reviewable action in relation to one officer based on legal advice that the telecommunications interception material collected during the course of the investigation could not be used as a basis for disciplinary action.

As to point 'b', the Commission reported that it is satisfied that the taking of non-reviewable action is appropriate in the two cases identified.

As to point 'c', the Commission reported that this issue is subject to discussions and correspondence between the Commission and NSW Police and has not been resolved at the time of writing.

Subsequent to the Annual Report being tabled, NSW Police has reported in relation to 'a' above that:

- 'show cause' notices were issued in relation all officers in accordance with section 173(5) of the *Police Act 1990*;
- in three cases, the Commanders of the officers, after considering responses to the 'Show Cause' Notices, and taking into account other relevant factors, decided the most appropriate course of action was the issue of S173(2) non-reviewable Warning Notices. The Commander's made this decision in accordance with their delegated authority;
- in the case of one officer, reviewable action has been implemented; and
- the remaining two are subject to proceedings at the Industrial Relations Commission. The Commission would prefer to make no comment about these matters.

NSW Police has also reported that non-reviewable action has been implemented in relation to the two officers referred to in 'b' above.

The Commission has nothing further to report in relation to 'c' above.

18. Operation Jetz was a joint operation with Special Crime and Internal Affairs, NSW Police. Page iv of the Executive Summary notes that the Commission is of the opinion that in the absence of the electronic surveillance material gathered by NSW Police, the Commission would not have been able to obtain concessions made by the witnesses in evidence. Is the Commission considering on-going participation in joint-operations, such as Jetz, and how frequently will they occur? How does the work of the Commission benefit from such investigations?

The Commission is authorised under section 17 of the Act to arrange for the establishment of joint task forces with other State or Commonwealth agencies. Section 18(a) authorises the Commission to cooperate with other investigative agencies and bodies in exercising its investigative functions.

In terms of the first limb of the question, it is the Commission's practice to offer no comment on current or planned operations. As a general principle, however, the Commission seeks to conduct investigations in the most efficient and effective manner possible. The Commission remains open to the possibility of conducting joint investigations in the future, providing its

Questions on Notice

independence is not compromised. It is impossible to comment on how frequently joint operations will occur in the future. Decisions as to whether or not to engage in a joint operation will depend upon the merits of each and every matter and whether or not the Commission is satisfied that its independence, or the perception of its independence, would not be compromised.

As to the second limb of the question, some of the benefits that may accrue from the Commission conducting joint investigations with NSW Police and/or other agencies include:

- the sharing of costs and investigative resources (including specialist resources); and
- the continuity of investigative staff and resources, in the case of an operation that is commenced by an agency other than the Commission.

It is noted that some operations may be of such magnitude that they require the joint effort and resources of more than one agency. Operation Mascot / Florida required the resources and joint participation of three agencies: NSW Police, the NSW Crime Commission and the Commission.

REPORTS TO PARLIAMENT BY THE INSPECTOR OF THE POLICE INTEGRITY COMMISSION

Inspector of the Police Integrity Commission's Report on the Practices and Procedures of the Police Integrity Commission

19. The Inspector of the PIC made twenty-four recommendations in his report on the Practices and Procedures of the PIC. Where action by the PIC has been recommended, has this occurred?

The Commission accepted without reservation all of the Inspector's recommendations, and immediately moved to implement Practice Guidelines in line with those of the recommendations requiring action on its part.

A Practice Guidelines Committee, comprising the Commissioner, Assistant Commissioner and the Commission Solicitor, was established in June 2003, and work commenced on the preparation of guidelines.

Parts 1, 2 and 3 of the Practice Guidelines (respectively dealing with introductory matters, the conduct of hearings, and the exercise of discretionary and coercive powers) were finalised and published prior to the commencement of the Operation Abelia public hearing on 6 November 2003, the first public hearing subsequent to the Inspector's Report.

The Commission's approach has been to explain in some detail the nature of its functions and powers, and its approach to various aspects of them, in the Practice Guidelines. Practice Notes, which are mainly directed to legal practitioners, have been distilled from the Guidelines, to serve as a working guide to the conduct of representation in relation to Commission hearings and investigations. A copy of both documents may be found on the

Commission's website at www.pic.nsw.gov.au. The Commission will be giving further consideration as to their broader publication (eg. publication in legal journals).

At the present time, Part 4 of the Practice Guidelines, which is chiefly concerned with the disclosure of information by the Commission, remains incomplete. It is anticipated that the Part will be finalised shortly, thus achieving the implementation of all of the Inspector's recommendations.

20. On tabling the Inspector's Report in Parliament on 18 June 2003, the Minister for Police, Mr John Watkins MP, said that the Commissioner of Police had advised him that he had concerns about the recommendations 2 and 13. Recommendation 2 stated that the PIC should not engage external assistance on its Operational Advisory Group. Recommendation 13 stated that no change should be made to the current procedures in place at the PIC to determine privilege over documents. The Minister said that he would convene a meeting with the Police Commissioner and the Commissioner of the Police Integrity Commission about these recommendations. Has this meeting occurred and, if so, what was resolved in relation to these particular matters?

The meeting occurred on Monday 27 October 2003 and was attended by the Minister, the Commissioner of Police, the Commissioner of the PIC and the Director-General Police Ministry. The Commissioner of Police advised that they had reconsidered their position and the recommendation that there should be an external member on the Commission's Operations Advisory Group was withdrawn. In addition, the Director-General, Mr Tree, advised that the Cabinet Office is undertaking a review of the privilege issue. No further details are available at the time of writing.

21. Have the media guidelines recommended by the Inspector, following his investigation into the disclosure of surveillance material to 4 Corners, been implemented by the PIC and have there been any problems associated with the application of the guidelines?

On 27 June 2002 the Commissioner wrote to the Inspector concerning the implementation of the following instruction:

"The principles of procedural fairness as they apply to the Commission do not impose a rigid body of rules to be observed regardless of the circumstances of the particular investigation. However, careful consideration must be given to procedural fairness in circumstances where material is proposed to be released to the media for publication prior to its admission into evidence in a public hearing before the Commission.

In no circumstances should such material be considered for release without the identification of a clear investigative strategy and an assessment of the potential benefits of that strategy.

If media publication of the material prior to its admission into evidence would be likely to:

Questions on Notice

- (a) *be adverse to the interests or reputation of any person; and*
- (b) *disadvantage the person in making an adequate response before the Commission;*

consideration must be given to affording the person an opportunity to be heard prior to the publication. In arriving at a decision the nature and gravity of the above factors (a) and (b) are to be weighed against the potential benefits of the investigative strategy being pursued."

On 6 August 2002 the Inspector responded in the following terms: "*the guideline properly reflects the balance of considerations which should be brought to bear in deciding to release material for media publication*".

There have been no problems associated with the implementation of the above instruction.

22. *Have there been any further instances where material has been published, which may reflect adversely on a witness, prior to its introduction into evidence by the PIC?*

There have been no further instances of publication by the Commission of material adverse to a witness prior to its introduction into evidence in a Commission hearing. The Commission also is not specifically aware of publication of such information by any other agency or individual.

MATTERS ARISING FROM THE COMMITTEE'S FIFTH GENERAL MEETING WITH THE INSPECTOR OF THE POLICE INTEGRITY COMMISSION

23. *The Inspector met with the Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission on 25 June 2003. At this meeting the Inspector tabled answers to questions on notice that included a series of questions concerning the Inspector's jurisdiction. From his evidence, the Committee recommended in its report on that meeting that the Inspector's jurisdiction be amended to specifically cover alleged improprieties by non-Commission officers, in circumstances where conduct by an officer of the Commission is also involved, or the Commission is otherwise associated with the alleged misconduct. From the PIC's perspective, would there be any significant difficulties associated with the adoption of this proposal?*

No significant practical difficulties come to mind. In the Commission's view, it would be more a matter of any amending legislation being carefully drafted to ensure that the Inspector's jurisdiction and powers are adequate for such purposes.

24. *The Inspector gave evidence that it was his belief that a number of the criticisms made of the PIC following Operation Malta arise from confusing the Commission's role as a standing inquiry with that of a court of law. Does the Commission see this as a little understood distinction?*

Indeed it does. As the Inspector remarked in the Executive Summary to his Report on the Commission's Practices and procedures, the distinction between the Commission and a court of law "has ramifications for practically every aspect of the way in which proceedings are conducted", yet that distinction is not easily understood at times.

The failure to grasp the distinction is particularly evident amongst legal practitioners, who are trained in the context of an adversarial system of justice and have difficulties in leaving that training at the Commission's hearing room door, so to speak. While the Commission is required to conduct its hearings with as little emphasis on the adversarial approach as possible, the achievement of that objective depends in no small way on the co-operation and assistance of legal practitioners.

The Commission's Practice Guidelines and Notes seek to correct common misconceptions that are rooted in a failure to appreciate the fundamental differences between a Commission investigation and proceedings in a court of law, misconceptions such as:

- that the Commission sits in judgment or makes binding findings or decisions;
- that procedural fairness requires the Commission to act as if an investigation were an adversarial legal proceeding;
- that a hearing of the Commission involves concepts of evidence and relevance the same as those applying in a court setting; and
- that a person or entity appearing at a Commission hearing has a "case" to pursue.

It is hoped that the Guidelines will assist in the development of the legal profession's and general public's understanding of the nature of the Commission and its functions and powers.

PIC'S PARTICIPATION IN LEGISLATIVE REVIEWS

Review of the Police Integrity Commission Act 1996

25. The Discussion Paper arising from the Ministry for Police statutory review of the Police Integrity Commission Act 1996 made a number of recommendations. These included that the Inspector of the PIC review the Commission's practices and procedures, that the principle objects of the act be amended and that consideration should be given to amending the Act to allow a public authority, public official or individual who is substantially and directly interested in an investigation to make an application to the Commission to discontinue the investigation. While the Inspector's review deals with a number of these recommendations, some are still outstanding. Does the Commission know of any actions been taken in response to the recommendations contained in the Discussion Paper?

The Inspector has concluded his review of the Commission's procedures and practices. The Commission is also aware that the privilege issue has been referred to the Cabinet Office. The Commission is advised that, following further submissions in response to the Ministry's

Questions on Notice

Discussion Paper, some recommendations will now not be pursued. It is understood that the Ministry is presently preparing a Cabinet Minute concerning the remainder of the recommendations requiring legislative amendment / government decision. A draft of the minute is expected to be provided to the Commission for comment shortly.

26. Given that the Inspector of the PIC recommended very few changes to the PIC in his Practices and Procedures Report, does the PIC see any value to the recommendation contained in the Discussion Paper that the Police Integrity Commission Act be reviewed again in another five years?

The Commission supports a review of the validity of the objectives of the Act and whether the terms of the Act remain appropriate to achieving those objectives. In fact, given the substantial changes occurring throughout the Police, in terms of restructuring (ie the return of the 'squads' in what is now called the State Crime Command), the return of some aspects of the former role of the Special Branch to the Counter-Terrorism Coordination Command and substantially increased powers to deal with terrorism, there may be considerable value in reviewing, in the future, whether the terms of the Act continue to remain appropriate for achieving its objectives.

However, it is the Commission's view that the first review process, unnecessarily canvassed issues associated with the Commission's performance and its management and operational practices. The Commission's performance is regularly reviewed by the Parliamentary Committee. The Commission's practices are regularly reviewed by the Inspector and, in some respects, by the Ombudsman and the Audit Office. A further review which canvasses these same issues is unnecessary and a waste of time and money. Responding to these extraneous issues proved burdensome for the Commission. It is the Commission's view that any further review should be confined strictly to broader consideration of the objectives of the Act and the terms of the Act in achieving those objectives. It should not consider the Commission's performance in specific investigations, nor should it consider the Commission's practices or its preferred application of authorised powers.

As to the timing of any further review – if a review is to be fixed in time, and not to be conducted on an 'as necessary' basis as is the usual practice for such reviews – then it would make sense to link the timing of it to the conclusion of a number of outstanding matters. These matters include: the Review of the *Police Act 1990*; the statutory annual review of the powers held by the Commissioner of Police; the Commission's Operation Florida; and, implementation of the recommendations from the first review. Five years from the conclusion of each of these matters would provide more than sufficient time for any issues to arise concerning:

- changes in the police structure;
- the activities of the Counter-Terrorism Coordination Command;
- the new strategic relationship between the Police and the Crime Commission on counter-terrorism; and,
- the practical application of the *Terrorism (Police Powers) Act 2002*.

Review of the Police Act 1990

27. *Has the Commission made submissions to this review, or been consulted during the conduct of this review? If so, have any proposals been raised that would significantly impact on the Commission's jurisdiction, functions or operations?*

The Commission made a submission to this review on 23 October 2002. By and large, the submission dealt with the issues raised in Chapter 12 of the *Report on the Review of the Police Integrity Commission Act 1996 – Discussion Paper*. The Ombudsman provided the Commission with a copy of its submission. At the time of writing, the Commission has not been consulted in regard to any other submissions or proposals. The Commission is not aware whether any proposals have been raised which “*would significantly impact on the Commission's jurisdiction, functions or operations*”.

MATTERS ARISING FROM THE SIXTH GENERAL MEETING WITH THE POLICE INTEGRITY COMMISSION

Questions arising from the Sixth General Meeting with the Police Integrity Commission

28. *Has the Police Oversight Data Storage (PODS) system been implemented? Has there been any resulting modification to the old system of formal notification of complaints between PIC, the Ombudsman and SCIA?*

PODS was implemented by the Commission in November 2002. PODS is now being enhanced to include additional NSW Police data (Firearms Licensing System, the Integrated Licensing System and E@gle.i. (the NSW Police case management system) and to extend the system to additional users.

PODS has had no impact on complaint notification processes. However, the complaints management system, C@ts.i, has resulted in a number of changes, including:

- NSW Police no longer notify the Commission of a new complaint by providing a hard copy of the complaint documents.
- The number of hard copy documents received from the Ombudsman has greatly reduced.
- The Commission accesses c@ts.i directly and retrieves all complaints already designated Category 1, all complaints not yet assigned a category, and all complaints already designated Category 2 which may in fact be Category 1. These are all assessed by the Commission as part of the current complaints process.

The Commission is required by the *Police Act 1990* to refer back all referred complaints that it decides not to investigate in order to be to be dealt with under Part 8A of that Act. This referral is still conducted by way of letter. The Commission has made submissions to the review of the *Police Act 1990* to eliminate the need for this process.

Questions on Notice

29. *In his opening statement to the Committee, the Commissioner gave evidence that the Commission was specifically considering "the role of education in producing officers who have a well-developed ethical framework capable of resisting the temptation to engage in acts of corruption" (Sixth General Meeting with the Commissioner for the Police Integrity Commission p.30). What work has since been undertaken by the Commission to this end?*

At the time the Commissioner made these remarks in 2002, the Commission was awaiting advice from NSW Police concerning the removal of a number of elements from the Diploma of Policing Practice (DPP), including "Ethics and Accountability."

Following to the Sixth General Meeting, NSW Police informed the Commission that Curriculum Review Teams were being implemented in significant topic areas within the DPP, including Ethics and Accountability. This review process was subsequently absorbed into an holistic review of the entire DPP program.

The Commission was consulted during the course of the review; received materials from the NSW Police concerning the review; and consulted with other parties, including representatives of external agencies, who also played a role in the process.

In January 2003, the Commission received a final report on the review, which was accepted by the Steering Committee and the Course Committee.

The Commission considers that the review addressed its concerns regarding the removal of "Ethics and Accountability" from the earlier program.

CORPORATE PLAN AND PERFORMANCE MEASUREMENT FRAMEWORK 2003 - 2006

30. *Have any particular problems been encountered in finalising and reporting against the Investigations Performance Framework?*

One of the key purposes for the development of Investigations Performance Framework was to trial the process of developing an outputs/outcomes based performance measurement framework before the Commission embarked on the development of a framework to replace the Corporate Plan. This was a new experience for the Commission, having only previously had experience in developing the more traditional objectives/strategies based performance plan. While the Commission was satisfied with the process, and it was subsequently used to develop the corporate framework, the investigations framework was not implemented due to changes in structure and the role of the Operations Advisory Group. The Committee is referred to the Commission's 2001-2002 Annual Report for further details on those changes and the reasons for not implementing the Investigations Performance Framework.

A number of issues arose, however, during the implementation of the *Corporate Plan and Performance Measurement Framework 2003-2006* which led to minor changes to, or deletion of, some measures. The changes related to improving clarity and simplifying data collection and reporting. The changes are further detailed in the 2002-2003 Annual Report.

31. *A number of the measures in the Corporate Plan and Performance Measurement Framework require baselines to be set following the first year of operation of the Framework. Has this been done and, if so, what baselines have been set?*

The baselines for the relevant measures are as follows:

Measure	Baseline
<i>Output Measure:</i> Ratio of number of public hearing days to the number of days to release a report after submissions have been concluded ³⁷	N/A
<i>Output Measure:</i> Number of participations / representations in education or prevention programs/ seminars/ presentations/reviews/ discussion panels.	22
<i>Outcome Measure:</i> Ratio of number of Commission reports downloaded from the Commission's website following public release to the annual average of reports downloaded. ³⁸	1.5 : 1

A further output measure: *Number of issues identified in Commission hearings and reports resulting a change in practice*; which is associated with the *Improvements in Practices* outcome, will not have a baseline set but will be reported as a result 'number'. A result 'number' is used rather than a ratio or a percentage measure for two reasons, both of which introduce a number of variables.

Firstly, changes in practices can occur over a number of reporting periods, or in the other extreme, almost immediately the issue is identified. For example, an issue identified in Operation Saigon in 2001, might not lead to an improvement in a practice until 2004, an issue identified in Operation Abelia and communicated to NSW Police, might already have resulted in change. The result reported relates to Commission performance over a number of years.

Secondly, the result reflects not only the Commission's performance but also that of the NSW Police. During a Commission investigation, the Police will often identify issues which need to be addressed and will make submissions to the Commission on measures it has, or intends to put in place. These issues are counted in this result 'number'.

32. *Has the benchmark been set for the new program level performance indicator consisting of the "proportion of briefs where prosecutorial authorities assess that a prima facie case exist". To what extent does the PIC regard the quality of these briefs as an indicator of performance?*

³⁷ This measure has been reviewed and is now not to be used for performance reporting, as time taken to release the report is subject to other variables. Refer *Report on the Practices and Procedures of the Police Integrity Commission*, Inspector Police Integrity Commission, 2003, paras. 4.74, 4.75 & 4.77.

³⁸ Formerly a 'quarterly' average. Changed to 'annual' average due to insufficient totals for averaging purposes per quarter.

Questions on Notice

The Office of the Council on the Cost of Government reviewed the program level and 5 year trend indicators during the reporting period. At the time of writing the Commission has not been advised of the outcome of that review.

The Committee will note that the Commission has included the original program level indicator in its Corporate Plan and Performance Measurement Framework 2003-2006, although raised the standard as follows:

Measure	Target
<i>Outcome Measure:</i> The proportion of recommendations relating to potential criminal charges <u>which proceed to prosecution.</u>	80%

33. What have been the outcomes of the recommendations by the PIC for consideration of disciplinary action or criminal prosecution?

Investigations resulted in recommendations for disciplinary action in respect of 9 officers during the year (Operation Jetz). Final responses have been received in respect of 8 of these recommendations. In each case, the recommendations, or satisfactory alternatives, have been accepted.

Investigations resulted in briefs of evidence for 12 persons and a possible 49 charges being referred to the Office of the Director of Public Prosecutions (ODPP). The Commission has received a response from the ODPP in regard to briefs for 3 persons and 22 potential charges. All 22 charges are to proceed to prosecution. The remaining briefs for 10³⁹ persons and 27 potential charges are still being considered by the ODPP. Outcomes in regard to these matters will be reported in the 2003-2004 Annual Report.

For further details, the Committee is referred to the Summary of Operations Review and Appendix 5 in the 2002-2003 Annual Report.

MANAGEMENT

34. During the 2001-2 reporting year the PIC engaged consultants (to the amount of \$20,200) in relation to an organisational review. What was the nature of the organisational review and what recommendations and changes arose from it?

Payments were made to two consultants. One consultant was engaged to assist in the development of the *Investigations Performance Measurement Framework* and pass on skills to staff subsequently involved in the development of the *Corporate Plan and Performance Measurement Framework*. The Committee is referred to the 2002-2003 Annual Report for further details on the *Corporate Plan and Performance Measurement Framework*. The second consultant was engaged to evaluate a number of Commission positions. Such evaluations regularly occur when position roles are significantly varied or new positions created.

³⁹ One person is duplicated in both sets of figures.

35. What has been the outcome of the PIC's consideration of recommendations by an external consultant regarding the Information Security and Business Continuity Planning, including risk management?

The services of private consultants were engaged to assist the Commission in achieving compliance with Australian Standard AS7799 (Information Security etc) in accordance with *NSW Government Circular No. 2001 - 46 (Circular of Electronic Information)*

During discussions with the consultants, it was established that Commission lacks a series of comprehensive policies, and evidence of compliance with them, precursors to seeking a pre-certification inspection. These policies, Business Continuity Planning, Disaster Recovery & Information Security etc, are presently being drafted.

This is not to say that the Commission practices in these areas are deficient, in fact far from it. The Commission maintains quite substantial information *security* systems and infrastructure. The Commission is, however, short on documentation to achieve certification.

It is expected that documentation will be finalised and pre-certification will occur the first quarter of 2004 with full certification in the second quarter.

36. The role of the Operations Advisory Group was reviewed during the 2001-2002 reporting period by the PIC Commissioner. What findings were made and what was the outcome of the review?

The Commissioner's review did not so much concern identifying areas for improvement but provided more an opportunity to adjust the OAG to suit the Commissioner's particular approach to managing operational decision making. The current Commissioner, who has investigations experience, prefers a 'hands on' approach and maintains an active interest in the day to day direction of investigations. The Commissioner commenced chairing the OAG shortly after appointment. The Commissioner prefers broader input to operational decisions, hence the involvement in the OAG of the Manager Intelligence and the Executive Officer.

Outcomes include a more detailed involvement in day to day direction of investigations, and, greater responsiveness where decisions can be made immediately without reference to a higher authority.

37. The focus of the Operations Advisory Group has been extended to include, not only long-term planning and objective setting, but also the management of risk at key decision points for investigations. How is the effectiveness of the OAG's role in relation to risk management measured?

The Commission does not specifically measure the effectiveness of the OAG's role in relation to risk management.

Questions on Notice

38. How has the direct involvement of the OAG in setting investigation strategies affected the development of the Investigations Performance Framework?

As mentioned above, the Commission did not implement the *Investigations Performance Framework*. With the change in the role of the OAG and its more direct involvement in investigations strategy setting, it has been decided that the format of the framework, as originally proposed, was not appropriate. Rather than a format based around a performance 'discussion' between the Director Operations and the Manager Investigations (a now deleted position), the OAG's assessment of performance relies on regular, structured reporting, briefings (which increase in regularity at key points during investigations), feedback from partner agencies on the effectiveness of relationships and the reliability of the advice and recommendations which it receives from investigations.

QUALITATIVE AND STRATEGIC AUDIT OF THE REFORM PROCESS – REPORT FOR THE THIRD YEAR

39. The third and final report of QSARP was tabled in 2002. Has the PIC been involved in any further strategies or processes to ensure that reform of NSW Police is ongoing?

While the Commission maintains an interest in the reform of the NSW Police, with the completion of the QSARP, the Commission's role in overseeing the audit of reform progress, has now concluded. Following dialogue with the Police Minister's Office the Commission has been advised that the Minister intends referring the oversight of reform to the Cabinet Subcommittee on Police Reform which is chaired by the Premier.

The Committee is referred to the 2002-2003 Annual Report for details on QSARP and the Commission's involvement in the Appendix 31 Reforms Advisory Committee.

40. Is the Reforms Advisory Committee still in existence? If so, what work is the Committee now undertaking?

The Committee is referred to the 2002-2003 Annual Report for details on the Commission's involvement in the Appendix 31 Reforms Advisory Committee. This Committee ceased on 30 September 2002.

41. In response to questions on notice at the Sixth General Meeting, the Commission gave evidence that NSW Police had entered into a tender arrangement with Australian Pacific Projects – specifically their subcontractors St James Ethics Centre, Marlowe Hampshire and Change Works. The Reform Advisory Committee, of which the Commission had membership, was advising NSW Police in relation to this project. What has been the outcome of this project?

The outcomes of the project include:

- Implementation of the NSW Police Project Management Framework.

- Piloting of the methodology during the reduction of NSW Police Regions from 11 to 5.
- Development of the NSW Police reform plan: *Change Strategy 2003-2006*.

42. *In the Australian on 6 September 2003, the following extract appears under an article by Steve Barrett entitled 'The shame game': "Five officers from Sydney's northern beaches, as a result of an unrelated section of the Florida inquiry, received jail sentences for corruption. But there are many who were also named in the PIC inquiry who do not know what their futures are due to the uncertainty over how authorities will eventually respond in matters of prosecution and employment." How many officers are still awaiting a determination as to whether or not they will be prosecuted, and when will the matter be finalised?*

There were eight separate segments of evidence considered during the Operation Florida hearings conducted by the Commission. Private hearings in relation to the last segment concluded in August 2003. The submission process in that segment is still continuing. Several officers were adversely mentioned in more than one segment, which made it necessary to deal with all segments collectively in a single report, rather than by way of single report for each segment.

There are over 7,000 pages of transcript and over 900 exhibits to be considered together with 872 pages of submissions, not including the last segment. Such a volume of evidence means that the report will be detailed and quite lengthy. This is appropriate given the scale and seriousness of the conduct examined in Florida. These factors also mean that the procedural fairness obligations on the Commission have been onerous and time consuming.

This process, however, has not delayed NSW Police in addressing criminal conduct, or police misconduct, as it has been identified. It is accepted practice for the NSW Police, in regard to matters the subject of Commission hearings, to proceed with criminal and disciplinary action where appropriate, well in advance of the publication of the Commission's report to Parliament. This is to prevent the development of the situation referred to in the article, namely, adversely named persons having to wait lengthy periods to learn how their matter will be determined.

Operation Mascot/Florida was the most substantial investigation of serious police misconduct since the Royal Commission. It takes time to conduct and finalise such extensive investigations. NSW Police have made significant progress. Not only did they take criminal action promptly against the five Northern Beaches officers referred to in the article but they have also:

- concluded a total of 418 investigations into serious police misconduct;
- prepared detailed files concerning 25 cases for consideration of action under s173/181D of the Police Act;
- prepared and forwarded 10 briefs of evidence to the DPP for consideration of criminal prosecution;
- prepared 4 Individual applications for indemnity from prosecution for consideration by the NSW Attorney General; and,

Questions on Notice

- arrested a total of 69 persons and preferred 213 criminal charges – seven of those being serving or former NSW Police Officers, all but one receiving terms of imprisonment.

Many of these matters have been finalised. A proportion are awaiting legal advice and/or advice from DPP concerning possible prosecution. A small number may be awaiting further consideration in regard to disciplinary action. The NSW Police manage these processes. The Commission is not aware of the detailed status of each of these matters at the time of writing and it would take some research by NSW Police to prepare a precise response. The Committee might consider addressing this question to NSW Police.

When the Commission publishes its report, it will note and comment upon the action which has already been taken by the Police in respect of any affected persons named in the report.

There may be a small number of matters in Florida where the NSW Police have not yet made a decision concerning disciplinary action or criminal prosecution. The Commission will, where appropriate, make a recommendation in its report. It is intended that the Florida report will be finalised by the end of 2003. Given the practicalities associated with printing, it may be early in the new year before the report is tabled in Parliament.

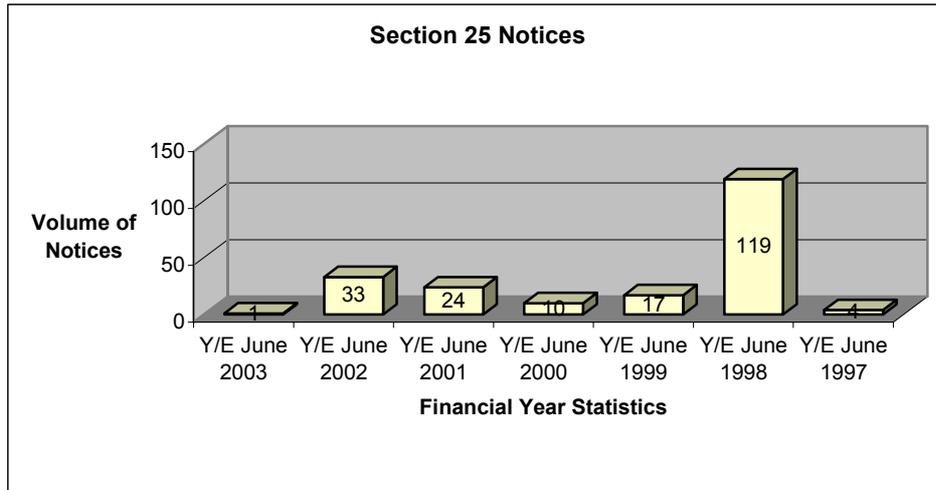
43. The Australian article: Corruption complaint 'ignored' 8/9/2003 - Are the remarks concerning the PIC justified and, if not, why not?

The Commission received the complaint referred to in the article on 23 March 1999. The particular complaint made by Mr Davison to the Commission concerned inaction in respect of complaints earlier made by him to the Commissioner of Police regarding members of Operation Gynea. The Commission decided, after considering the particular matters raised by Mr Davison, that it was not serious police misconduct of a nature and type appropriate for the intervention of the Commission, taking into account investigative strategies, priorities and resources available at the time. It was referred to the NSW Police to be dealt with under Part 8A of the then *Police Service Act 1990*. Mr Davison was advised of the Commission's decision on 4 June 1999.

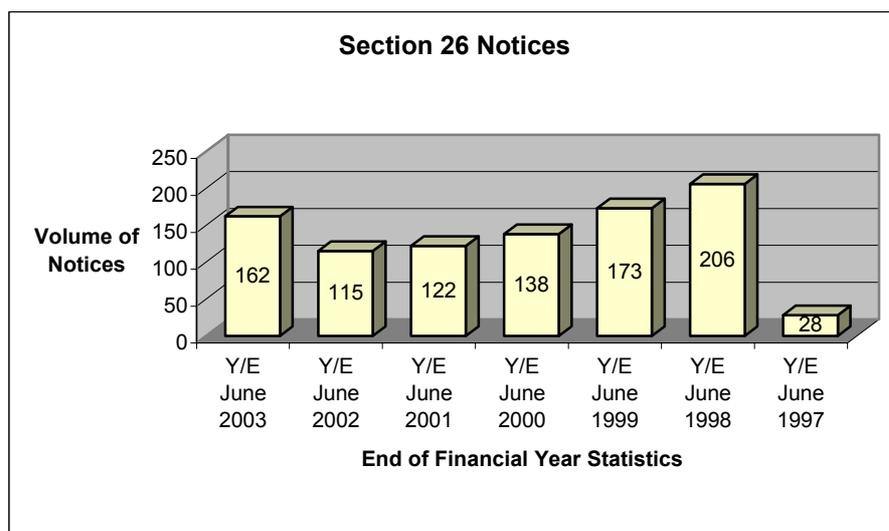
QUESTIONS ON NOTICE: APPENDIX A

STATISTICAL DATA ON THE USE OF THE COMMISSION'S COVERT AND COERCIVE POWERS

1. Section 25 – Requiring public authority or public official to produce a statement of information:

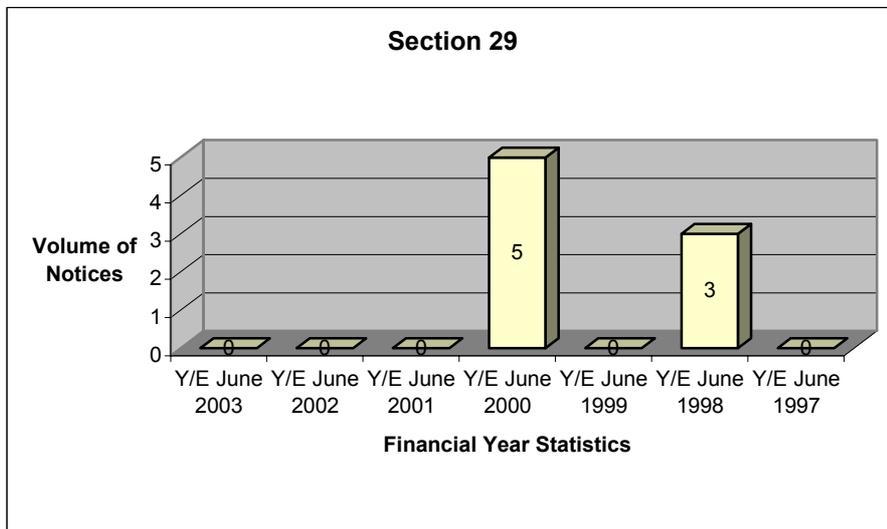


2. Section 26 – Requiring a person to attend before an officer of the Commission to produce a specified document or thing:

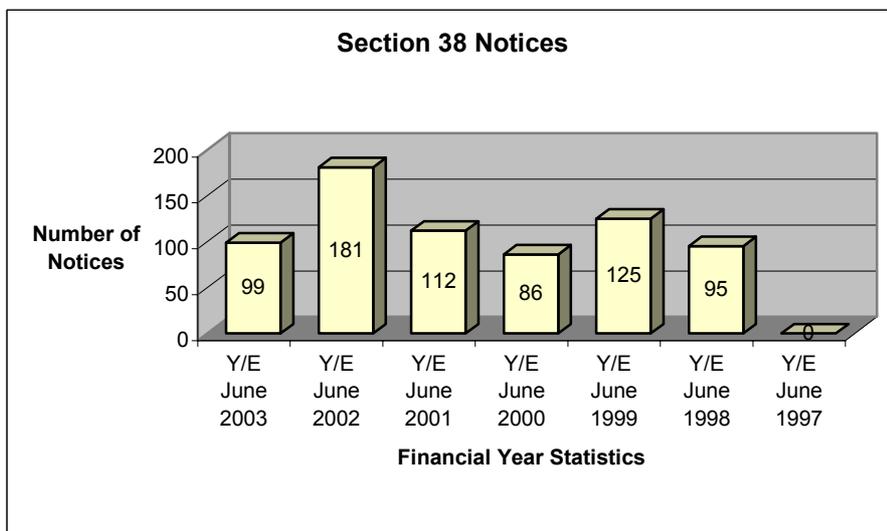


Questions on Notice

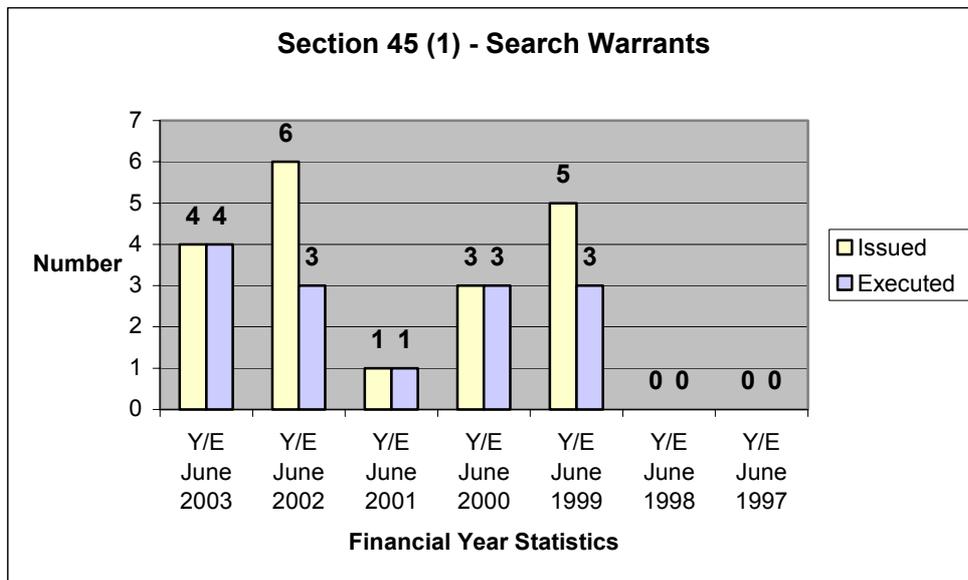
- 3. Section 29 – Commission may authorise an officer of the Commission to enter and inspect premises:



- 4. Section 38 – Commissioner may summon a person to appear before the Commission and give evidence or produce documents or other things:



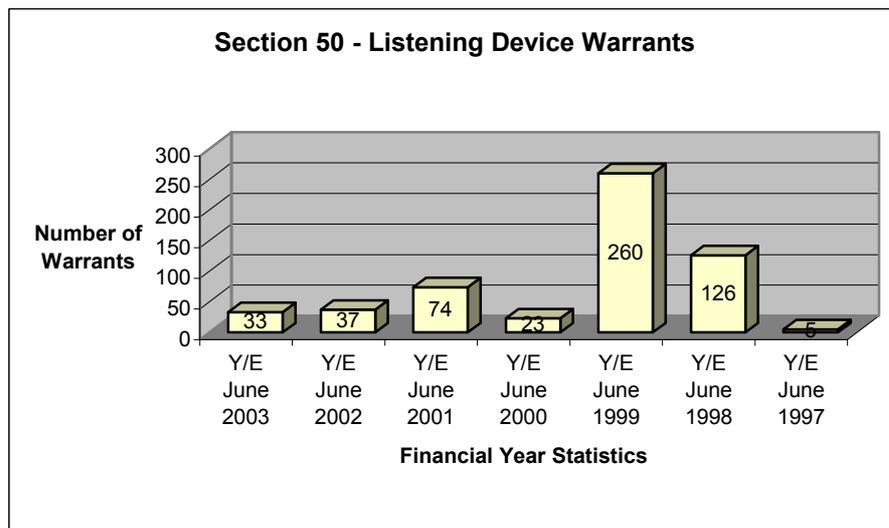
5. Section 45 (1) – Authorised justice may issue a search warrant:



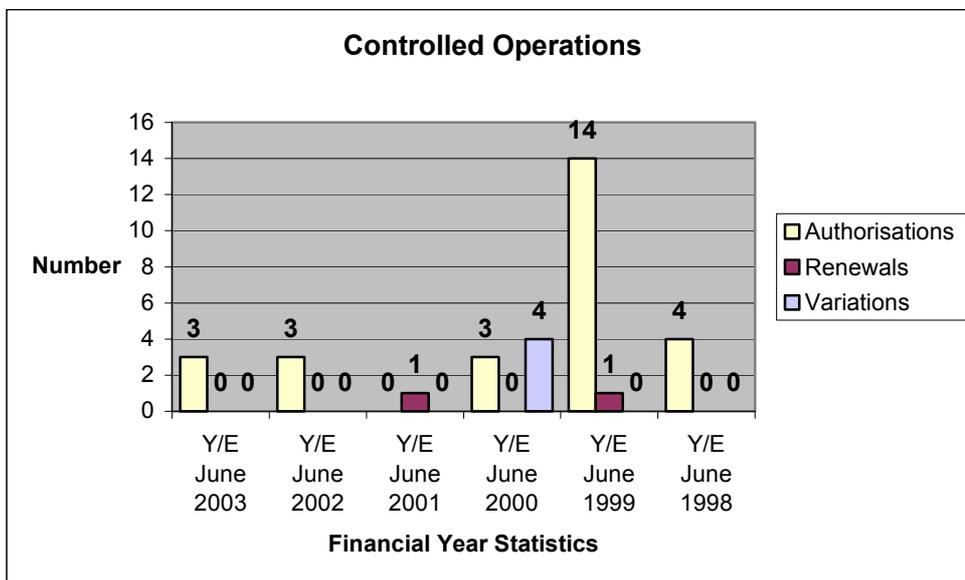
6. Section 45 (2) – Commissioner may issue a search warrant:

NIL

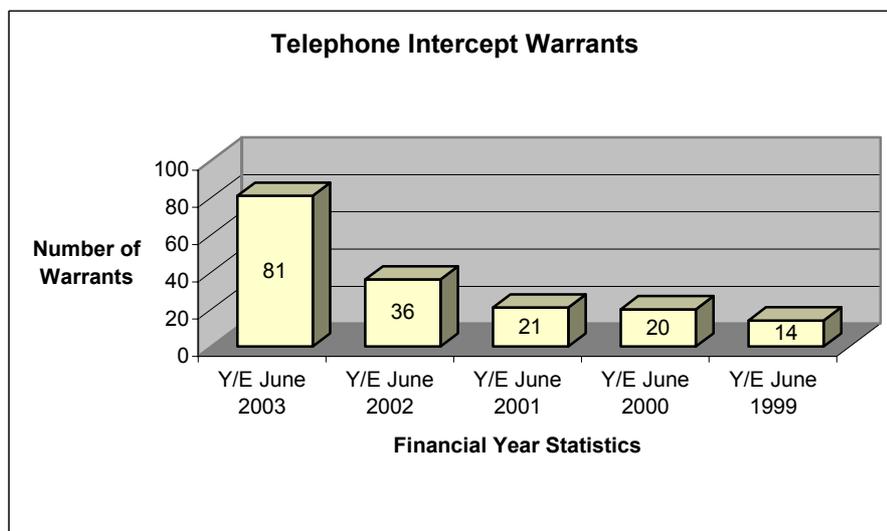
7. Section 50 – Number of warrants obtained under the *Listening Devices Act*:



8. *Law Enforcement (Controlled Operations) Act* – applications granted for authority to conduct a controlled operation, renewal of authority and variation to authority⁴⁰:

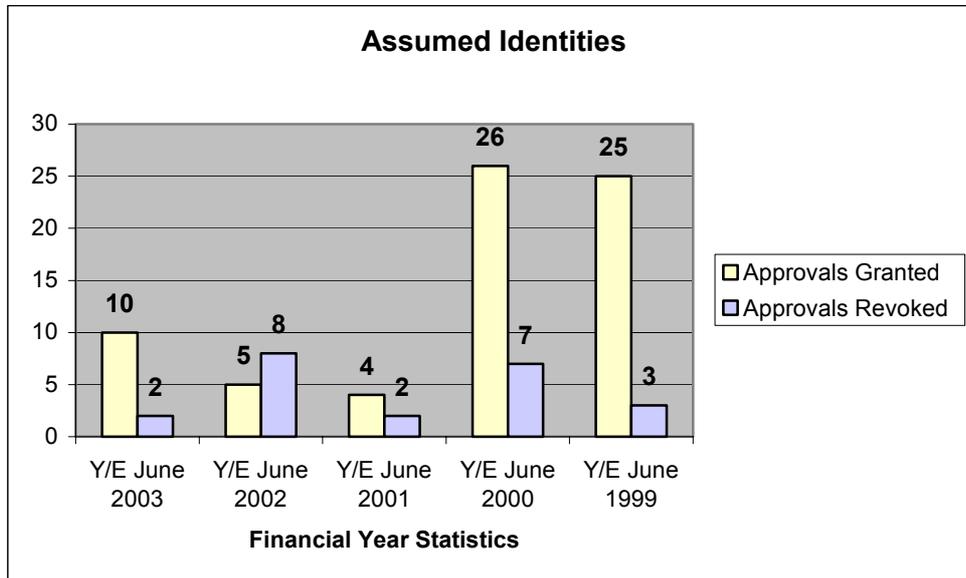


9. *Telecommunications (Interception) Act* – warrants issued for the interception of communications:

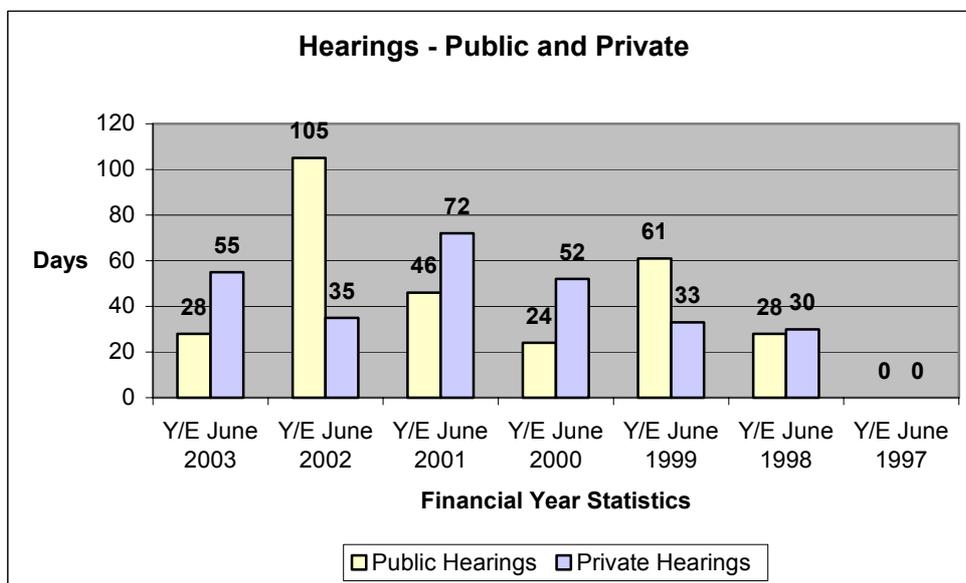


⁴⁰ Act came into operation 1st March 1998

10. *Law Enforcement (Assumed Identities) Act* – applications of assumed identity approvals granted and revoked⁴¹:

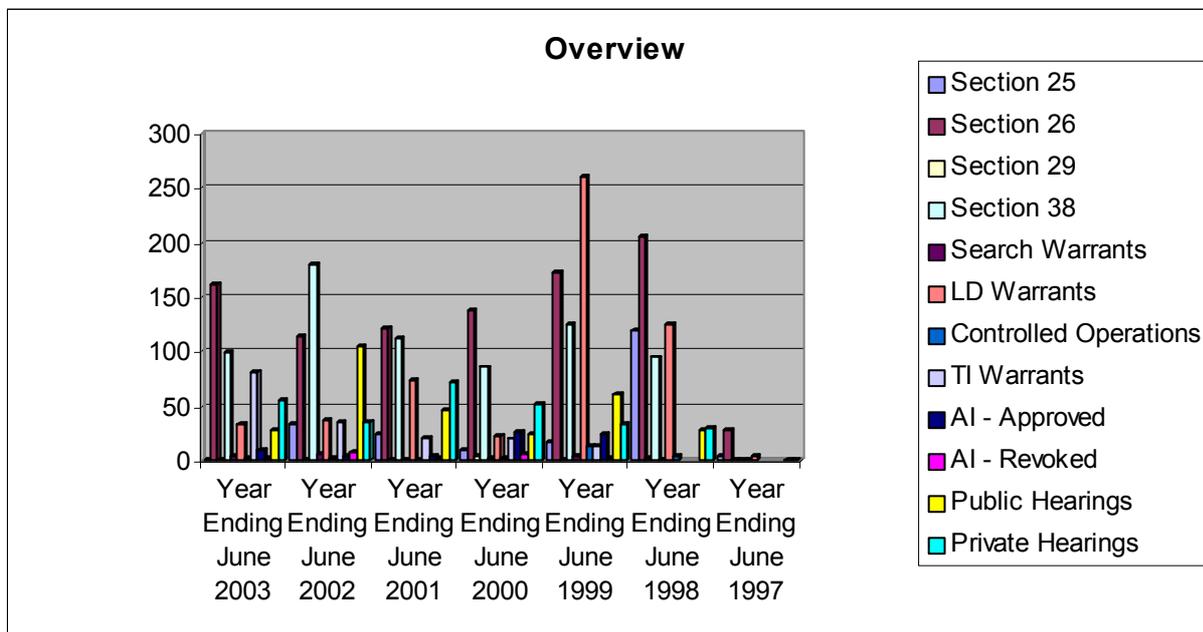


11. Section 32 and Section 33 – Public and Private Hearings Days:



⁴¹ Act came into operation 8th March 1999

12. Overview – Annually



Chapter Three - Questions without Notice

TRANSCRIPT OF PROCEEDINGS

REPORT OF PROCEEDINGS BEFORE

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

At Sydney on Tuesday, 25 November 2003

The Committee met at 2 p.m.

PRESENT

Mr P. G. Lynch (Chair)

Legislative Council

The Hon. Jan Burnswoods

The Hon. P. J. Breen

The Hon. D. Clarke

Legislative Assembly

Mr G. Corrigan

Ms N. Hay

Mr M. Kerr

Questions without Notice

TERENCE PETER GRIFFIN, Commissioner, Police Integrity Commission, 111 Elizabeth Street, Sydney;

GEOFFREY (TIM) ERNEST SAGE, Assistant Commissioner, Police Integrity Commission, 111 Elizabeth Street, Sydney, and

STEPHEN ALLAN ROBSON, Commission Solicitor, Police Integrity Commission, 111 Elizabeth Street, sworn and examined, and

ALLAN GEOFFREY KEARNEY, Director, Intelligence and Executive Services, Police Integrity Commission, 111 Elizabeth Street, Sydney, affirmed and examined:

CHAIR: You have provided written answers to questions on notice. I take it that you would wish to have those included as part of your sworn evidence?

Mr GRIFFIN: I would seek to tender those.

CHAIR: Do you wish to make an opening address?

Mr GRIFFIN: If it suits the Committee.

CHAIR: Absolutely.

Mr GRIFFIN: Thank you for the opportunity to make an opening statement.

Previously I have commented upon the accountability to Parliament of the Police Integrity Commission and, although there is a formal regime for us to report, in practical terms, accountability is achieved most notably through this Committee. The commission is mindful of the importance of the relationship between Parliament and itself and remains committed to the principles that govern the independence of the commission and the ultimate authority of the Parliament. Short of compromising operational matters or putting personnel in harm's way, the commission will do all it can to provide information to members of the Committee today.

Committee members will have received responses prepared by the commission to the questions on notice from the Committee. If there are issues that arise from those responses I trust we, the attending senior members of staff, can provide clarification during today's meeting. If there are matters we cannot resolve we will provide whatever information we can as soon as possible. It is not my intention to repeat the information contained with the responses. That document is or is meant to be self-explanatory. However, I would like to comment on several developments or highlights since the last general meeting and touch on the body of work being undertaken by the commission.

2002-2003 was a sound year in terms of the number and significance of results achieved by the commission in different areas. Briefly, the commission has referred a number of briefs of evidence to the Office of the Director of Public Prosecutions, continued to expose serious corrupt conduct through the Operation Florida public hearings and made a substantial number of recommendations to the police for improvements to systems and the

conduct and management of internal investigations. The commission is at a stage now where some important and long term matters have come or are coming to a conclusion.

Operations Florida and Malta and the qualitative and strategic audit of the reform process, which I would much prefer to call QSARP, and I hope I can do that, are three matters I would like to touch on. All commenced before I was appointed as commissioner. Although two have been concluded and the last, Florida, is almost finalised, all three have generated considerable publicity over a number of years. They have represented a major commitment in terms of the commission's resources and featured prominently in the commission's annual reports and reports to this Committee. They have also been responsible for achieving some significant outcomes.

Turning first to Malta, since the last general meeting the Commissioner has furnished a report to Parliament, the report being tabled in February 2003. Members of the Committee will recall that this investigation commenced in October 2000 as a result of allegations that senior police were obstructing the reform process.

I would only like to make two observations, first through its operation and report in Operation Malta, the commission clarified the circumstances surrounding allegations of serious misconduct in the NSW Police. As I noted in the annual report, it should be reassuring to the community that there was no evidence of obstruction of the reform process by senior police identified by the commission.

Second, as noted by the inspector of the Police Integrity Commission in his June 2003 report on the practices and procedures of the Police Integrity Commission, the matter was highly unusual and perhaps unique in so far it involved the highest echelon of NSW police administration and generated a great deal of publicity. As the inspector further noted, it would have been out of the question for the Commission to have dealt with the allegations in any way other than in a public hearing.

Turning now to Florida, Operation Florida was an investigation conducted jointly by the Commission, NSW Police and the NSW Crime Commission and arose from the joint NSW Police Crime Commission investigation code name Operation Mascot. This investigation uncovered serious and entrenched corruption in the northern beaches area of Sydney during a period of more than a decade in the early 1990s. The last day of public hearing occurred late in 2002, although investigations continued, the last private hearing was well into 2003.

The commission is currently preparing a report in relation to this matter and it will be furnished hopefully quite soon. Without wanting to pre-empt the report, Operation Florida can be seen as a landmark investigation into very serious forms of police corruption. Although difficult to measure, the public exposure of this matter is likely to have had a significant impact in terms of deterring police who may be contemplating acts of corruption. This investigation demonstrated the importance of committee resources to long-term covert operations to uncover and obtain evidence on the most secretive and serious forms of police corruption. It also underscored the value of partnerships between the commission and other law enforcement agencies.

I do not believe that any one of the three partner agencies alone could have obtained the results that have been achieved through the joint effort in Operation Florida.

The third area of work I would like to mention is QSARP. As members of the Committee would be aware, the Royal Commission recommended that an external auditor be engaged by the commission to carry out a qualitative and strategic audit of the reform process in the police. In March 1999 the commission engaged consultants to conduct an audit over three years. The audit was completed in December 2002 with a public release of the third and final audit report, the two earlier reports being released in February 2001 and January 2002.

As indicated in the commission's annual report, the final QSARP report found that there was demonstrable progress in a number of individual reform activities in NSW Police. The commission finds its underpinning work to be encouraging in terms of providing a solid foundation for reform work.

With QSARP now concluded, the commission's role in overseeing the audit is also complete. The separate audit reports speak for themselves; however, it bears repeating that the commission considers reform as being critical to the long-term effectiveness and well being of NSW Police. In the commission's view, the NSW Police must continue to build on its recent work and the commissioner and his executive team must maintain a commitment to reform.

I would now like to turn to a new body of work which was commenced earlier this year. We expect it will extend well into 2004. As members of the Committee are probably aware, on 6 November this year the commission commenced a public hearing into the use and supply of illegal drugs by some police, the abuse of prescription drugs by some police and the association between some police and the suppliers of legal drugs. The matter has been named Operation Abelia. Some officers have already admitted to using illegal drugs in their evidence at the commission's hearing. Electronically recorded material that reveals illegal drug use by other officers has been heard by the commission also.

Investigations into drug use and the supply by a number of officers and related matters are currently in train and consideration will be given to hearing evidence publicly in relation to those matters under the auspices of Operation Abelia. Equally, it is notable that private hearings will continue in relation to Operation Abelia throughout its course.

The commission's interest in this area, particularly the use of drugs by police, has been longstanding, concerns first having been aroused during its Operation Saigon investigation. Evidence and information of use of illegal drugs has frequently come up in a number of other subsequent commission investigations and in that regard I draw the Committee's attention to section 5 of the annual report, the summary of review of operations, where information of illegal drug use or possible illegal drug use by police officers features in four separate investigation summaries. It is noted that some of those investigations revealed evidence and information of illegal drug use by several officers.

Almost without exception I read the complaints that come into the commission and I can tell the Committee that a large number of them relate to illegal drugs, allegations of either use of illegal drugs by police or police associating improperly with people involved in such drugs. Members of the Committee will also recall that the commission flagged its concern about this issue during the Committee's hearings in September 2002 concerning

trends in police corruption. The commission commenced planning its research relating to drug use by police in March of this year. Since that time it has taken a number of steps, including consulted with other police agencies and oversight bodies in Australia and overseas regarding their policies, procedures and training material. The commission has conducted interviews with experts in such areas as assessing the extent of drug use and drug testing. It has also consulted with researchers both in Australia and overseas and reviewed quantities of academic material pertinent for the subject.

In Operation Abelia the commission is therefore seeking to combine a long-term research project into the issue of drug use by police with active misconduct investigations. It is our belief and expectation that this approach will help to ensure that the final product emanating from Operation Abelia, which will be a report to this Parliament, will be well informed and will provide sound insight into the nature of the problem. Hopefully we will also identify ways of dealing with the issues.

I said at the sixth general meeting that beyond helping to expose, prosecute and discipline corrupt police officers, there is a preventative role for the commission. I saw that then as being critical and I do now and in that vein the focus and emphasis of the commission's endeavours in Operation Abelia is very much on preventing or minimizing a form of police misconduct.

In its investigations and research the commission will be seeking to identify the best agency-wide remedies available for preventing, deterring and otherwise discouraging officers from using drugs, as well as the most effective strategies for dealing with those who have been caught or alternatively, have come forward.

It is the view of the commission that illegal drug use and the abuse of prescription drugs by police officers has potential to cause significant harm. It can impair the ability of individual officers to discharge their duties, it can compromise the integrity of officers, it can affect their health and it can impose a risk to members of the community and to their colleagues.

I am pleased to acknowledge that Operation Abelia is progressing with the full co-operation of the NSW Police. The Commissioner of Police made a statement during the opening day of the Operation Abelia public hearing and has actively supported the operation since.

Other discussions are occurring between the two agencies and I expect will continue throughout the life of the operation. It is our intention that the commission will consult with the NSW Police and the Police Association by way of round table discussions in relation to policy and procedural issues in particular as they are identified.

It is most noteworthy that Abelia is progressing in this manner. In the wash up of Operation Malta, the time taken for and the cost of the operation were much discussed. Various figures were bandied about and even though it was subsequently demonstrated that the commission's costs were only a fraction of the total, it was clear to many that such adversarial proceedings were inappropriate.

Questions without Notice

To be able to inform this Committee that the NSW Police and the Police Association have accepted that we have a common goal in this matter gives me great pleasure. Not only should the operation progress more quickly, it should also prove to be far easier on the public purse. In my opinion it is a great credit to both organizations and their chief executives that they have adopted such a course. The co-operation that is occurring between the commission and the NSW Police in relation to Operation Abelia is indicative of what I believe to be an improving professional relationship between the two agencies.

I would like now to briefly touch of some other developments and outcomes that have occurred since the last meeting.

In June 2003 the commission furnished another Dresden report. As far as the commission is concerned, this continues to be an effective way of monitoring the quality of NSW Police investigations, identifying weaknesses and shortcomings and ensuring that a focus is maintained on the continuous improvement in this area of NSW Police business. It is the commission's present intention to conduct at least one further Dresden type audit.

In the last general meeting with the Committee I noted that I had made several changes to the management structure and internal decision making processes of the commission. I note briefly that these changes appear to have been bedded down and operating satisfactorily. There were, as noted in the annual report, no changes to the commission's organizational structuring during the 2002/2003 reporting year.

Since the last general meeting the Committee has conducted a research project examining trends in police corruption. The commission was pleased to have been able to provide input to the process through its responses to the Committee's questions on notice and by appearing at the Committee's hearings. As noted in the correspondence with the Committee Chairman in March this year, the report is a useful contribution to the discussion on the difficult question of the measurement of trends in serious police corruption. It is also a useful collection of relevant research into corruption, policing and policing oversight in NSW.

In closing I note that within the last twelve months the commission has developed and implemented a new corporate plan and performance measurement framework. The performance measurement framework was used for the first time in the commission's 2002/2003 annual report to report its outgoings. As far as the corporate plan is concerned, we have retained the same mission as before, that is to be an effective agent in the reduction of serious police misconduct. This remains a relevant and valid statement of the principal objective of the commission and appropriately reflects the fact that it needs to work collaboratively with other agencies in dealing with serious police misconduct whilst retaining its independence.

The performance measurement framework has seven separate outcome areas. Without going into each of these, it is relevant to note that the emphasis is on high level outcomes that are intended to have a positive and agency-wide effect on the NSW Police and assist in assuring the community of this state that there is a vigilant and effective oversight of the police force.

Finally, I thank the Committee for its serious and considered contributions to the effective management of the task before the commission and if it pleases the Committee, we will now endeavour to answer any questions.

CHAIR: When you mentioned QSARP you made the point that the Police Commissioner and the leadership of the police must continue to maintain a commitment to reform. How do you measure that? How can you tell whether they continue to have that commitment?

Mr GRIFFIN: I suspect that the only measurement will be history and hindsight. However, having said that, the processes that they are putting in place, which flowed from recommendations in QSARP - and so far as we know are adopted - should, if maintained, go a long way to providing information that will allow it to be tested. There is no doubt in my mind that if there were a commissioner who had no interest in reform that process could be stalled a thousand different ways probably, but, given the commitment that the commissioner and his executive have, have expressed and have done things to achieve at some level without another QSARP, I think you and we and the community will need to accept that as a genuine attempt and see what happens. The concept of commencing QSARP again seems to me to be a very expensive and not necessarily effective way of going about monitoring what is really a management exercise by the New South Wales police.

CHAIR: You touched on Florida in your opening comments and made the point that three different agencies or bodies working together got a better result than individual bodies would. I am wondering whether that is typical of the work of the PIC in that is there a lot of cooperation with other agencies, or is that an unusual thing? What is the balance of how it breaks down?

Mr GRIFFIN: I think it is driven by the size of the adventure to a large extent. Florida would have been greater than either the Crime Commission or the Police Integrity Commission could have managed just by the number of bodies, so the police resources were important, but, as a breakdown, we do most of the catching and dealing with our own in terms of investigations and we sometimes set up small task forces. The effectiveness of the commission's powers in Florida came well after the Mascot Operation, which was a joint operation that had been going for some time. We are sometimes approached by the police to use the powers of the commission to aid their investigations into police misconduct and we, all else being equal, help where we can, but the Florida thing I think is so extraordinary that it is not a very good paradigm for how we do our work.

CHAIR: You would start to wonder why there is a separate agency if all you are doing is cooperating with other agencies all the time. That is why I was interested in exploring it with you.

Mr GRIFFIN: I think that is right, and some of this flows from what I said about Operation Abelia. The Police Integrity Commission has extraordinary powers, and that is why we are here, because they need to be oversighted, and we need to apply them very carefully. But having them in the back pocket is much better, it seems to me, than having the stick out and belting people with it all the time. We have the powers, everybody knows it, so when we need something done it behoves us to ask nicely in the first place. In Abelia we saw an opportunity to get on with the job rather than having fights about peripheral issues and we

asked nicely. We have the stick in the bag if we need it, but we did not need it. Now that, I am sure, will save a great deal of time and it will not impact on our independence at all because if there is a change in heart or not a genuine approach to get the job done we have all the power and certainly there will be no hesitation about using it. It seems to me that it is just a sensible way to proceed, at least in the first place.

Mr KERR: When did the Florida inquiry commence?

Mr SAGE: Well, the public hearings commenced on 8 October 2001, but the actual investigation commenced in the Crime Commission - and I do not have the date, Mr Kerr - some two years before the public exposure.

Mr KERR: So that would take us back to 1999?

Mr SAGE: That is right.

Mr KERR: Commissioner, I think you have said that you will be reporting to Parliament soon. Does that mean weeks, months, years?

Mr GRIFFIN: I think I said "hopefully soon". I would hope that the writing would be done by the end of this year. The exigencies of trying to have things printed - and we have been caught by this before - at Christmas time will probably mean that the printed report is available early next year. They are our current intentions. There are things that might still happen in Florida, it is not a closed investigation.

Mr KERR: One would expect the report in the first half of 2004 on present indications?

Mr GRIFFIN: Well, I have no reason to change my earlier answer. I expect, and we hope, to have it done early next year. I cannot see any point in me trying to say it will be ready by--

Mr KERR: I am not asking you to be a prophet, I am asking you for a ballpark date.

Mr GRIFFIN: Nothing firmer than I have given you.

Mr KERR: You introduced the word "soon" into your evidence here today.

Mr GRIFFIN: You will appreciate, I am sure better than most, that this is a massive operation. There were 418 separate investigations in Florida and the thing involves a great deal of work. There are eight separate segments. We took a view - conscious and considered view - that we would need to report at the end of the segments rather than report each segment as they arose for the reason that there were some officers who were the subject of complaints or allegations that went across segments and to try to write a report, deal with an officer, have him or her crop up in the next segment and then have to deal with the affected persons became impossible. The last segment will be written before the end of the year, short of catastrophe, and when that is done it will only be a matter of publishing and that should certainly be finished early in the beginning of next year.

Mr KERR: I understand that. It has now been going longer than World War I, of course.

Mr GRIFFIN: I am not very good at history, sir, but I would not have thought that was quite right.

Mr KERR: World War I went from 1914 to 1918.

Mr SAGE: It was covert for most of the time or half the time at least.

Mr KERR: They did not declare war until August 1914.

The Hon. JAN BURNSWOODS: It actually finished four and a quarter years after it started, so World War I is ahead at the moment.

Mr KERR: Not on the forecast of the completion of Florida. If I could ask about category 1 matters, what is involved in category 1? Have you heard that expression?

Mr GRIFFIN: I have heard that expression. I might ask Mr Kearney to read out the category. I am sure you would have seen these, sir; if not, we can provide them.

Mr KEARNEY: It is quite lengthy. Do you want me to read it out?

Mr KERR: It can be tabled.

Mr KEARNEY: It tends to be the more serious areas of police misconduct.

Mr KERR: Are there timeframes applied for police in regard to the investigation of category 1 type matters?

Mr KEARNEY: There are. We looked at this in Dresden and there are timeframes for reporting. If I recall correctly, it is 90 days. So, if all things are equal, a matter should be finalised within 90 days or, alternatively, a report made seeking an extension.

Mr KERR: Does the PIC set benchmarks for its own investigations as to timeframes for them to be completed?

Mr GRIFFIN: No.

Mr KERR: How many PIC investigations completed prior to 1 January 2003 are still outgoing or awaiting the issue of a final report? You may want to take that on notice.

Mr GRIFFIN: I think so, I would prefer to, if you do not mind.

Mr KERR: Of course.

Mr GRIFFIN: Prior to 2003 that have not been reported on in the last eight or nine months?

Questions without Notice

Mr KERR: Yes, they are still awaiting reporting and are still ongoing.

Mr GRIFFIN: You will appreciate that we do not report on the majority of our investigations.

Mr KERR: But the ones requiring a report or that you will be reporting on.

Mr GRIFFIN: Right.

Mr KERR: In relation to Operation Abelia, what is new in that that was not covered in Saigon?

Mr GRIFFIN: I am sorry, I do not understand the question.

Mr KERR: Saigon dealt with drug-taking in the police force.

Mr GRIFFIN: Amongst other things, yes.

Mr KERR: That was a completed report?

Mr GRIFFIN: Yes.

Mr KERR: So that was investigated and dealt with in terms of drug-taking. How is this operation different from Saigon? What is new? What is fresh?

Mr GRIFFIN: Well, I should say that I would not concede, if it is your proposition, that there should be anything new because if we see this as a serious problem, as we do, and we see it having implications across the force, as we do, I believe we should be looking at it. However, having said that, the Saigon matter was quite a narrow investigation. It looked at activity and came across and dealt with drug-taking activity and drew some conclusions from what it saw. The efforts of Abelia are aimed at providing a much better understanding of drugs in NSW Police and maybe from that what is happening in the community as well, across the board, and it is certainly, I hope, going to have some geographic and demographic information that Saigon did not contemplate at all.

You would know, I think, that this work is not undertaken adequately anywhere in the world. If we manage to do this, and I am perhaps being slightly broad brush here, but if we manage to do this as we hope, it will be seen by a great number of the law enforcement agencies around the world as useful work that they have not been able to do. So we are taking on a lot. It is broad-looking, it is combining research with instances of drug-taking, which is what Saigon would have given us and we would have used, and still might look at those, and hopefully we will come up with a much broader solution than we would have ever got from looking narrowly.

Again, at the risk of boring everybody with Abelia, we see an important problem with associations of police who break the law by using drugs because they have to buy them and the people they buy them from. I have said it before in this place and others: If you have a police person, who is supposed to uphold the law, buying from a dealer, the dealer has an advantage in that relationship from then on. Those relationships tend to grow and they have

proved to be, in the past, serious problems where historically detectives were going out drinking with the villains. There is a parallel there that we think is something we really need to get on top of before it becomes a major issue.

Mr KERR: Could you summarise the goals you set for Abelia?

Mr GRIFFIN: We would like to type, if we can, the drugs that are being used by police. We do not think that we can achieve any sort of quantitative stuff, we do not think we can say a percentage or a number because I do not think that information will be available readily. We would like to find out if there are demographic issues that can help us. We would like to determine whether there are things about the police recruitment processes, testing prior to recruitment and training, whether there are areas about the actual testing regimes, whether random testing and targeted testings are the right things to do. We would like to find out whether a zero tolerance policy in relation to management of individuals is going to be more effective than a rehabilitation policy. I have probably forgotten some other things that Allan will remind me of: The legislation and policy will need to be dealt with to prop up any of those things if we conclude that they need to be dealt with.

Mr KERR: The legislation and policy as it relates to the police force?

Mr GRIFFIN: As it relates to the police force, applying those things that we determine, if we can, need to be fixed. There may well be some things where the legislation is important.

Mr KERR: You mentioned the abuse of prescribed drugs, so we are not here talking about illicit drugs, we are talking about drugs that have been obtained quite lawfully under prescription?

Mr GRIFFIN: Yes, or perhaps. The reason that that is within the terms of reference is that we have concerns about the use of steroids. Steroids are drugs that can be obtained legally and they are also drugs that are used, we understand, quite widely, whether or not they are obtained legally, perhaps not, I understand that there is a considerable use of veterinary steroids in body building areas.

There are research papers that indicate that the use of steroids increases or can bring on what they call "roid rage", a serious change of personality. We would like to make sure that we included that in Abelia because we have, if there is a problem, the possibility that people are taking legally obtainable drugs, whether they obtain them legally or not, and then involving themselves with the police duties in a condition where you would not want them.

So that was the nature of the legal drugs in the Abelia project.

Mr KERR: Sure, but the term prescription implies it is prescribed to deal with a medical condition, I mean, police officers, as members of the general community, obtain prescribed medication and nobody is suggesting that simply being on medication is wrong I take it.

Mr GRIFFIN: Well, I would have thought that is inescapable. I mean, all we are doing is leaving open the opportunity to look at, and not prohibiting ourselves by our terms of

reference from looking at things that are legally prescribable, whether they are obtained that way or not, but nevertheless being misused. I mean, I would imagine there are quite a number of drugs, some of the “stay awake” pills that truckies use, you would not want your truck drivers using them in a way that would make them dangerous drivers, but you would not preclude an inquiry into truck drivers from looking at those drugs. It is just giving us the opportunity to look, no-one is suggesting that an officer who takes a heart pill is going to fall within our ambit. We are not interested in those things.

Mr KERR: You would not preclude somebody from receiving a prescribed medication if it goes to meet a proper medical condition?

Mr GRIFFIN: No, if that will help the record, certainly not. I have not heard that suggested.

The Hon. JAN BURNSWOODS: Is Abelia including alcohol?

Mr GRIFFIN: No it is not. There has been a lot of work done on alcohol. The principal difference that we see in that is that we are looking at excluding the stuff Mr Kerr is talking about, illegal drugs, because it goes to the oath of office taken by police, their law enforcement role and opens up the association with criminals. So you do not get that when you apply alcohol, although I accept it is a significant problem in the community, not just the area we are looking at.

CHAIR: At some of our hearings we have had some evidence that suggests alcohol consumption, especially on duty, is dramatically less than it used to be amongst police officers and whilst it would have been a notorious problem a number of years ago, it is nowhere near that level of seriousness now. Is that a fair assessment of it all?

Mr GRIFFIN: I think that is the accepted wisdom. The indications are that the testing regime in relation to alcohol has been extraordinarily effective. The alcohol testing people apparently feel free to enter wherever they like, whenever they like and test and that has had a great effect. There has also been, I think it is fair to say, a major change in the community's use of alcohol.

The Hon. DAVID CLARKE: During Operation Abelia you would have obtained a great deal of information on non-police drug dealers, drug cartels and so forth I would imagine. What do you do with that information?

Mr GRIFFIN: It is early days and yes we will. We have seen some dealers already come through our investigative stages. The process to date, and we will drive it operationally by how much mileage we can make out of each case and how much potential damage there might be if we did nothing but to date we have delivered the offending individuals to the NSW Police to deal with and they have been charged. In one recent case one of the people who was dealing to the police was charged with, I think, commercial quantities of drugs in relation to dealing. So we have in place, and this is one of the beauties of the co-operation we have when we are not hammer and tongs with the police, we can deal with those matters swiftly and without any concerns that it is going to affect what we are doing with Abelia.

The Hon. DAVID CLARKE: Those involved in the drug industry, the drug dealers, have you detected, even at this early stage, any common factors between these dealers?

Mr GRIFFIN: I do not have any knowledge of that. It is not the sort of thing that we personally are looking for in relation to them except in so far as they are dealing with police.

The Hon. DAVID CLARKE: But anything that would come out incidentally.

Mr GRIFFIN: It may very well at the end of the report but it will be incidental to what we are doing and I think probably all of our experience indicates, as with the Courts, that they come in all shapes and sizes and I would be surprised if there was any common denominator, but we have not found one, and it is early days.

CHAIR: You mentioned just then and it was echoed in your opening comments, you talked about the co-operation from the Police Association and especially the police. That seems to be a very pleasant change from the Malta experience. Am I correct in detecting a generally better relationship, that the police are not going to the bunkers every time the PIC puts their head up?

Mr GRIFFIN: I believe that is so. This was a mammoth step for the commissioner and he agreed not to seek to be represented before our hearings. I cannot commend him enough for that because it was against the advice he was getting within the police service as far as I know and whether it was or not, it certainly is an indication that we are doing our business in the right way, in my view. There is no separate charter for the police in what we are doing in Abelia, we are ad idem and for that to be recognized at the early stage, as I said in the opening, it should save the community a great deal of money because the costs in Malta were high and I think we can get the job done more quickly. In answer to your question, we have a drug dealer, we have police, we do not have to worry about whether or not they are on our side or not. If that is writ, and whilst it works we are delighted with it.

Mr KERR: Can I just ask a question arising from that, in terms of this inquiry out outlined the goals, all of which would be embraced by the hierarchy of the police and by the hierarchy of the Police Association. Would that be correct?

Mr GRIFFIN: So far as I know.

Mr KERR: Yes. They would have a lot of explaining to do if they do not and I would have thought since the commencement of the police force, the commencement of the union, all of them would have publicly subscribed to the goals which you have outlined. Is what the public, the minimum the public would expect of its police force.

Mr GRIFFIN: Sorry?

Mr KERR: Let me put it this way, the public expects its police force to be free of drug abuse.

Mr GRIFFIN: I would have to take your word for it, I do not know.

CHAIR: I think the real point that was being made, was that whilst everyone would ostensibly commit to a series of goals and aspirations, at practice when enquiries are conducted and investigations conducted, quite often an organization can become very defensive, seek to be represented, fight against any potential adverse criticism and that seems to have been the process of what happened in Malta.

Mr GRIFFIN: I see what you mean. Malta was a perfect example of just that. You would have said, I am sure, the same thing about the aims in Malta, where if there was some effort to prevent the proper processes in the police service the hierarchy and the community would have expected those things not to be the case.

Mr KERR: No, subject to what the translator says. In Malta there was a series of allegations that were made against the police commissioner, and as you said in your opening, these allegations were that senior police sought to prevent reform being effected. Now, I would have thought any commissioner, any person having had allegations made against him would want legal representation. The difference here is that this operation, there have been no allegations levelled at the commissioner or the police hierarchy. Isn't that the situation?

Mr GRIFFIN: That is certainly true at this stage.

Mr KERR: At this stage, yes, and you do not have any actual knowledge that the commissioner was advised to obtain legal representation, do you?

Mr GRIFFIN: No, I do not have any knowledge.

CHAIR: What is the relationship between court and legal services and the PIC now?

Mr GRIFFIN: One of the things that happened in Abelia, which would be the best test of that, was that court and legal services are not directly concerned with the management of the matter from the police service's point of view. So, I am not able to say until we have an opportunity to test that, I would assume that they are going about the business of the police service but in relation to Abelia, it has not arisen because they are not in the loop of dealing with Abelia, it is being dealt with differently.

CHAIR: To everyone's benefit I would suspect. Further questions arising out of the opening or related topics?

Mr KERR: Just in relation to Malta. I think we have now had the benefit of the inspector general's report and the benefit of hind sight in relation to Malta, I am just wondering what is your view why it took longer than it should have?

Mr GRIFFIN: Malta?

Mr KERR: Yes.

Mr GRIFFIN: I was not there at the beginning.

Mr KERR: I understand, but you have read all the material. In fact, you wrote part of the report or contributed to the report?

Mr GRIFFIN: I could not take it further or say it better than the inspector said it in his report, I would not add anything to that and I have accepted what he said in relation to the report without any queries. There were issues about how the PIC was perceived and that being the principal tool that the PIC was able to apply in setting up a new standard for Abelia, that is clearly this is the way it was perceived of the court, etcetera and can get past that, everyone accepted it.

Mr KERR: What about conflict of interest with counsel, was that a major contributing factor?

Mr GRIFFIN: Every time counsel before any hearing wants to appear for more than one person there is likely to be a problem. You would know that better than I. Counsel have rules that apply. I think it is fair to say that the commission is enlivened to the dangers in conflict of interest more than it has ever been probably but I do not think that it is likely to be a factor that would delay matters before the commission in the future with the benefit of hind sight.

Mr KERR: With the benefit of hindsight, are there new procedures that have been laid down?

Mr GRIFFIN: The procedures practice guidelines, I believe we have a copy of them here for you. We brought these on the basis that they might usefully be tabled, Mr Chairman, and there are guidelines and notes. They touch on the issues that the inspector noted and we accepted. They also deal with the questions that Mr Kerr is asking.

(Documents tabled)

Mr KERR: Mr Ryan's biography, the former police commissioner –

Mr GRIFFIN: No sir, I have not read Mr Ryan's biography in any form.

Mr KERR: You have not had any of the matters that are raised there summarized to you?

Mr GRIFFIN: No I have not.

Mr KERR: Could I take you to page 289 where it is said:

Ryan was forced to sit and fume for an astonishing sixteen months after the press conference first aired the damning allegations until he was finally invited to have his say at the PIC on 4 March 2002. Even then he was alerted to journalists to the date he was to appear, he hadn't even been told.

Now in terms of your procedure with witnesses, well first of all, is that a correct account of the way he was dealt with as a witness?

Mr GRIFFIN: I have no idea but I doubt it.

Mr KERR: Does Mr Sage know?

Mr GRIFFIN: You are asking us to comment on how Mr Ryan was behaving.

Mr SAGE: I would have to go back and check the records in relation to that but my memory is that that is not how the arrangements were made with Mr Ryan. My memory is, and I will need to check it, that there was some discussion with his office and we finally settled on the date in March to suit his diary.

Mr KERR: I would be grateful, basically in terms of procedure with witnesses. You would appreciate that the way witnesses are treated by the commission is very important and they are entitled to be advised, like in any court matter.

Mr GRIFFIN: I would not concede that for a moment, Mr Kerr. I think that in the appropriate case we would put our hands on somebody's collar in the street and wheel them in. That is the first thing. I mean we are not a court. Secondly, in relation to Mr Ryan, a lot of this stuff from your book--

Mr KERR: It is not my book.

Mr GRIFFIN: Are you sure? It goes around and around. I spoke with Ryan on a number of occasions in the early part of the year when he was apparently sitting and fuming about attending in the witness box and he was not available to do that and I would have had that conversation with him on two or three occasions. So the essence of what you put, to my mind, is a nonsense because I was talking to him personally, but as to particular dates and who told him and what "informed" means and how his mental state was, I do not think we can take it any further.

Mr KERR: I am simply interested in the procedure.

Mr GRIFFIN: The normal procedure is that we issue process and witnesses have an obligation to answer that, as you know; they are given opportunity to seek legal representation, which they do, and it is done with a minimum of fuss and a great deal of cooperation. If we had somebody who did not want to play that game, we have the capacity to do other things, but there is not an issue, so far as I know, about how the PIC deals with witnesses. I do not think it is an event. In any event, practice and guidelines are around and we are a very courteous organisation.

Mr KERR: You are not a court, but you would still extend courtesy to citizens?

Mr GRIFFIN: Absolutely.

Mr KERR: In terms of collaring people off the street, I take it that is an extreme situation?

Mr GRIFFIN: I cannot imagine it arising, but I would not concede that we could not do it if it arose.

Mr KERR: No, but it would have to be in extreme circumstances and not your preferred course of action?

Mr GRIFFIN: Certainly not.

Mr SAGE: Mr Ryan was represented by senior counsel and a legal team and they had been on the record and appearing at every hearing, from my memory, from day one of the public hearings. One would anticipate that there would have been discussion with at least senior counsel about his availability and they were on notice for quite some time that Mr Ryan was going to be called, so for him to be sitting around fuming, I would have expected that there was plenty of opportunity for him to get on with the commissioner role that he had in the police service and have the benefit of some knowledge, not necessarily the date, but the knowledge that in the near future he was going to be called, at least before the end of the hearing process.

Mr GRIFFIN: I hate to go back to this book, but I am, in my own mind, certain that Mr Ryan would not allege what is alleged in that book.

Mr CORRIGAN: It is not an autobiography.

Mr GRIFFIN: That is my view of the circumstances at the time. I suspect that there has been a little bit of literal licence taken with that document in relation at least to that paragraph.

Mr KERR: Has anybody spoken to Mr Ryan since his retirement?

Mr GRIFFIN: I hope somebody has; certainly I have not.

Mr KERR: Mr Sage?

Mr SAGE: No. I have spoken to someone who has spoken to him recently, but I have not spoken to him.

Mr KERR: Anything retold that was relevant to this?

Mr SAGE: Absolutely not. It was about his role in Greece with the Olympic Games.

The Hon. DAVID CLARKE: I would like to touch on the question of funding. Is the proper performance of the commission's duties restricted in any way because of funding limitations?

Mr GRIFFIN: I do not think it is, except we could do more and to do more we would need more people. The essence of what we do with the complaints that come in, and with Abelia we are trying to be active or proactive, if anyone likes the word, but mostly we react to complaints. I look at them all because I choose to, but we do a very small proportion of them. Frequently I look at a bundle of complaints and think it would be really nice to do these six, but we can do one of them, because all our investigators are out, or two. It does not mean that they do not get dealt with, it just means that we do not apply our resources to them. So to the extent that we could do more effectively and comfortably, but not without

Questions without Notice

more staff, the resourcing is the limitation, but to the extent that we manage the process and the rest of the complaints are picked up and dealt with adequately by the Ombudsman and the police under the arrangements, it is not a major issue, I think.

The Hon. DAVID CLARKE: So there are other important additional things you could be doing if you had additional funding?

Mr GRIFFIN: I do not think there is any limit to the work of a commission like the PIC. If, for example, we wanted to do a research based project, as we are in Abelia, in other areas, you could have a whole university of people working on it. There is no sensible limit or parameter that I can think of. What we can say I think is that those matters that must be investigated by the PIC are matters where there are senior police who may not otherwise be properly looked at by the police service, or systemic problems. We have the capacity to deal with them - and do - and it has not been an issue to date.

The Hon. DAVID CLARKE: Well, to cover all of those things that you would like to cover, would that require additional funding?

Mr GRIFFIN: I am sorry, I need to correct that. They are not things I would like to cover because if we created something in a police type commission, which is quite a boutiquey, small and focused organisation, that dealt with all the research and did all the programs, it would be a much bigger task to manage and we see some advantage in dealing with the sharp end of where we are going, so it is not something I would seek to do because I think being narrow and small and focused is a great advantage to the work we do, but in answer to the question, if you wanted to do all of that stuff, you would certainly need more resources. Now that bit of the cake is out there, it is just a matter of where you cut it between the Ombudsman and the police and ourselves, I believe.

CHAIR: In relation to resources, there seems to have been a significant decrease in the level of operational staff from 77 in June 2001 to 67.7 in June 2002. I am wondering why that happened; what implications there were flowing from it and whether that was related to difficulties with resources?

Mr GRIFFIN: I would have to ask the man who has done the figures because I suspect it is how you count them. The operational staff I think are important to the PIC and we need to keep the numbers up. There is always a danger you can drift one way or the other. I will ask Mr Kearney to tell me about the drift in a minute.

Mr KEARNEY: Actually I am a little confused.

Mr GRIFFIN: I thought we had been going the other way.

CHAIR: Let me give you the figures again: 77 in June 2001 and 67.7 in June 2002. There is probably a higher figure then for June 2003.

Mr KEARNEY: Are they percentages or numbers?

CHAIR: They are numbers I think. It is obviously going in an upward direction at the moment, but it had gone down quite significantly.

Mr GRIFFIN: I think it might be how we count them. With a bit of luck we can deal with it.

Mr KEARNEY: We were carrying some vacancies at that particular time and I think recruitment took some time.

Mr GRIFFIN: One of the problems is just that there are 100 people in the place. At the moment I think we are eight or nine down. They are percent when you translate them to investigators and there was a time when the Western Australian royal commission started coincidentally and some of our people went over there, as did one of our senior investigators, so it could easily be just that. There has not been a change in approach. I am surprised by your figures.

CHAIR: They are your figures, not mine.

Mr GRIFFIN: Sorry, I appreciate that. There has been no change in our approach or our capacity to do the work in relation to operations. If we need to go into this in any more detail we would probably need to take it on notice.

Mr KEARNEY: As I recall, it was just to do with some vacancies we were carrying at the time. Those figures would not have been an average for the whole year, they would have been the state of play at June 2002. Recruitment action has since taken place and we are now running at a full-time equivalent of 101.8. The staffing mix is around about the same as it was in the two previous years.

CHAIR: You said a moment ago that you have seven or eight vacancies now waiting to be filled by a normal recruitment process?

Mr GRIFFIN: Well, yes, except that we have difficulty obtaining people. If the Committee would give us the capacity to employ New South Wales police we could probably do better. I should put on record that we do have difficulty recruiting. One of the problems is the cost of real estate. To bring somebody from another State or overseas into Sydney is a major expense for someone and the investigators do not think that they should carry it at whatever they are getting a year because they can get that at home and I have resisted, and I will try to keep resisting but I fail now and then, the expectation that we will provide rental allowances or housing. Those things, rental allowance and housing, would be a major imposition on the commission, so getting qualified, clever people to come to Sydney, New South Wales, is a difficult thing to do for us.

The Hon. DAVID CLARKE: But additional funding would overcome that.

Mr GRIFFIN: Well, juggling our budget would overcome it too. It is just that I do not think we should do it that way, but it is a difficulty. If we had unlimited funds it would certainly overcome it.

CHAIR: The staff that are at the commission are employed under the Public Service Management Act?

Questions without Notice

Mr GRIFFIN: Very few, I think. It might be none. We employ under our own Act, almost exclusively under contract. There has been some talk about Public Sector Management Act personnel, but generally there are none. I am told it remains at none, so we employ under contract under the PIC Act.

CHAIR: Everyone who works there is under a specific contract, term limited?

Mr GRIFFIN: Yes, varying conditions, but yes.

Mr CORRIGAN: I recently became aware that in NSW Police an undercover operative was installing listening devices and the team helping him did not let him know that they had lost sight of the subject and the subject came into the house and he had to dive under the house for 12 hours and is now on stress leave. Have you had any incidences of your operatives having to go on stress leave or serious occupational health and safety concerns resulting from surveillance operations?

Mr GRIFFIN: Not that I know of. I will just check with Mr Sage. Historically have we had any?

Mr SAGE: No.

Mr GRIFFIN: No. So that goes back well before my time. It is nevertheless an occupational problem, as you can imagine. I may have to amend that. The director of operations reminds me that we have had difficulties with surveillance operators working and having to get out of where they were fairly quickly, but it has not brought on the additional bit that you ask about, that is stress problems - at least not yet.

Mr KERR: I do not wish to verbal you but, in relation to Malta, I think you mentioned that there were serious allegations made and they were shown to be incorrect or false. What do you see as the achievement of the Malta inquiry?

MR GRIFFIN: I think just that, I think the public would be delighted to know that the commission was not inundated with evidence of the police trying to do dreadful things. The fact that that they were doing the right thing or not doing anything wrong, I would have thought would be comfortable to the public. That is a great negative result, I think. The result of inquiries should not be: Gee, we have got three scalps. It would be much better, in my view, if every time we did an inquiry into serious police misconduct, we could not find anything.

Mr KERR: It is very important that in fact if an innocent party has an allegation made against a police officer, that they are exonerated as quickly as possible. That would be one of the roles of the PIC?

Mr GRIFFIN: Well, whether or not it is, I agree it would be a good idea if it could be done.

Mr KERR: Yes and in relation to the evidence there which you looked at before, you helped to write the report, it was evidence that was diametrically opposed witnesses, you could not reconcile the accounts?

Mr GRIFFIN: You could take that view, yes.

Mr KERR: Was any consideration given to charging anybody with perjury?

Mr GRIFFIN: Not that I know of.

Mr KERR: I think Mr Tink has expressed a concern in Parliament about the role of Judge Urquhart in this matter and his term being extended in terms of the appointment. To your knowledge did Judge Urquhart make a contribution to the final report?

Mr GRIFFIN: I understand that he did. It is a matter that you should probably put to him but certainly he was involved in the process.

Mr KERR: Did you oversee the process of that report?

Mr GRIFFIN: I was party to it and he was party to it in the sense that I was then the commissioner; I oversaw it. In the sense that I demanded that my views had precedence or should be considered more heavily than anyone else's, I did not, but the process was one that involved both Urquhart and myself and others, as you know.

Mr KERR: Yes, but I think you told the Committee last time the report was your responsibility.

Mr GRIFFIN: Certainly.

Mr KERR: Does that mean if you took a particular view that your view would prevail?

Mr GRIFFIN: No, I do not think it means that.

Mr KERR: Did it ever come to that?

Mr GRIFFIN: Not that I can recall.

Mr KERR: There were never any disagreements?

Mr GRIFFIN: There were discussions about things throughout, I say that in general terms, I do not recall any of them but I know there were discussions about nuances and editing and language but I do not recall any major disputes about interpretations of the matters.

The Hon. PETER BREEN: Just on Malta, was the case of Ken Seddon an embarrassment to the commission? Ken Seddon was charged with fraud when he went back to England, there was a newspaper suggestion that he represented a lost scalp, if you like?

Mr GRIFFIN: Well, not it was not an embarrassment to the commission but I do not know the report that you refer to. I know that he was dealt with and those matters I think were well known to the commission.

The Hon. PETER BREEN: He was not the subject of the commission inquiries?

Mr GRIFFIN: No.

The Hon. PETER BREEN: Can I just ask a question about the research project in the context of Operation Abelia, is there any conflict between the commission undertaking a research project and being at the pointy end of an investigation? It seems to me that the disciplines are quite different and I was just wondering if there was a precedent for this kind of combination of inquiry and research?

Mr GRIFFIN: I do not know but I can say that there is some tension between what researchers would like to achieve and what operational people would like to achieve. In the commission we manage it because that could otherwise possibly impact on how the matter progressed by having the operations drive the example, the exemplar sort of stuff that we hope to put forward and the research dealt with separately, but tension arises when or would arise if we did not ensure that the investigative type matters had free reign in relation to where they went and what they could produce. I mean, it would be perhaps tempting if you had a good target, to get them in and say: Oh well, tell us all you know about how you got onto drugs and where you first met them and who you buy them from and we won't bother about investigating you. We do not, at least, have not chosen to at this stage, do that. We have just done the investigations as investigations and they inform, hopefully, the public hearing process.

Our plan would be that we will not try and call a whole lot of people who use drugs in the police service. It does not seem to me to serve any end to name and shame a whole lot of people. What we want to do is inform the public that there are problems in steroids and eccies and heroin, if that is the case, and then leave the examples alone. Although the case studies may be dealt with, if there are briefs they will be dealt with and leave the research people to try and, from the examples and the research work, cut some cloth to make a decent set of clothes out of.

The Hon. PETER BREEN: I get a sense from your answer that there is less emphasis on prosecuting those people that might be found involved in the drug trade somehow.

Mr GRIFFIN: Sorry, if I gave that impression, that is certainly not the case. If we can find a brief, it will be put together and that will be dealt with in the normal way. It will go to the DPP and they will decide whether they want to prosecute. There is no suggestion that we would not follow that to the nth degree.

The Hon. PETER BREEN: I think earlier in your answer to another question you said that you would hand an investigation over to the police rather than undertake it yourself. Are there any precautions in place to make sure that police doing an investigation are not somehow connected with those that are under surveillance?

Mr GRIFFIN: What I think I said was we have handed some over and there is no general rule, what we think we have done is achieved the capacity to do that when we choose to. In relation to the ones where we have proceeded to give them to the police we have known the players very well, who they were dealing with, we have dealt with special crime and internal affairs police, in whom we have confidence and there has been no hint of a

problem in dealing with them in that way, but the occasion may well arise where, and in fact we are investigating matters at the moment where we would not necessarily choose now or further down the track to bring police in – not because we do not think it is secure but because we would like to develop the matters ourselves and see where they go.

The Hon. PETER BREEN: It is not a hard and fast rule everything goes over to the police?

Mr GRIFFIN: Certainly not and if it were it would probably be a bit daft because eventually there would be some lines crossed, probably.

The Hon. PETER BREEN: There is a view I think on the Committee that the relationship that you have built up with the police is a good one and it is productive and fruitful in terms of both police and the PIC but there is another view that it is a bit too cosy and it does not lend itself to proper oversight of the police. Do you have a view about that?

Mr GRIFFIN: I do. I was probably clumsy in trying to express it before. I do not think that moving gently and politely in the first instance necessarily should be taken as a sign of weakness. If we are required to use the clout we have, I do not think the police are in any doubt, even if there is some doubt in the Committee that we would do so, my view is they know that the commission will do whatever is necessary and it is because of that that they are prepared to adopt the relationship that they have. I think if they thought they could put it over us they would not go the way they have gone. So I think it is useful and a mark of respect to the commission. They know the powers we have got. We can all read the Act.

The Hon. DAVID CLARKE: Does the Honourable Member have any instances of this cosiness?

CHAIR: The questions go to the commissioner, not the Committee members.

The Hon. PETER BREEN: I was actually going to ask the commissioner just that question in fact, is there any data or any surveys that have been done or do you have any hard examples of the product or the fruits of this better relationship with the police? I mean, it must show up somewhere in the statistics?

Mr GRIFFIN: At the end of Abelia I suspect it will show up in about \$8 million worth of unspent fees but I do not have anything that I can point to. What I can say is that if there is a problem now between the police and myself I can speak to the commissioner and the problem is usually solved very quickly. I know that if I need to issue process, I need to involve my lawyers, get the process done, serve it on their lawyers, have it go into the bunker, it is a very slow way of dealing with things. Now, if that has to be done, I do not have the least hesitation in pulling the stick out of the bag, but it seems to me it is sensible not to do it until it needs to be done.

The Hon. PETER BREEN: I have to say my own experience with the police is they prefer the new relationship obviously?

Mr GRIFFIN: I do not know if that is good or bad. But look, I think it is working.

The Hon. PETER BREEN: It makes life better for them. I do not know in terms of corruption whether it works better but in terms of giving them peace of mind I think it is better.

Mr GRIFFIN: Well, if that translates, as I believe it does, to us being more efficient and more professional, I think that is good.

The Hon. PETER BREEN: I have one final question, the appendix at the back of your answers refers to what appears to be a marked increase in telephone intercepts, on page 4 of the appendix. I was just going to ask you whether these are warrants issued by the commission or do you issue warrants for other people?

Mr GRIFFIN: No it does not. We have sought a substantial number of telephone intercept warrants. It is almost an accident of who our targets are. We find if we are dealing particularly with people who deal in drugs – this is anecdotal, I am not supposed to do anecdotal stuff – but they use two or three mobile phones and if we hear about the numbers, we want to put them all off, so the sort of target we have will drive the number of warrants but we always and have no option but to go to the court and we prepare the affidavits and they are judged on their merits.

The Hon. PETER BREEN: This, I suspect, would be almost entirely due to Operation Abelia, this large increase?

Mr GRIFFIN: Substantially in relation to matters that involve drugs and they will therefore turn up in Operation Abelia but they did not necessarily start that way. Operation Abelia is going to be a basket that catches a lot of stuff that we have been doing and will continued to do but they are driven by operations that stand on their own, they do not start off being: Let's go and find some drug dealers for Operation Abelia. We get a complaint, it involves the police using drugs or associating, we pursue it and then because it is a good example, if it is, we would bring it into Abelia, but it is more the nature of the work that we do.

If we were doing a fraud type matter it might very well be that we would issue a lot more 26 or 25 notices. It is just that the nature of our work at the moment has been stuff that requires telephone intercepts.

The Hon. DAVID CLARKE: I guess commissioner you would be concerned about any allegations of cosiness between the commission and the police and if there was any specific allegations as opposed to general sort of all encompassing statements, you would be interested in hearing details?

Mr GRIFFIN: I would. I would be horrified and I would be very keen to hear details, because it is an easy thing to say, a lot of things that the commission touches on, people have got a whole lot of things they think they know and that would be an example where it would be very easy to de-stabilise what we are trying to do by saying: Well, they are too cosy, they are too close, you know, they are not getting their job done. If there were examples, I would be horrified and I would certainly want to know and we would do something about it if we could.

The Hon. DAVID CLARKE: And if I was aware of any I can raise them?

Mr GRIFFIN: I hope you would.

The Hon. DAVID CLARKE: On the question of Operation Malta where you are dealing with false allegations against the police, I mean allegations can be innocently made or they can be malicious to a purpose hindering the police in their duties. I think this was touched on earlier. You are not aware of whether any action was taken against those who made maliciously false allegations against the police?

Mr GRIFFIN: I am not.

The Hon. DAVID CLARKE: Into whose realm would that matter have fallen? I do not know whether you can assist us on that.

Mr GRIFFIN: Well, I cannot because, with respect, it is a very general matter. If a member of the public made allegations against a police officer it is highly unlikely to be something that would fall within our charter unless it was peripheral to something we were doing. That would probably be a matter for the police, peculiarly enough, and in any event there is a huge difference between, as we well know, allegations and evidence and allegations that are not supported by and are unlikely to be supported by evidence are not going anywhere by any investigative authority, so they are almost non-events I think.

The Hon. DAVID CLARKE: Except maliciously inspired allegations.

Mr GRIFFIN: Difficult to prove.

The Hon. DAVID CLARKE: Yes, but if they can be proved. We need to stamp out corruption, but the innocent also need to have their reputation protected.

Mr GRIFFIN: Certainly. If a police officer was making maliciously inspired false allegations, that would be police misconduct in my view. Whether we investigated it or not would probably depend upon all the things that we have talked about today, but it would be a matter that would be open to investigation if there was evidence as opposed to conjecture.

Mr KERR: If I can return to examining the appendix at page 4.9, telecommunications, it appears from that that in the 2002-2003 fiscal year the PIC obtained 81 telephone intercept warrants. I take it they do not include the telephone intercepts obtained by the police and the New South Wales Crime Commission in relation to Florida and Jetz, the joint operation, do they?

Mr KEARNEY: No, they do not, and for those particular investigations they would have been a couple of years beforehand.

Mr KERR: This may be a question you would want to take on notice, but how many operations did the deployment of the 81 TIs involve?

Mr GRIFFIN: I would like to take that on notice.

Questions without Notice

Mr KERR: How effective were the use of those 81 TIs?

Mr GRIFFIN: How do you seek to measure effectiveness in that respect, Mr Kerr?

Mr KERR: Does the PIC have a measure of effectiveness in relation to that?

Mr GRIFFIN: Do you have any particular view in mind?

Mr KERR: No, just how you rate effectiveness.

Mr GRIFFIN: Thank you.

CHAIR: Could we have a copy of the table and the submissions from the commission to the Law Reform Commission, the material that is referred to in the answer to question 3?

Mr GRIFFIN: Certainly. I think we might be able to table those.

Mr ROBSON: I think I have a copy of the Law Reform Commission's report on surveillance that I can table.

CHAIR: Does that include the table?

Mr ROBSON: Yes, there is a letter by the commissioner dated 10 August 2001 and quite a lengthy table, not all of which contains problems with the legislation, but observations, comments and so on.

(Documents tabled)

CHAIR: The annual report at page 54 has reference to the accidental misuse of a credit card that was reported to management and funds subsequently repaid to the PIC. In what circumstances did that occur; has it occurred at other times and is there a system to make sure it does not occur again?

Mr GRIFFIN: I am going to claim old age here because I knew about this about 15 minutes ago and I have forgotten entirely. Do you remember the details, Mr Sage?

Mr SAGE: No, I do not. The issue that sticks in my mind is that the officer brought it to our attention shortly after it happened, but the detail I cannot recall.

Mr GRIFFIN: Would the Committee be happy if I took that on notice and provided the details? I am sorry, I know them and I was satisfied when I heard the explanation that it was trivial - it needed to go on report, but trivial - and the systems we have in place are, in my view, excellent in terms of dealing with both covert and overt credit cards, but I will need to get the details. I apologise.

CHAIR: From what you say, this was a case where the person misused it and immediately reported it or subsequently came forward?

Mr GRIFFIN: Came forward and said, "I accidentally bought some petrol for my private car with my covert card", I think - it was that sort of nature, although I might be confusing the issues - and paid the money and was told that it was all right, but not to do it again.

The Hon. DAVID CLARKE: Trivial in nature.

Mr GRIFFIN: That is certainly the case, yes.

CHAIR: If when you get the full details it is of that nature, I do not particularly need anything in writing.

Mr GRIFFIN: Thank you. I am certain it was that, I just cannot remember whether it was a meal or petrol or a tyre or something of that nature.

CHAIR: Has the commission had a draft Cabinet minute sent to it following on from the discussion paper of the Police Integrity Commission Act review? When did you get the minute and what is your understanding of the legislative proposals that have been drafted?

Mr GRIFFIN: Yes, sir, we did receive such a document and Mr Robson has the details, I think, of the timing.

Mr ROBSON: It was received last week, I think it might have been the 20th, and the timeframe for response was by the 29th. The commission generally agrees with the proposals in the Cabinet minute. There is one issue about the amendment to section 142 which concerns the giving of a concurrence by presently the Minister and, as proposed, the Commissioner of Police to the use of police officers in a commission investigation. There is a bit of fine-tuning in relation to that, but nothing which cuts across the general tenor of the proposed amendment.

Mr GRIFFIN: I should say that in relation to that it was something that we previously conceded was not a problem and Mr Robson has pointed out an issue that might in some circumstances cause us difficulties. It is not a major issue. So far as they were concerned, we were happy with it.

CHAIR: Can I ask Mr Robson if he is able to give us a precise date and time when you received the document?

Mr ROBSON: I cannot recall as I sit here.

Mr GRIFFIN: Can we take that on notice and provide it?

CHAIR: Yes, that is actually what I was trying to say in my convoluted fashion: Could you drop us a note about the precise time and date?

Mr ROBSON: Certainly.

CHAIR: The annual report notes that in the last year you established an internal audit committee. Does that mean that prior to that there had been no internal audit committee?

Mr GRIFFIN: Yes, I think it does mean that.

CHAIR: Is there any reason you have only just had one?

Mr GRIFFIN: In my case it was ineptitude. When I arrived at the commission I thought that there ought to be one - there was not one - and I was then overwhelmed by what I was trying to do and only got around to it more recently. It is, I believe, an important and useful idea. In fact I think probably it is something that everyone should have one of, and ours is working all right I think.

Mr KERR: I am wondering whether you are aware that a former assistant commissioner, Geoff Schuberg, is doing a report in relation to police promotions. I think it may have been mentioned at previous Committee meetings with a police sergeant complaining to the PIC at some stage about promotions - Mark Fenlon or someone?

Mr GRIFFIN: I do not remember, but I know Mr Schuberg is looking at a process.

Mr KERR: Would you expect to be given a copy of the draft report?

Mr GRIFFIN: I really have no idea. I will ask Mr Kearney: Would we?

Mr KEARNEY: There has been no discussion about it.

Mr GRIFFIN: We have not been party to the process and you can probably tell by the reaction at this end of the table, I do not think we expect it. It is a ministerial inquiry as far as I know and we have not been party to the process.

Mr KERR: Given that it relates to the system of promotion, it is a matter you are almost a stakeholder in, is it not?

Mr GRIFFIN: No, I do not accept that. I must say that I think promotions within the police service, given that they are not corrupt or being manipulated, are very much a matter for management of the police. I do not think, unless there is some suggestion that the process is being abused or misused, that the commission has a great interest in it.

Mr KERR: If there is any reform to the system of promotion, you would want it to be fair, as transparent as possible and as corruption-resistant as possible.

Mr GRIFFIN: I think that is certainly true, but I do not think we would suggest that we were the only people that could come to that position. If we found a difficulty with it we would not be shy about commenting, but I do not think we see promotions as part of the work of the commission per se.

Mr KERR: Do you have a large number of complaints about police promotions?

Mr GRIFFIN: No, not a lot; some.

Mr KERR: You do get some?

Mr GRIFFIN: There are some, yes; there have been some over the years.

Mr KEARNEY: They tend to be category 2 complaints more than category 1.

Mr KERR: I would have thought it would be a wise course of action for your views to be sought in relation certainly to corruption prevention in any reforms.

Mr GRIFFIN: Well, I suppose, Mr Kerr, that is a matter for Mr Schuberg or the Minister or whoever is controlling it. If we were asked, it may well be if we saw something useful we would comment, but we have not been part of the process. I do not see it as a matter that would cause us a great deal of concern unless there was a problem.

Mr KERR: In relation to Dresden 1, what was the timeframe for that from commencement to completion?

Mr KEARNEY: Can I just clarify, Mr Kerr: Are you talking about the duration from which the sample was taken?

Mr KERR: Yes.

Mr KEARNEY: I think it was about two and a half years.

Mr KERR: That was Dresden 1, was it?

Mr KEARNEY: Dresden 1, yes.

Mr KERR: What about Dresden 2?

Mr KEARNEY: Dresden 2, three years.

Mr KERR: When you make recommendations, given that they extend over years, does the situation occur that, as you would be addressing a situation two years prior to when the report is made, the police force may have moved on during that period of time?

Mr KEARNEY: That is correct, and that is why we are planning on doing a third Dresden over a similar period of three years. I think if you look at Dresden 2, any outcome of the recommendations from Dresden 1 would probably only have been seen in the last year.

Mr KERR: So has the planning for Dresden 3 been completed?

Mr KEARNEY: Not yet, but it will be starting probably next year.

Mr KERR: The planning will be starting next year?

Mr KEARNEY: Yes.

Mr KERR: How long would you expect the planning to last?

Questions without Notice

Mr KEARNEY: I would not expect it to last more than three months. The project needs to be discussed internally and resourced and what not, but if all goes smoothly I would expect it to be well and truly under way by late next year.

Mr KERR: I suppose there are reasons why a plan for Dresden 3 would not be in place at the completion of Dresden 2?

Mr KEARNEY: Other priorities.

Mr KERR: Other priorities?

Mr KEARNEY: Yes, we have moved on to other priorities since the conclusion of Dresden 2.

Mr KERR: Would you be able to provide a report on Dresden 3 each year, given that it is over a three year period?

Mr KEARNEY: I am sorry, Mr Kerr, I do not understand the question.

Mr KERR: Would you report on how it is going each year? Three years is a long time.

Mr KEARNEY: I am sorry, perhaps I have not been terribly clear. When I say three years, it will not take three years from the end of next year before Dresden 3 is completed. What I am saying is that the period we will be taking the sample from will be a three year period and that three year period I think started at the end of Dresden 2, which was 2001, so 2001-2002 will be the first year, 2002-2003 will be the next year and the year it concludes will be the financial year 2003-2004.

Mr GRIFFIN: The cases we would take to look at will come straight on the back of the concluding date of Dresden 2 and forward for three years. That is our sample database. We will then plan and examine those cases to determine whether or not there are trends and so on. That is what happened in the previous matters.

Mr KERR: If I can take you to question 42, is that related to that article which was in The Australian in September 2003. Are you familiar with that article?

Mr GRIFFIN: Yes, in broad terms I am familiar with what it said.

Mr KERR: I think basically you said that there could still be people charged as a result of Florida, is that correct or has everybody who was going to be charged been charged?

Mr GRIFFIN: There is a segment that is not concluded and whether there will be people affected as opposed to charged from that segment is not determined so far as I know yet, but most likely - the difficulty I am having and the reason I am being cautious is that it is not a matter for us, of course, that is a question for the police whether people are charged and there may well be some matters that are in the melting pot of the police decision making process about charges. I probably cannot take that question.

The Hon. PETER BREEN: I think earlier you said there were 22 people referred to the DPP, I am assuming that is all your investigations, not just Operation Florida?

Mr KEARNEY: It is 49 charges have been referred, 49 charges for 12 people.

The Hon. PETER BREEN: I thought it said 22.

Mr GRIFFIN: I think Mr Sage is saying that is correct. What I was talking about was the year under review for the commission being 22, not Florida. The Florida figures are at page 21 of the answers to the questions on notice and I think the point is made there Mr Kerr that there may be a small number of matters where the police might decide to proceed criminally but it really is a matter outside of us. You will understand the police have the capacity to deal with these things at any stage through the process when they are minded to or conclude that there is a prima facie case, they are entitled to do what they like. It is not a matter for the commission.

Mr KERR: And dealing with question 43, which was a complaint by Mr Davison to the commission, it was a newspaper article in The Australian dated 8 September. It said:

Former Sgt Paul Davison has since been retired medically unfit since the Police Integrity Commission had declined to investigate his allegations, the basis of Mr Davison's complaints is that he and his men were used as pawns during the inquiry into police corruption. He said their operation put their lives in danger and involved them in telling lies to their superiors and allegedly breaking the law over a search warrant.

Is that an accurate summation of the complaints do you know?

Mr GRIFFIN: I have no idea I must say. You would have to say that the decision made at the time was that his complaint did not rate amongst the complaints that were around and was passed on to the police for investigation.

The Hon. DAVID CLARKE: But if the reported allegation is correct?

Mr KERR: I would have thought it was an allegation of police serious misconduct.

Mr GRIFFIN: I am sure that if it was correct it would be serious police misconduct. I do not cavil with that but I need to reiterate I think that we get a number of complaints about serious police misconduct. We deal with a very small number of them, mostly because they are more serious than the ones that are below. Sometimes we choose complaints that are serious complaints because they have some systemic problem but the fact that there is a complaint about serious police misconduct does not really inform the decision of its own, about whether we take it on, but we are comfortable generally and sometimes seek reports about whether or not the police have looked at them in a particular way but the system seems to work terribly well and the fact that Mr Davison is not happy with us not looking at his complaint is reflected in a number of complaints, I must say, because we do not look at a lot of them and everybody's complaint to them is very important.

CHAIR: Just a couple of brief final things: The PIC annual report 2002/2003 says that the recommendation from Operation Saigon concerning the mandatory blood testing of officers involved in critical incidents has twice been sent to the Minister for Police for legislative action. Has that matter been considered in the review of the Police Act and has that matter then been referred back to the commission to consider in Operation Abelia?

Mr GRIFFIN: It is a matter that will be looked at in Abelia. I am not aware of it having been referred back to this commission in any formal sense but it would be clear from our association about Abelia that that is where we are going. So to that extent the commissioner would be aware that Abelia will look at it but I do not recall it being referred and I might consult. I do not think we have any knowledge of a formal referral.

CHAIR: Finally, does the PIC consider that the audits of the Protective Service Group need to continue?

Mr GRIFFIN: That is a hard question. The PSG seems to be in a state of flux at the moment. The counter terrorist command seems to have subsumed it. The audits that are undertaken in relation to the PSG, which are driven, as you know, by the concerns that arose out of the police commission, have probably been very well received by this commission. The PSG appear to be staying within their charter in the past and doing what it was that they were supposed to do in accordance with the concerns about the special branch. I think that is a reasonable thing to say. So, to that extent, the past shows that they are proceeding properly and effectively.

Having said that, the difficulty that I find myself in is the problems that arise from the counter terrorist subsuming that command and nobody being quite sure how it is going to work. For what it is worth, Mr Scipione, who the counter terrorist control command comes under, has said that in relation to any complaints that he receives about what that command is doing, he will treat them all as category 1's and inform us immediately, which goes some way to dealing with concerns that we might have about how the powers are being used, but until the relationship between the two groups is a bit clearer and the charter of the PSG, if it is to exist, is formalized, it is my view that probably the audit should stay.

It is not a particularly definite answer but it is a very difficult area at the moment and you would imagine that having focus put on these management issues is relatively difficult because concerns are about the real issues of counter terrorism.

There are concerns, I mean Mr Robson has mentioned and identified some concerns about the definitions in the Act that might bother us later on. There is a section that deals with the authority not being challenged in any court and so on and you would be familiar with that. Maybe I will get Mr Robson to explain it but basically the difficulty might be that we are precluded from investigating things that the Act purports to say for us.

Mr ROBSON: The potential problem might be that given the very broad terms of section 13 of the Terrorism (Police Powers) Act which prohibits any questioning or challenge of the validity of an authority in a court of law or any other legal proceeding, that is all well and good to protect the decision maker under the legislation. It does not preclude the commission from investigating misconduct short of the grant of the authority, but the question then is what happens at the conclusion of a commission investigation? It is not

necessarily an end in itself, there might be prosecutions that need to be considered in the light of the commission's assessments. Questions might arise in any criminal prosecution or disciplinary proceeding, which is a legal proceeding after all, if the question of the validity of the notice is a central issue, whether the proceeding can in fact be taken.

Questions might also arise in criminal trials similar to those which presently arise in relation to illegally or improperly obtained evidence in relation to warrants. Courts can generally collaterally review the validity of a warrant and determine whether or not the warrant is valid in certain respects and then that would enliven the exercise of a discretion to exclude evidence obtained under the warrant. The situation in relation to this legislation would seem to be, given the very, very clear and broad terms of section 13, that the court may well not have a discretion to exclude evidence obtained under the authority of an authorization, because the authorization cannot be challenged, questioned in any way, so there are questions about what can flow from a commission investigation or indeed, the right of any person in a criminal proceeding to seek the exercise of the usual kinds of discretions that the court has in relation to evidence.

If I may go back a little bit in relation to the Protective Security Group, you of course understand, Mr Chairman, that the role of the commission is to monitor the conduct and effectiveness of the audit. The commissioner's comments in relation to the appropriateness of the audits is quite correct with respect but there were some early problems when the audits were initially conducted after the establishment of PSG, in terms of the scope of the audit, the issues that were looked at, perspectives and those kinds of things. But by the time of the second or third, all of those problems were bedded down and the audits generally proceeded with proper consultation with the commission and no major problems were discovered in relation to the activities of the PSG. But of course, that was the PSG as it then existed and the PSG as it exists at the present time in the present climate is somewhat different. It can actively investigate rather than gather intelligence and so on and I personally think there is a need for audits to continue and for oversight of the process.

Mr KERR: Are persons who are adversely named in a report by the PIC, if it is publicly released, informed that they are going to be adversely named?

Mr GRIFFIN: Yes.

Mr KERR: If an officer or non-serving officer is interviewed or subjected to private hearings, do they get the opportunity to make submissions on the evidence?

Mr GRIFFIN: It would depend on how they were being viewed.

Mr KERR: What sort of viewpoints are there?

Mr GRIFFIN: Well, there are a number of officers who just give evidence to private hearings. It is not a question of whether or not they are likely to be adversely named or considered. That might well be the majority. If there is an adverse finding, or likelihood, they are given an opportunity.

Mr KERR: They are given an opportunity to make a submission on the evidence?

Questions without Notice

Mr GRIFFIN: Yes.

Mr KERR: This might be a question you would want to take on notice, but I was wondering how many serving or non-serving police officers are being investigated by the PIC and are still waiting for a determination to be made in relation to their conduct?

Mr GRIFFIN: Investigated in relation to personal misconduct?

Mr KERR: Any misconduct.

Mr GRIFFIN: I would be happy to take that on notice.

Mr KEARNEY: If I could just clarify: These would be people who are aware that they are being investigated?

Mr KERR: Yes, and the investigation has been completed.

Mr ROBSON: The commission does not necessarily express an opinion or make an assessment in every case where it investigates a particular person or officer. The question is whether it is making a public report or reporting any adverse assessment or opinion. That is the point at which the rules of procedural fairness require the extending of an opportunity to the person concerned to dissuade the position of publishing that adverse opinion or assessment, so we may investigate matters, but there is to be no public report or any recommendation which affects the interests of that person, in which case we do not then make a final determination on the matter and say whether or not that person has engaged in corruption. It is just an investigation at the end of the day. It differs from a police investigation insofar as the commission makes reports to Parliament and publishes assessments, but it is not necessarily the case that in every investigation where we have investigated an officer there will be some final opinion expressed on the matter. In reports to Parliament, that is where you have the requirement for the commission to express an opinion one way or the other, but certainly not in relation to matters where there is no report.

Mr GRIFFIN: Or no finding.

Mr KERR: In terms of the morale of the police officers, if they have been investigated and the investigation is completed, it could well remain as a sword of Damocles over their head?

Mr ROBSON: Well, if there is no adverse assessment or no disciplinary proceedings initiated as a result of investigation, I think they can take it as read that the matter is finished.

Mr KERR: It is just an assumption on their part?

Mr ROBSON: I cannot say what the commission does in every case where it undertakes an investigation. It may communicate with the NSW Police that there is no assessment or opinion or recommendation in relation to that officer. I cannot say with certainty whether it happens in every case.

Mr GRIFFIN: I think we are at cross-purposes. It must be clear to the Committee that we investigate officers that do not even know we are doing it.

Mr KERR: I am talking about officers who are conscious that they are being investigated.

Mr GRIFFIN: Whom we are naming in public?

Mr KERR: Not even in public, but they know that they are being investigated and the investigation has been completed. Of course, if you placed yourself in that situation, as a police officer investigated by the PIC, you would want to know the outcome, I take it?

Mr GRIFFIN: Yes, perhaps you would. In that case, it would not necessarily happen, and we might sometimes gain some benefit from them not knowing, but if they were to seek promotion then at that stage that information is likely to be given to the police so they would get to know about it in that course. If nothing happened in that way, it may be they would not. If we had a villain that we could not catch, it might be that that was appropriate.

Mr KERR: Or an innocent man who could not be exonerated.

Mr GRIFFIN: There is strength in innocence probably there.

Mr KERR: Sorry?

Mr GRIFFIN: The individual would have strength in innocence perhaps.

Mr KERR: Not necessarily, because you are aware that other officers know that an investigation is going and their reputation could suffer.

Mr GRIFFIN: Sure, I can understand it. I mean the police must face the same thing on every occasion they investigate somebody too and it is often the case that people are not told.

Mr KERR: But there is still a presumption of innocence for the civilian?

Mr GRIFFIN: Well, that applies here too.

The Hon. PETER BREEN: There is a practice I think of giving draft reports to people who may be adversely affected and asking them to consider the issue before the report is finally published?

Mr GRIFFIN: If we are talking about public reports then before we publish about people that are affected we obtain submissions in relation to what we propose to say. I think that just accords with the normal rules of natural justice and we do it in every case, so far as I know.

CHAIR: Do you give draft reports to complainants as well?

Mr GRIFFIN: No, not as a rule. I cannot imagine any occasion when we would.

The Hon. PETER BREEN: What if a complainant drives you mad?

Mr GRIFFIN: It is not good enough reason, although tempting.

Mr KERR: How long has the PIC been in existence now?

Mr GRIFFIN: Six and a half years, I am told, six and a bit.

Mr KERR: What would you see as the PIC's major accomplishments?

Mr GRIFFIN: I would have to ask Mr Sage to answer that, sir, because I am coloured by my term.

Mr SAGE: I think one of the major achievements is that we have contributed to change in the nature of corruption in the police service. We have also achieved a number of policy changes in the police service.

It is always hard to assess the impact and effect of a body such as the Police Integrity Commission or any other oversight agency. If you were not there, would the Police Service be in the state that it is in today? I do not believe it would be. I believe it is much healthier now, although there are a number of problems that we are probably all aware of, one being the large number of young police that have been recruited since the Royal Commission, and I think Commissioner Moroney has gone on the public record and said it is somewhere around 5,000 that have come on board since the Royal Commission, and they bring with them some new and emerging problems, some of which we have talked about today, but the systemic corruption that the Police Royal Commission identified and exposed so publicly, apart from the experience of Florida-Mascot in the northern beaches, I am not aware of and I would hope that that type of corruption in the detectives is not continuing.

Some of you know that I have been in Belfast and London as recently as a fortnight ago and I met with a lot of senior law enforcement officials, particularly from the anti-corruption branches of law enforcement. The Police Integrity Commission is well-known to most of the major police services in the western world and the powers that the Parliament has given the Police Integrity Commission are the envy of most of the jurisdictions overseas because they do not have those powers. As the Commissioner said earlier, the powers are there. They are not used in every case, but they have a very, very deep effect, I believe, on the Service, that the Commission has the power to investigate very, very effectively the activities of the Police Service and is well-equipped to do that.

I think the changes that we have seen in the Police Service, the contribution through QSARP and the appendix 31 committee, the fact that we are there and continue to be there with the powers and things we are doing is keeping the Police Service from that cycle that has been referred to by Mollen in his report into the New York police service and the sentiments that he expressed or the findings that he recorded in relation to the cycle of corruption and the need to have a continuing oversight to break that cycle. I think that the Police Integrity Commission has been effective in breaking the cycle that has been seen throughout the world in police services where there is an inquiry or there is a major investigation and there are reforms put in place, but not a continuing body, and then there is

a re-emergence of corruption maybe five or ten years later and the need for another inquiry. Hopefully that cycle has been broken by the initiatives of Parliament in this State.

I think there is a healthy fear in police officers of the Police Integrity Commission and what it can do. We have seen in the Abelia investigation a number of police officers resign and publicly state the reasons for their resignation because of the fact that the Police Integrity Commission was investigating them. Now I think that that is a good thing. If the Police Integrity Commission was not there, would they resign? I doubt they would. They would continue on and they would take their chances of being caught.

I still would say there is a lot of work to be done, but there have been some major achievements in the time of the Police Integrity Commission's life. It is only a short life. It is a difficult area to investigate. There have been some very, very hard cases of corrupt officers that have been investigated and, one way or the other, they are out of the police service now, and that is a good thing for the police service.

I think they are probably the major achievements.

Mr KERR: In a democratic society, of course, great powers require great justification and you have said that the PIC has changed the nature of corruption, but what was the nature of corruption pre-PIC which no longer exists post-PIC?

Mr SAGE: I think it has reduced the effect of corruption too. We have seen some entrepreneurial one-offs or two-offs involving corruption, but not the large groups of corrupt police that could call on their mates to be involved in a corrupt activity. The Magnum investigation that we conducted in Operation Florida publicly was an investigation into the activities of a group of detectives in 1991 where some evidence was given that the entire team of 16 to 20 officers were all prepared to act corruptly if they needed to - and did in some cases - so I am not sure that there is that capacity within the police now to draw those large groups together in a joint corrupt enterprise. I hope there is not.

Mr KERR: You do not say that the move from the potential for systemic corruption to private entrepreneurial activity has changed?

Mr SAGE: Pardon?

Mr KERR: Is that the change?

Mr SAGE: What I am saying is that there is a reduction in the level of corruption. That is the change, the reduction in corruption.

Mr KERR: But that is not a change in the nature, that is a change in the quantum.

Mr SAGE: And that is a good thing. I do not think we will ever eliminate corruption in a police organisation the size of this one, there will always be some corruption, but I think the level of corruption has been reduced and reduced dramatically.

(The witnesses withdrew)

(The Committee adjourned at 4.15 p.m.)

Appendices

Appendix 1 Committee Minutes

Appendix 2 Answers to Questions on Taken on Notice

Appendix 3 Police Integrity Commission Practice Guidelines

APPENDIX 1 – COMMITTEE MINUTES



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

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

Wednesday 28 May 2003 at 6.30pm

Room 1254, Parliament House

Members Present

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

....

General Business

The Chairperson

....

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

....

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

Chairperson

Committee Manager



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

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

Tuesday 25 November 2003 at 10.00am

Jubilee Room, Parliament House

Members Present

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

....

GENERAL MEETING WITH THE POLICE INTEGRITY COMMISSION

The Chairman opened the public hearing at 2.08pm.

Mr Terence Peter Griffin, Commissioner; Mr Geoffrey (Tim) Ernest Sage, Assistant Commissioner; and Mr Stephen Allan Robson, Acting Commission Solicitor, Police Integrity Commission, took the oath. Mr Allan Geoffrey Kearney, Manager, Intelligence affirmed. The Commissioner made an opening statement. The Commission's answers to questions on notice were tabled as part of the sworn evidence. The Chairman questioned the Commissioner and PIC executive officers, followed by other Members of the Committee. The Commissioner tabled the Commission's Practice Notes and Guidelines and the Commission's detailed comments on the recommendations of the Law Reform Commission's Interim Report on Surveillance, as well as correspondence to the Ministry for Police on the PIC response to the Interim Report.

Questioning concluded, the Chairman thanked the witnesses and the witnesses withdrew. The hearing concluded at 4.15pm and the Committee adjourned *sine die*.

Chairperson

Committee Manager

APPENDIX 2: ANSWERS TO QUESTIONS TAKEN ON NOTICE



ABN 22 070 745 340

Our ref: 11019/10
TG/AK

BY HAND

 3 December 2003

Mr Paul Lynch MP
Chairman
Committee on the Office of the Ombudsman
and the Police Integrity Commission
Parliament House
Macquarie Street
SYDNEY 2000

Dear Mr Lynch

QUESTIONS ARISING FROM PJC HEARING 25/11/03 - RESPONSES

Following are the questions which arose from the PJC hearing of 25 November 2003 which the Committee kindly agreed the Commission might take on notice, together with a response to each. In addition, please find attached a copy of the Commission's response to the LRC Report.

The Committee requested a copy of the Category One Agreement

The Committee is referred to Appendix 8 of the 2003-04 Annual Report which contains a copy of the Agreement.

How many PIC investigations completed prior to 1 January 2003 are still ongoing or awaiting the issue of a report, that is those investigations requiring a report or that the PIC intends reporting on?

There are no investigations which were completed prior to 1 January 2003 where the Commission intends reporting (at this time) and where that report remains outstanding.

11019/23

LEVEL 3 111 ELIZABETH STREET GPO BOX 3880 SYDNEY NSW 2001 AUSTRALIA
TELEPHONE (02) 9321 6700 FACSIMILE (02) 9321 6799 FREECALL 1 800 657 079 www.pic.nsw.gov.au

The only outstanding investigation reports are for Operation Florida, which continued well into 2003, and Operation Abelia which is expected to be completed next year.

How many operations did the deployment of the 81 TIs involve?

The 81 warrants were issued for the interception of 48 telecommunications services as part of nine separate Commission investigations.

How effective were the use of those 81 TIs?

TI operations are but one of a complimentary set of strategies available to the Commission to support investigations. They do not produce outcomes per se and therefore performance is not usually considered in terms of effectiveness. TI operations produce outputs which, together with other strategies, and the involvement of an external agent (DPP, NSWSP for example), produce outcomes such as improvements in practices, prosecutions and/or disciplinary action.

Being outputs, performance tends to be measured in terms of efficiency rather than effectiveness.

The character and value of intercepted information varies dependent on: the nature of the offences under investigation; the care exercised by the persons involved; and, where the person, the subject of the intercept, fits within a group involved in corrupt activity.

Some intercepts will provide **direct** evidence of corrupt activity. Other intercepts will provide information which **corroborates** such evidence. At a minimum, intercepts will generally provide a range of important information, for example financial details and evidence of associations and meetings, or, will **support** the use of other investigative strategies such as listening device and surveillance operations. Efficiency measures for a TI warrant therefore relate to the capacity of the TI to produce these categories of information.

In regard to the nine investigations mentioned above:

- Four investigations remain ongoing. TI warrants used in these investigations are being, or were, efficient in producing information for each of the categories detailed above (ie. direct, corroborative, supportive), in two cases, highly efficient.
- Two have ceased with multiple prosecutions in process. TI warrants were highly efficient in producing direct and corroborative evidence as well as information which supported a variety of other strategies throughout the investigations.
- One investigation has resulted in intercepted information being referred to NSW Police for further investigation of criminal offences. TI was efficient in producing direct and corroborative evidence.
- TI provided efficient support for other investigative strategies in regard to the remaining two investigations.

11019/23

POLICE INTEGRITY COMMISSION

Appendices

Credit Card Certification

The incident referred to in the Annual Report involved inadvertent use of a Commission credit card for personal use. It was trivial in nature but nonetheless required reporting. It was immediately noticed by the staff member at the time and reported to ~~his~~^{his} supervisor. The amount involved was repaid.

What was the precise date and time that the Commission received the draft Cabinet Minute following on from the discussion paper concerning the Police Integrity Commission Review?

The draft Cabinet Minute concerning proposed amendments to the PIC Act was received from the Ministry by facsimile on 19 November 2003 (at 12.11 pm) and marked "urgent". The Commission's response was required by COB 29 November 2003.

Other Matters

I note that there was a further question from Mr Kerr MP concerning the numbers of officers investigated by the Commission and awaiting a determination. The specifics of the question, particularly following the ensuing discussion, are not entirely clear from the transcript. There is also some doubt as to whether the question remains extant. Would you please advise me whether any further response is required in regard to this matter. If it is, could I ask that consideration be given to Mr Robson's comments at the bottom of page 57 and 58 of the uncorrected transcript.

I trust these responses assist the Committee. I am happy to elaborate further if necessary.

Yours sincerely



TP Griffin
Commissioner

11019/23

POLICE INTEGRITY COMMISSION



ABN 22 870 745 340



Your Ref: 624/01
Our Ref: 2034/41

URGENT

10 August 2001

Mr Les Tree
Director General
Ministry for Police
Level 19, Avery Building
14-24 College Street
DARLINGHURST NSW 2010

Attention: Mr David Hunt
Facsimile: (02) 9339 0650

Dear Mr Tree

Re: Law Enforcement Surveillance Legislation – Response to LRC Report

I refer to the meeting held on 8 August 2001 between your Mr Hunt, a representative of the Minister's Office, and representatives of the portfolio agencies and the Independent Commission Against Corruption.

The Commission is concerned about many aspects of the Law Reform Commission Report and the Attorney-General's draft Cabinet Minute. However, time has not permitted a thorough consideration of all the Report's individual recommendations, much less development of alternative proposals. Given the limited time available, the Commission's response is in two parts:

A. Fundamental Issues

There are two major concerns with the proposed legislative scheme. Firstly, the definitions of "surveillance" and "surveillance device", and therefore the scope of the activities to be regulated, is misconceived, and does not take sufficient account of the legitimate needs of law enforcement. Secondly, the proposed warrants and accountability schemes, in particular the reporting requirements for the users of covert surveillance, are in many respects inappropriately onerous and impractical.

B. Individual Recommendations

The Commission holds serious concerns about many of the Report's individual recommendations. The report contains many instances of internal inconsistency, flawed reasoning and unsupported assertions, too numerous to detail. Some considerations have,

LEVEL 3 111 ELIZABETH STREET GPO BOX 3880 SYDNEY NSW 2001 AUSTRALIA
REF : 2034/41
TELEPHONE (02) 9321 6700 FACSIMILE (02) 9321 6799 FREECALL 1 800 657 079



in our view, been given inappropriate weight, while others have been discounted. In many cases, the relationship between the proposed laws and existing legislation has not been properly considered. While some examples of these concerns can be given, the Commission would require a great deal more time to properly address each Recommendation and formulate suggested alternatives.

A. Fundamental Issues

1. The scope of activities to be regulated

The LRC Report makes it clear that, in making its recommendations, it has treated as paramount a "right" (or at least expectation) of privacy. It specifically rejected calls to "achieve a balance between protecting privacy and permitting surveillance for legitimate purposes", preferring an approach of "facilitating and controlling legitimate surveillance within the over-arching consideration of respect for personal privacy": see LRC Report at pp39-39.

In the Commission's view this approach is fundamentally flawed, and does not take sufficient account of the very real public interest in effective law enforcement. The Commission does not intend to suggest that privacy is unimportant. The public interest in at least some activities and conversations remaining confidential has been recognised (significantly though, no general right to privacy has been so recognised in the common law).

It is, however, incorrect to say, as the LRC appears to have done, that the public interest in privacy can never be outweighed by other public interests such as protection from criminal harm.

The scheme proposed by the LRC rests on the definitions of "surveillance device", "surveillance" and "monitor" in Recommendations 1, 2 and 3 respectively. All activity which falls within the definition of "surveillance", whether covert or overt, is to be regulated under the proposed scheme. In the Commission's view, these definitions are much too broad. If the proposed definitions are maintained, it has the potential to affect almost every aspect of the Commission's operations.

Under the proposal all surveillance would be regulated, with the following definitions applying:

- "**Surveillance**" means "**the use of a surveillance device in circumstances where there is a deliberate intention to monitor a person, a group of people, a place or an object for the purpose of obtaining information about a person who is the subject of the surveillance.**"
- "**Surveillance device**" means "**any instrument, apparatus or equipment used either alone, or in conjunction with other equipment, which is being used to conduct surveillance.**"
- "**Monitor**" means "**listening to, watching, recording, or collecting (or enhancing the ability to listen to, watch, record or collect) words, images, signals, data, movement, behaviour or activity.**"

The Commission's principal functions are to prevent, detect and investigate police corruption and serious police misconduct: *Police Integrity Commission Act 1996*, s13. Most of what the Commission does in the exercise of those functions would fall within the definition of "surveillance" under the LRC proposals, and would require the obtaining of a covert warrant from a superior court judge, or compliance with the proposals' overt surveillance principles.

It is not putting it too strongly to say that the Commission would be unable to carry out its statutory functions effectively, were such legislation to be enacted. It is simply not possible to "detect or investigate" criminal or corrupt activity without gathering and analysing intelligence. This necessarily involves "recording words", "collecting data" and so on, within the proposed meaning of



"monitor". Such recording, collecting and so on necessarily involves the use of "instruments and equipment", from pens and paper, desks, books, photocopiers and computers to vehicles, telephones, prescription glasses and hearing aids.

The application of the proposed definitions would result in some examples which are, in our view, ludicrous. To take a common example, suppose the Commission has received an allegation that a particular police officer is engaging in serious police misconduct. In the course of investigating those allegations, the Commission may utilise a number of investigative techniques, including the following:

- Accessing various sources of intelligence (including the Commission's internal databases, the NSW Police Service "COPS" database, public registers such as those held by the Land Titles Office, and documents held by banks and telecommunications companies) to build a profile of the officer.
- Conducting "traditional" physical surveillance, such as covertly following the officer, taking photographs and making observations about the officer's behaviour and routines.
- Interviewing the complainant, the officers' associates or colleagues.
- Utilising electronic surveillance methods, such as the use of listening devices, telephone intercepts and tracking devices.
- Exercising the Commission's special powers under the PIC Act, such as conducting hearings or requiring the production of documents.

It is arguable that all the above activities would fall within the definition of covert surveillance, requiring the issue of a covert warrant. This raises various issues, for example:

- (a) The agency is presented with an insurmountable difficulty: without a warrant, it cannot gather intelligence about the suspect; yet without intelligence and a reasonable suspicion of wrongdoing, it will be unable to satisfy a judge of the matters required to obtain a warrant.
- (b) The proposals require distinctions to be drawn, particularly in relation to physical surveillance, which verge on the farcical. Some examples would include:
 - A surveillance officer who watches a target from inside a car requires a covert warrant, while another who hides behind a tree does not.
 - A short surveillance officer who climbs a ladder to look over a fence requires a warrant; a tall one who can look over the fence unaided does not.
 - An officer who needs prescription glasses to see requires a warrant; another, with 20/20 vision, does not.¹

¹ The LRC Report suggests that hearing aids would not be considered surveillance devices if they are used only to improve hearing to "normal levels", but would be so considered if their use was designed to amplify hearing so as to eavesdrop. With respect, this distinction is neither practical, nor apparent in the terms of the definition of "surveillance device".



- (c) If the complainant is interviewed using an "ERISP" machine (or indeed using a hand-held dictaphone or pen and paper), the use of such instruments to record information about the suspect officer would constitute covert surveillance, despite the fact that the complainant has consented to being so recorded. This is a serious concern, as anything which could impede the Commission's ability to freely interview complainants and witnesses has the potential to severely affect the proper exercise of its functions.
- (d) It is unclear how other legislative provisions would affect or be affected by the proposed Surveillance Act in this context. For example, the conduct of a private hearing under section 32 of the PIC Act could arguably be considered covert surveillance. It would seem inappropriate, to say the least, that the Commission would require a judicial warrant before it could exercise an administrative discretion to conduct a hearing in the course of an investigation.

The Commission recognises that there are inherent difficulties associated with defining the extent of legislation such as the proposed Surveillance Act. There are three possible approaches to defining "surveillance device":

- (a) Device-specific (i.e. listing those instruments to which the Act applies). The disadvantages of this approach are twofold: it invites legal and technical arguments on whether particular devices fall within the definition; and it does not allow for the legislation to keep pace with technology.
- (b) General, without exceptions. This is the approach proposed in the LRC report. Its disadvantages are apparent from the examples given above.
- (c) General, with exceptions. This approach may overcome the difficulties in (1) and (2), but may be difficult to apply, and may suffer the same definitional problems as (1). There would also be problems defining the scope of the exceptions.

If it were accepted that the scheme as currently proposed is too broad, it may be best to limit the circumstances in which, rather than the devices to which, the laws would apply. The Ministry has recommended that consideration be given to requiring a warrant only where the surveillance would involve criminal or tortious conduct, such as trespass or nuisance. At this stage, and in the absence of detailed research into the issue, the Commission would support an approach based on this principle, possibly together with a provision which exempts commonly used items such as hearing aids and prescription glasses from the regulative scheme.

2. The warrants and accountability schemes

The proposed regulatory scheme, as it applies to law enforcement agencies², has three principal limbs:

- (a) Overt surveillance must be conducted in accordance with specified principles and codes of conduct.
- (b) Covert surveillance may only be conducted pursuant to a warrant granted by a superior court judge.
- (c) All surveillance is subject to a system of accountability, including provisions for reporting, the keeping of registers and inspections by an oversight body.

² The proposed employment surveillance regime in its current form would also apply to law enforcement agencies: this is further discussed below.



Due to time constraints, the Commission is not in a position to make detailed submissions concerning the proposed overt surveillance scheme, although some brief comments have been provided in the attached table. The Commission's principal concern in this area is that the proposed laws should not impede its ability to properly carry out its functions under the *Police Integrity Commission Act 1996*.

The balance of this part of the submission concerns the proposals for a law enforcement covert surveillance warrant scheme, and the proposed reporting requirements for warrant-holders.

The LRC Report states that the warrant and reporting regimes are based on the Listening Devices Act 1984 (NSW) ["LD Act"]. While that Act may have formed the starting point for developing the proposals, the final recommendations are substantially broader and more onerous than the LD Act; nor do they take into account many of the concerns about that Act expressed by law enforcement agencies and others over the past ten years or more.

Time has not permitted a full analysis of all the relevant recommendations, however put briefly, some of the Commission's concerns include the following:

- (a) The process of applying for a warrant under the LD Act is detailed and time-consuming. This is accepted, as there are relatively few occasions on which listening devices are used, and it is a particularly intrusive form of surveillance. However if the scope of the proposed legislation is not substantially narrowed, even the existing LD Act requirements (much less the expanded requirement proposed by the LRC) would mean that law enforcement agencies would find it very difficult to function without substantially increased resources.
- (b) The LRC has rejected submissions for the warrant period to be extended to 90 days, despite the fact that most Australian jurisdictions permit this length of time or do not impose any time limit.
- (c) A number of the proposals raise serious issues of public interest immunity, in particular the requirements in several Recommendations that agencies provide details of the type and location of surveillance devices. Protection of law enforcement methodology has long been recognised as a legitimate public interest, and the LRC does not justify its proposals to abrogate this principle.

Of particular concern is the Recommendation that the court Registry should compare applications for warrants with reports on the use of surveillance, and report "any discrepancies" to the Attorney-General [Rec 70(d)]. This proposal is highly inappropriate. It means that clerks would be required to read extremely sensitive material, of the kind which is currently held in sealed envelopes accessible only to the eligible judge concerned, and make assessments about law enforcement operations which they are entirely unqualified to make. That such a recommendation has been made is, in our submission, symptomatic of the LRC's failure in this Report to take into account legitimate public interests inherent in law enforcement, including the need to protect the identity of informers and covert operatives.

- (d) The Recommendations relating to retrospective granting of warrants are generally ill-conceived (Rec 48). The requirement to apply for such warrants within 24 hours of the surveillance having taken place is unworkable: 24 hours will generally be insufficient even to prepare the paperwork, and urgent applications being made outside normal working hours would impose a great burden on the eligible judges who would need to be available to hear such application at short notice. The focus should be on refining



the general warrant scheme so that retrospective applications are almost never required.

(e) Of particular concern are Recommendations 68 (agency reports to Attorney General), 69 (agency reports to issuing authority) and 79 (Attorney General reports to Parliament), and to a lesser extent Recommendation 72 (agency record-keeping requirements). The Commission's concerns fall into three general areas:

- (i) The proposed reports are broader than currently required under the LD Act. In some cases, the information sought is difficult to ascertain. In others, release of the information raises issues of public interest immunity or breaches existing secrecy provisions. Many of the proposed extensions to the existing reporting regime seem to serve little or no discernable public benefit. In all cases the administrative burden on the agency is greatly increased.
- (ii) The information contained in the reports will be available to more people, including the Court Registry and the staff of the Privacy Commission. In many cases, the information is highly sensitive, including details of covert operational methodology, the identity of informers, or material which could jeopardise ongoing investigations. The public interest in revealing such details only to a strictly limited number of people is clear, and has been recognised by the common law. Similar considerations underlie "secrecy provisions" such as section 56 of the *Police Integrity Commission Act 1996*.
- (iii) If the Surveillance Act is as broad as is proposed, there will be many more reports than currently provided for listening device. This means that the administrative burden of providing such reports, which is already considerable under the LD Act, will be increased to a level which would have the potential to severely affect the Commission's functioning.

The Commission recognises that there is a place for appropriate reporting requirements: as an oversight body itself it is very familiar with the need for accountability in law enforcement. However, there is no place for reporting requirements which merely increase the administrative burden on law enforcement agencies and increase the risk of the inappropriate dissemination of secret information, without producing a demonstrable public good.

B. Individual Recommendations

The Commission holds serious concerns about many of the Report's individual recommendations, quite apart from its opposition to the underlying principles of the proposed scheme discussed above. For example, the Report contains many instances of internal inconsistency, flawed reasoning and unsupported assertions, too numerous to detail. Some considerations have, in our view, been given inappropriate weight, while other equally valid principles of public interest have been discounted. In many cases, the relationship between the proposed laws and existing legislation has not been adequately addressed, nor the practical consequences of many of the Recommendations properly considered.

Some comments have been provided in the attached table. However, the Commission would require a great deal more time to properly address each Recommendation and formulate suggested alternatives.



C. Conclusion

The Commission reiterates the views expressed in its recent letter in relation to this matter. This is an important area of the law, and a hasty and ill-conceived approach has the potential to cause great harm. The proposal as it stands is fundamentally flawed, and large parts of it should be reconsidered before it is appropriate to release it publicly in the form of an Exposure Bill.

The Commission's contact officer in relation to this matter is Kate Deakin (ph. 9321 6745), and I would ask that you keep the Commission informed, through her, of any developments.

Yours faithfully

A handwritten signature in black ink, appearing to read 'P D Urquhart'.

Judge P D Urquhart QC
Commissioner
encl.

Appendix 3: PIC Practice Guidelines



POLICE INTEGRITY COMMISSION

PRACTICE GUIDELINES

November 2003

CONTENTS

	Page	Practice Note
PART 1: INTRODUCTION		
1 The purpose of these Guidelines	1	
2 The Commission, its objectives, functions and powers	2	
3 Application of the rules of procedural fairness	3	
PART 2: CONDUCT OF HEARINGS		
4 Appearances	5	[1]
5 Legal representation	6	
6 Joint representation and conflicts of interest	6	[2]
7 Conduct before a hearing	8	[3]
8 Placing evidence before the Commission at a hearing	10	[4]
9 The General Scope and Purpose	10	
10 Challenge to the Commission's jurisdiction	11	[5]
11 Evidence, relevance and "admissibility"	12	[6]
12 Challenge to warrant	12	[7]
13 Submission timetables	13	[8]
PART 3: DISCRETIONARY AND COERCIVE POWERS		
14 The discretion to hold public or private hearings	14	
15 Non-publication of evidence	15	[9]
16 Notices to produce statement of information/documents or things	16	[10]
17 Privilege in relation to notices	17	[11]
18 Procedures for objecting to Notice	19	[12]
19 Summons to produce documents/give evidence at a hearing	19	
20 Privilege in relation to giving evidence or producing documents/things at a hearing	19	[13]
21 Objection to giving evidence etc.	21	[14]
22 Parliamentary privilege	22	[15]

PART 1: INTRODUCTION

Topics covered in this part:

- Purpose of the Guidelines
- The nature of the Commission and its objectives, functions and powers
- Application of the rules of procedural fairness to Commission investigations

[1] The purpose of these Guidelines

1.10 These Practice Guidelines are intended to better acquaint persons, in particular legal practitioners, with the nature of the Police Integrity Commission's functions and powers, their usual exercise by the Commission, and its practice and procedure with particular reference to:

- hearings;
- the exercise of discretions and coercive powers; and
- the disclosure of information.

1.20 Amongst other things, the Guidelines explain the Commission's approach to various provisions of the *Police Integrity Commission Act 1996* ("the PIC Act") and its view of the application of relevant principles of law. The opinions expressed in these Guidelines, though indicative of the Commission's position on relevant matters, should not be taken as determinative of how it may decide any particular application. The Commission remains open to persuasion on any arguable question as to the proper construction of the PIC Act, or legal questions concerning its functions or powers. However, applications predicated upon any contrary view should be supported by submissions which address the Commission's thinking on relevant matters or issues.

1.30 It is intended that the Guidelines will be amended or added to over time, as additional issues concerning the Commission's functions and the conduct of its hearings become apparent, or appear to require guidance.

Practice Notes

1.40 A number of Practice Notes have been distilled from the Guidelines. These are primarily directed to legal practitioners acting for persons involved in a Commission hearing or investigation, and their requirements must be observed.

Copies of the Guidelines/Notes

1.50 Copies of the Guidelines or Notes, as amended from time to time, may be downloaded from the Commission's website at www.pic.nsw.gov.au, or obtained from the Information Manager, Police Integrity Commission, Level 3, 111 Elizabeth Street, Sydney, Tel.: 02 9321 6700 or Freecall 1 800 657 079.

[2] The Commission, its objectives, functions and powers

2.10 The Commission is a statutory corporation established pursuant to the *Police Integrity Commission Act 1996* ("the PIC Act")¹ with objectives, inter alia, to detect, investigate and prevent serious police misconduct and other misconduct and, in so doing, protect the public interest.²

2.20 Parliament has provided "special mechanisms" by which the Commission's various functions may be achieved³ and which are manifested in the Commission's broad powers and discretions. Amongst other things, the Commission may conduct an investigation "even though no police misconduct is suspected",⁴ and require the giving of information and production of documents notwithstanding the privilege against self-incrimination and other forms of privilege.

The Commission is not a court

2.30 Notwithstanding the Commission is an investigative body, its hearings are sometimes equated with those of courts and tribunals. Such comparisons impede a proper understanding of the nature and functions of the Commission.

2.40 As an investigative body, the Commission's functions do not form part of the administration of justice,⁵ in that they do not include the making of conclusions or findings with regard to criminal or civil liability. The essential and immediate purpose of an investigation by the Commission is to inform the Commission on matters of police misconduct and, in its discretion or as required, to make assessments and recommendations, express opinions, and communicate the results of the investigation to Parliament.

2.50 Accordingly, an investigation by the Commission does not directly affect or create legal rights or obligations.⁶ As a result of the Commission's opinions or recommendations, *consideration* may be given to the taking of prosecutorial or disciplinary action by a relevant authority. Personal rights may then be affected or created.

The corporate nature of the Commission

2.60 The Commission is constituted as a corporation, with the corporate name of the Police Integrity Commission.⁷ It has the functions conferred or imposed by the PIC Act or any other Act.

2.70 The Commission's functions are exercisable by the Commissioner for the Police Integrity Commission. Any act, matter or thing done by the Commissioner in the name of or on behalf of the Commission, or with the authority of the Commissioner, is taken to have been done by the Commission.⁸

¹ s 6(1) PIC Act

² s 3 PIC Act

³ s 3(b) PIC Act

⁴ s 23(2)

⁵ *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625; *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125.

⁶ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 per Gleeson CJ at 147.

⁷ s 6(1) PIC Act

⁸ s 6(3) PIC Act

2.80 The Commissioner for the Police Integrity Commission also has certain discrete functions and powers under the PIC Act.

[3] Application of the rules of procedural fairness

3.10 While the rules of procedural fairness may apply to a Commission investigation, they are not applicable in every case, nor in the same manner or to the same extent as in court proceedings.

The hearing rule

3.20 In the broad, the hearing rule requires the Commission, before publishing a report containing assessments, opinions or recommendations adverse to the interests of a person, to provide an opportunity for the person to persuade it to a different view of the relevant evidence. In *Independent Commission Against Corruption v Chaffey* (1992) 30 NSWLR 21 per Gleeson CJ at 28 it was said:⁹

... an authority having power to inquire and make a report which may include adverse findings must listen fairly to such relevant evidence and rational argument against the finding as a person likely to be adversely affected may wish to put.

3.30 Within these boundaries, it has been recognised that the actual *content* of the rules will vary according to what is necessary in the circumstances of the particular case.¹⁰ Although the need to protect the integrity or confidentiality of the investigation does not exclude the rules, it may greatly reduce their content, even to the extent of reducing them to nil in certain situations.

3.40 Thus it has been held that the rules of procedural fairness do not require a commission of inquiry to suppress the publication of evidence until such time as a person affected has had an opportunity to respond,¹¹ to conduct a hearing wholly in private,¹² or to proceed as if it were a court by granting all persons who might be affected by a hearing an appearance.¹³

The rule against bias

3.50 Similarly, while the second limb of the rules of procedural fairness - the rule against bias - is not excluded by the Commission's functions, the content and practical application of the rule will vary and may in some cases be very limited. In *Re Finance Sector Union; ex parte Illaton Pty Ltd* (1992) 66 ALJR 583 the High Court observed:¹⁴

The precise practical requirements of the principle vary from case to case. They will be influenced by the nature, function and composition of the particular tribunal. Thus, the operation of the principle in a case such as the present where it is sought to prevent a member of the Commission from participating in the determination of particular proceedings is governed by a number of considerations relating to the nature and function of the Commission, the

⁹ Agreeing with Lord Diplock's observations in *Mahon v Air New Zealand Ltd* [1984] AC 808 at 820.

¹⁰ See *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21 per Gleeson CJ at 28; *Donaldson v Wood* (unreported, SCNSW, 15/09/95) per Hunt CJ at CL.

¹¹ *Donaldson v Wood* (supra).

¹² *Independent Commission Against Corruption v Chaffey* (supra).

¹³ *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296.

¹⁴ Per Deane, Toohey and Gaudron JJ.

Appendices

prescribed or desirable formal qualifications and practical experience of those appointed to discharge those functions, the nature of the contests involved ...

3.60 A significantly greater degree of intervention will be permitted on the part of a presiding official in an inquisitorial hearing than might be the case in curial proceedings:¹⁵

In applying the principles different expectations of conduct will exist according to the function being performed by the person or entity who exercises the relevant public power. For example, a degree of intervention that is unacceptable in a judge may be acceptable in a commissioner. The commissioner has an inquisitorial function while the role of a judge is essentially to adjudge an adversarial contest. But the expectation that the person exercising the power will bring an impartial and unprejudiced mind to the resolution of the question to that person is not diluted.

3.70 Decision makers who are performing statutory functions may be entitled to be involved in an investigation and to make final decisions where they are authorised by statute to act in both capacities.¹⁶ Accordingly, something more than the mere fact of prior involvement in an investigative decision may need to be present before a reasonable apprehension of bias can be said to be firmly established.

¹⁵ See *Carruthers v Connolly* (unreported, Supreme Court of Queensland, 05/08/97) at 37.

¹⁶ See *R v Howard* [1902] 2 KB 363 at 377 per Collins MR(CA).

PART 2: CONDUCT OF HEARINGS

Topics covered in this Part:

- Appearances and legal representation
- Joint representation and conflicts of interest
- Conduct before a hearing
- The General Scope and Purpose
- Challenging the Commission's jurisdiction
- Evidence, relevancy and admissibility
- Challenging warrants during an investigation
- Submission timetables

[4] Appearances at a hearing

4.10 No person may appear at a hearing of the Commission as of right. Pursuant to s 34, the Commission has a discretionary power to authorise an appearance by a person at a hearing or a specified part of the hearing. The discretion arises for exercise once it is shown to the Commission's satisfaction that the relevant person is "*substantially and directly interested*" in the subject-matter of the hearing. Thus the person seeking leave bears the onus of establishing that sufficient grounds for the appearance exist.

4.20 In keeping with its statutory requirement to proceed without undue formality and technicality, to accept written submissions as far as is possible, and to conduct its hearings with as little emphasis on an adversarial approach as possible,¹⁷ the Commission is conscious of avoiding unnecessary appearances at its hearings.

4.30 The Commission takes the view that an appearance, and the participation in the investigation that it invites, should serve a concrete and direct interest of the person concerned in or arising from the subject-matter of the hearing. Such will commonly be the case where a person wishes to protect their reputation by responding to allegations or adverse evidence likely to be aired during the hearing, or to ward off potentially adverse assessments or opinions in a subsequent report of the Commission. Those who otherwise may wish to assist the Commission in its investigation can usually do so by means other than an appearance at a hearing.

4.40 Where practicable, persons intending to seek leave to appear at a hearing are encouraged to make a written application to the Commission prior to the hearing, identifying with as much precision and particularity as possible:

¹⁷ s 20 PIC Act

- The nature of the interest(s) held in the hearing;
- Why such interest(s) might be said to be both "substantial" and "direct";
- How an appearance at the hearing would serve the identified substantial and direct interest(s); and
- If an appearance is sought on the basis of the rules of procedural fairness, the particular interest(s) involved, and the reasons why the rules are attracted.

[See Practice Note 1 - Appearances]

[5] Legal representation

5.10 Legal representation of a person appearing or giving evidence at a hearing of the Commission is also by leave.¹⁸

5.20 The Commission is required to "give a reasonable opportunity" for a person giving evidence at a hearing to be legally represented.¹⁹ The Commission does not consider this provision to inform the manner in which its discretion to authorise legal representation should ultimately be exercised, but rather to require it to consider any temporal or logistical difficulties on the part of a person summoned to give evidence in arranging for legal representation at the hearing. Whether an opportunity is "reasonable" will depend upon the circumstances of the particular investigation and the witness concerned.

[6] Joint representation and conflicts of interest

6.10 A hearing for the purposes of an investigation neither starts with an immutable or fully known set of facts, nor a clear view of the terrain ahead. The purpose of the hearing is to discover facts, and unexpected paths may be taken as the evidence unfolds and leads are explored. Consequently, personal interests that appear consistent prior to the commencement of a hearing may prove to be anything but some way into the hearing.

6.20 These factors pose significant problems for legal practitioners seeking to represent multiple clients at a Commission hearing, which, despite the practitioner's best intentions and professional rigour, may be incapable of avoidance.

6.30 The functions of the Commission do not include policing the lawyer-client relationship, and it expects a legal practitioner seeking leave to represent any person before a hearing to have fully considered and resolved any potential ethical difficulties. However, the Commission may refuse or withdraw leave for a person to be represented by a particular practitioner, where, by virtue of a conflict of interest or for any other reason, the circumstances pose a potential for its investigation to be prejudiced.²⁰

6.40 Practitioners should be particularly mindful of problems associated with joint representation in the following situations.

¹⁸ s 35(1) PIC Act

¹⁹ s 35(2) PIC Act

²⁰ See for example, *National Crime Authority v A, B, and D* (1988) 18 FCR 439; 78 ALR 707; *R v Whiting* [1994] 1 Qd. R 561; *Australian Securities Commission v Bell* (1991) 32 FCR 517.

Public authorities and individual officers

6.50 It may be difficult to perceive a public authority's interests as being any different from the interests of its officers performing duties in the course of their employment. This may be particularly so in relation to the authority's most senior officers. However conflicts of interest can arise in various ways.

6.60 If a public authority is to take the stance of seeking the truth and advancing the public interest, it may be necessary for it to place evidence before the Commission which is adverse to the interests of a particular officer, and indeed may show the officer to be guilty of misconduct. The officer will usually want to resist this conclusion.

6.70 There may arise conflicts between different officers and particularly between senior and more junior officers. There may be questions as to whether a problem lay in the departmental system and administration, or in the failings of particular individuals. It may be necessary for a lawyer appearing on the authority's behalf to submit that one or more of its officers, even those on its executive, should be the subject of adverse comment, or consideration for prosecutorial or disciplinary action.

6.80 Finally, the authority will have responsibility for any disciplinary proceedings against its officers arising from the inquiry, in relation to which the legal practitioner (particularly where employed "in-house") may be required to advise. In this situation there will be the clearest divergence of interests.

Multiple clients

6.90 Despite what is known to a legal practitioner on the basis of their instructions at the commencement of the hearing, he or she can never be certain that the interests of any two or more clients will never collide. Certainty can only be reached in hindsight, after all of the evidence has been gathered and the Commission has formed its assessments and expressed opinions.

6.100 It may become necessary at any stage of the hearing to advise a client of the benefits of assisting the Commission, placing the practitioner in an immediate position of conflict in relation to another client whose interests stand to be affected by such assistance.

A client the subject of an allegation and relevant witnesses

6.110 Quite apart from whether any conflict of interest can be said to arise, an appearance on behalf of a person the subject of an allegation, and one or more relevant witnesses, presents significant problems for the integrity of the Commission's investigation.

6.120 The public perception may well be that the person the subject of the allegation and relevant witnesses have banded together to prevent the Commission from getting to the truth of the allegation, or that individual witnesses may have been put under direct or indirect pressure not to speak out.

Private hearings

6.130 A legal practitioner who has appeared for a client in a private hearing, and is therefore prohibited from disclosing the evidence, may find themselves in an

invidious position in acting for and advising another client who is mentioned in the evidence.

Instructing solicitors

6.140 Legal firms which act for multiple clients, but instruct different counsel on their behalf, should be equally mindful of the above factors. The construction of "Chinese walls" may be an effective means of avoiding potential ethical problems in relation to legal proceedings, but will not necessarily satisfy the requirement for an investigation by the Commission to be free from real or perceived prejudice.

Principal solicitors

6.150 A Principal Solicitor of a public authority may need to be mindful of who their client properly is. The practitioner will owe fiduciary duties to the authority as *the client*, rather than any individual officer. A practitioner representing an entity must ensure that officers of the entity are not under the misapprehension that he or she is representing them or their personal interests.²¹

6.160 Principal solicitors usually hold unrestricted "A1" Practising Certificates, which entitle them to act for the employing entity, free from the requirement to have indemnity insurance. The Certificate is granted on the basis of an undertaking that the practitioner will not act for any other client unless insured. Quite apart from any conflicts of interest inherent in the circumstances of joint representation on behalf of a public authority and its officers, the Commission takes the view a Principal Solicitor holding an "A1" Practising Certificate, and any employed solicitor under his or her supervision, is not entitled to act for any officer of the authority in a personal capacity.

[See Practice Note 2 - Joint Legal Representation]

[7] Conduct before a hearing

7.10 Hearings of the Commission are held for the purposes of an investigation, in order that the Commission may inform itself on relevant matters. Except where the rules of procedural fairness otherwise require, a hearing is not held for the purposes of indulging the private interests of persons appearing with leave. The Commission, with the assistance of Counsel Assisting, has full control of the hearing, the witnesses to be called and their order, the documents and things to be tendered, and the matters and issues to be covered in evidence.

7.20 The Commission will not tolerate behaviour at or in connection with a hearing that serves to frustrate its ability to conduct the hearing as it sees fit. It is an offence to wilfully and unreasonably obstruct the Commission,²² and it will otherwise act to protect its investigation from prejudice by removing obstacles to its ability to get to the truth of a matter, or which have the appearance of such.

7.30 Persons appearing at Commission hearings, and their legal representatives, should be scrupulous in observing the following principles and requirements.

²¹ See Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand*, 2nd ed, LBC, 2001, at p 186.

²² s 104 PIC Act

The Commission is required to avoid unnecessary formality and technicality

7.40 The Commission is required to exercise its functions "with as little formality and technicality as possible".²³ It is one thing for the Commission to possess "special mechanisms"²⁴ for the detection, investigation and prevention of police misconduct, and thereby protect the public interest. However, it is another matter for the wide powers granted to the Commission to be effective. Were the Commission required to proceed with the kind of formality or technicality associated with court proceedings, it would lose its ability to conduct investigations in an efficient and timely fashion.²⁵

Hearings are not adversarial

7.50 In particular, the Commission is required to accept written submissions as far as possible and its "hearings are to be conducted with as little emphasis on the adversarial approach as possible".²⁶

No person has a "case"

7.60 No person appearing before a hearing of the Commission legitimately has a "case" to pursue. An inquiry is taking place, for the benefit of which a person may have information to give, or submissions to make:

Persons who are asked to assist an inquisitorial inquiry by giving evidence on matters being investigated do not have a 'case'. They have evidence to give. There may be adverse evidence that they wish to counter. They may have an interest in trying to ward off various conclusions which they fear the investigating inquiry may reach. And in preparing their evidence with all these things in mind, they may well need the assistance of legal advisers. But the conception that a witness needs to prepare a 'case' introduces an element inherent to adversarial proceedings but alien to an inquisitorial inquiry, at least at the investigative stage.²⁷

Seeking "forensic" advantage

7.70 It is not legitimate for a person to seek personal advantage at a hearing, by withholding evidence from, or delaying its availability to, the Commission. Such strategies may be perfectly appropriate in the adversarial setting of court proceedings, where the parties primarily determine the matters in issue, the evidence to be adduced and the documents to be tendered, but are anathema to an effective, efficient and well-planned investigation by the Commission.

Examination and cross-examination of witnesses

7.80 Examination or cross-examination of any witness by a person authorised to appear at a hearing or their lawyer is by leave of the Commission, and will be confined to such matters as it considers relevant.²⁸

²³ s 20(2) PIC Act

²⁴ s 3 PIC Act

²⁵ *Broken Hill Pty Co Ltd v National Companies and Securities Commission* (1986) 160 CLR 492; *Elders IXL Ltd v National Companies and Securities Commission (No 4)* [1987] VR 1.

²⁶ *Ibid*

²⁷ Sir Richard Scott, "Procedures at Inquiries – The Duty to be Fair", 111 *Law Quarterly Review* 596 at 604.

²⁸ s 37(1) PIC Act

7.90 While the rules of procedural fairness usually require a person affected by serious allegations to examine or cross-examine relevant witnesses, the Commission may, in appropriate instances, refuse such examination or cross-examination.

7.100 In the absence of examination or cross-examination of a witness by an affected person, the requirements of procedural fairness may be met in other ways, such as by giving the person an opportunity to reply to the allegations under oath, or to make submissions before any adverse opinion is expressed in a Commission report.

[See Practice Note 3 - Conduct before a hearing]

[8] Placing evidence before the Commission

8.10 Persons wishing to place evidence before the hearing must provide a statement of the evidence or a copy of the document to the Commission or Counsel Assisting as soon as practicable after the existence of the evidence, or its potential relevance to the hearing, becomes known.

8.20 The Commission will thereby be in a position to determine whether the evidence should be introduced at the hearing and, if so, its timing. Except where otherwise allowed, the evidence, if deemed relevant, will be introduced by Counsel Assisting at a time of the Commission's choosing.

8.30 Documents and statements are only tendered by Counsel Assisting. Other legal representatives have no right to directly tender documents or statements and no right to call for the production of documents.

[See Practice Note 4 - Presentation of evidence at a hearing]

[9] The Hearing and Its General Scope and Purpose

9.10 The word "hearing", as employed in the PIC Act, should not be thought to prescribe, by reference to curial proceedings, the approach or procedures to be followed. There is no issue to be decided, and the hearing is designed to discover facts that may lead to further action being taken. The word "hearing" has no significance other than to describe a process whereby the Commission may gather information and evidence, and exercise certain coercive powers, for the purposes of an investigation.²⁹

9.20 The Commission does not conduct its hearings according to strict terms of reference, in the manner of a Royal Commission or other ad hoc commissions of inquiry.

9.30 At each hearing, the presiding official must announce the *general scope and purpose* of the hearing.³⁰ A person appearing before the Commission at a hearing is entitled to be informed of the general scope and purpose, except where the Commission is of the opinion that this would seriously prejudice the investigation concerned.³¹

²⁹ *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296

³⁰ s 32(3) PIC Act

³¹ s 32(4) PIC Act

9.40 That the general scope and purpose of a hearing need not (as the phrase itself suggests) be strictly defined and confined, is further indicated by the breadth of the Commission's powers of investigation, which extend to the conduct of an investigation "even though no particular police officer or other person has been implicated and even though no police misconduct is suspected".³²

[10] Challenge to the Commission's jurisdiction

10.10 It will be difficult to challenge the Commission's jurisdiction to explore a particular matter at a hearing, on the basis that it is outside the general scope and purpose. A person seeking to do so will have the task of establishing that the questioning cannot, on any reasonable view, assist the formation of the Commission's views on any relevant matter.

10.20 Regardless of the perceived irrelevancy of a line of questioning, it is the Commission's perceptions that determine whether questioning is legitimate. The Commission does not act beyond its jurisdiction by exploring issues that it bona fide considers may assist it, directly or indirectly, to form a view on a question of police misconduct. It is not determining issues between parties but conducting an investigation into the relevant subject matter. The Commission is not bound by the rules of evidence and may have to develop and explore leads. There is no set order in which evidence must be adduced, and the significance of any particular piece of evidence, as a link in a chain of evidence, may not be apparent until all the evidence is in. Even where no such link is ultimately established, the Commission cannot properly be said to have acted outside its jurisdiction by exploring the issue. This flows from the very nature of the inquiry itself.³³

10.30 The function of judicial review of the otherwise within power decisions of administrative bodies is not to substitute the court's own discretion for that which the legislature has vested in the relevant body, but to set limits on the exercise of the discretion.³⁴ In the absence of any statutory indication as to how the discretion should be exercised, the factors that should be taken into account and the weight they are to be given are for the decision maker to determine. Under the *Wednesbury* principle, the exercise of the Commission's legitimate discretions may be impugned only if "manifestly unreasonable", such that the decision is shown to be so unreasonable that no reasonable person could have come to it.³⁵ Even where the reasoning of the Commission appears illogical, that itself will not be enough.³⁶

10.40 Where it is contended that the Commission is or would be acting beyond its jurisdiction in a particular way or matter, the person so contending should provide written submissions to the Commission. Where practicable, the issue should be raised before or outside any relevant hearing. The Commission will then be in a position to carefully consider the matter before determining whether it should proceed as planned, or make any necessary adjustments to its hearing program.

10.50 In circumstances where the Commission rejects a challenge to its powers, it may provide written reasons for its decision, either at the time of the decision or as soon as practicable thereafter.

³² s 23(2) PIC Act

³³ *Ross v Costigan* (1982) 59 FLR 184 per Ellicot J at 200-201

³⁴ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230

³⁵ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 per Mason J at 40-41; *Attorney General v X* (2000) 49 NSWLR 653 per Spigelman CJ.

³⁶ *Hill v Green* (1999) 48 NSWLR 161 per Mason P.

10.60 Any subsequent judicial challenge should be considered and prosecuted expeditiously. The Commission is neither obliged to, nor will, delay the carrying out of its investigative functions on the basis of vaguely foreshadowed legal challenges.

[See Practice Note 5 - Challenge to the Commission's jurisdiction]

[11] Evidence, relevance and "admissibility"

11.10 The rules or practice of evidence do not bind the Commission, and it may inform itself on any matter in such manner as it thinks fit.³⁷

11.20 The concept of relevance as it is understood and applied as a rule of evidence does little to properly inform an objection to the taking of evidence before a Commission hearing. What the Commission may look into is what it bona fide believes will assist its inquiries.³⁸ By the very nature of its functions, it is essentially empowered to conduct what might otherwise be regarded at law as an impermissible "fishing expedition", in order to uncover facts that might be informative of a question of police misconduct.³⁹ As a precept of the law of evidence, "relevance" connotes a connection between the evidence and a fact in issue for determination by a court. It is largely an inappropriate term by which to signify the required connection between evidence and an investigative process, the purpose of which is not to determine issues of fact, but to discover them.⁴⁰

11.30 Likewise, it will not usually be sound to make an objection on the basis that the line of inquiry would not elicit evidence admissible in a court proceeding. An investigation by the Commission is not focussed solely on the gathering of evidence that may be admissible in a prosecution or disciplinary proceeding, nor perhaps at all. The Commission is seeking to inform itself and may do so in any manner it thinks fit. A report by the Commission may ultimately contain no opinion or recommendation that consideration should be given to the prosecution of a specified person.

11.40 Legal practitioners should be judicious in their objections at a hearing of the Commission. Generally, the Commission will not be assisted by objections predicated on the rules or practice of evidence, or concepts as to relevance, as applied by the courts.

11.50 Greater assistance may usually be derived from a considered submission that the question put, or matter being explored, cannot serve to assist the Commission's inquiries or the formation of relevant opinions at its conclusion.

[See Practice Note 6 - Objections to evidence at a hearing]

[12] Challenge to warrant

12.10 The Commission is empowered to seek the grant of search,⁴¹ listening device,⁴² or telecommunications interception⁴³ warrants for the purposes of its investigations.

³⁷ s 20(1) PIC Act

³⁸ *Ross v Costigan (No 2)* (1982) 41 ALR 337 at 351; *MF1 & Ors v National Crime Authority* (1991) 33 FCR 449; 105 ALR 1, per Jenkinson J at ALR 16

³⁹ *Lloyd v Costigan (No 2)* (1983) 53 ALR 402 at 404; *Gibson v O'Keefe* (unreported, NSWSC, 20/05/98).

⁴⁰ *MF1 & Ors v National Crime Authority*, supra.

⁴¹ s 45 PIC Act

⁴² *Listening Devices Act 1984*

12.20 Except where the Commissioner for the Police Integrity Commission exercises the power to issue a search warrant under the PIC Act,⁴⁴ any such warrant will have been issued on the application of the Commission by an appropriately empowered judicial officer or authorised justice.

12.30 It is neither legitimate nor appropriate for any person, in an investigation by the Commission, to seek access to a warrant and the associated application purportedly to test its validity. Not only will the challenge be purely speculative, no logical or proper purpose can be served by questioning the validity of a warrant before the Commission. The Commission does not sit in administrative review of the decisions of judicial officers or authorised justices, let alone decisions made on its own application. Once issued under the terms of the relevant statute, a warrant is valid until set aside, and the only person who need be satisfied of such matters for the purposes of a Commission investigation is the Commission itself.

12.40 Any challenge to a Commission warrant is properly an issue for any relevant criminal proceedings initiated as a result of the investigation, in which instance the warrant will be available as a proof in the prosecution case, or otherwise directed to the Supreme Court as the appropriate forum for substantive review of the warrant.

[See Practice Note 7 - Challenge to warrant]

[13] Submission Timetables

13.10 The Commission will set strict timetables for the making of written submissions at the conclusion of a hearing and in appropriate cases will set a return hearing date for such purposes.

13.20 Legal practitioners must make every effort to comply with the timetable and should be under no illusion that the Commission will not treat any failure to do so most seriously.

[See Practice Note 8 - Submission Timetables]

⁴³ *Telecommunications (Interception) (New South Wales) Act 1987*

⁴⁴ s 45(2) PIC Act

PART 3: DISCRETIONARY AND COERCIVE POWERS

Topics covered in this Part:

- The discretion to hold public or private hearings
- Non-publication orders
- Notices to provide a statement of information or produce documents
- Privilege in relation to notices and procedures for objection
- Summons to give evidence etc at a hearing
- Privilege at a hearing
- Objection to giving evidence etc
- Parliamentary privilege

[14] The discretion to hold public or private hearings

14.10 In determining whether to hold a hearing in public or in private, or partly in public and partly in private, the Commission is obliged to have regard to any matters that it considers to be related to the public interest.⁴⁵ Such a requirement involves a discretionary value judgment on the part of the Commission by reference to the circumstances of the relevant investigation, confined only insofar as the context of the PIC Act may enable.⁴⁶

14.20 Amongst other things, the Commission will consider and weigh the following factors:

- the stage the investigation has reached, and the relative advantages or disadvantages involved in a public or private hearing;
- any unfair harm to a person's reputation that would be likely to result from a public hearing;
- the nature of the allegations and credibility of relevant witnesses;
- the relative ability of affected persons to respond to the allegations;
- the public interest in the exposure of police corruption, or in openly resolving allegations having the potential to undermine public confidence in the police.

⁴⁵ PIC Act s 33(3)

⁴⁶ *O'Sullivan v Farrer* (1989) 168 CLR 210, per Mason CJ, Brennan, Dawson and Gaudron JJ at 216

14.30 The Commission's decision as to whether a hearing should be public or private is necessarily made prior to the hearing. Persons appearing with leave at a public hearing may at any relevant time make application for the hearing, or a particular part of it, to be held in private. Alternatively, application may be made for a direction by the Commission suppressing the publication of evidence. Relevant considerations in relation to both kinds of application are addressed under the next heading.

[15] Non-publication of evidence

15.10 The Commission's powers to suppress the publication of evidence are contained in s 52 of the PIC Act. Amongst other things, the Commission may direct that any evidence given, or any information that might serve to identify or locate a person who has given or may be about to give evidence before the Commission, must not be published except in such manner, and to such persons, as might be specified.⁴⁷

15.20 The Commission must not give a direction suppressing the publication of evidence unless satisfied that it is "*necessary or desirable in the public interest*".⁴⁸ An application for a non-publication direction must therefore be supported by positive grounds identifying public interest considerations making it at least desirable for the relevant evidence or information to be suppressed.

15.30 Insofar as a public hearing is concerned, the making of a non-publication direction will involve at least a part reversal of the Commission's decision under s 33 of the PIC Act to hold a public hearing. In exercising its discretion under s 33, the Commission will usually have considered and weighed the harm to individual reputation that might be caused as a result of a public hearing, and determined the public interest to fall on the side of an open hearing.

15.40 Accordingly, with nothing more, it might be difficult to establish sufficient grounds for a non-publication direction on the basis that the applicant's reputation would be harmed in the absence of any such direction.

15.50 It is commonly submitted that relevant evidence should be suppressed, either totally or until such time as the person affected has had an opportunity to reply, as a matter of procedural fairness. However, the authorities have consistently rejected that kind of proposition. While harm to reputation usually attracts a duty to observe the rules of procedural fairness, procedural fairness does not require a public hearing to be conducted in such a way as to minimise harm to a person's reputation.⁴⁹ Provided a person affected is ultimately afforded an opportunity to respond to relevant allegations and evidence, questions as to the timing of the opportunity are largely for the Commission to determine according to the circumstances of the investigation.

15.60 It is also sometimes submitted that the Commission ought to make a non-publication direction on the basis of the way in which the media have reported or may report upon the public hearing, to the detriment of individual reputation. While the Commission expects that fair and accurate reporting of its hearings will occur in the

⁴⁷ s 52(1) PIC Act

⁴⁸ s 52(2) PIC Act

⁴⁹ *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21 per Gleeson CJ at 28; Mahoney JA at 60; *Donaldson v Wood* (unreported, NSWSC, 15/09/95) per Hunt CJ at CL.

media, its functions do not involve supervision of the media and it cannot sensibly conduct its inquiries according to such matters.

15.70 None of the above is to say that the Commission will not entertain an application for evidence to be suppressed on the basis of harm to a person's reputation *per se* - particularly where the subject person has become of interest in the investigation subsequent to the initial decision to hold a public hearing. Generally speaking, however, a more persuasive basis for a non-publication direction might exist where any potential harm to reputation is attended by a real and significant difficulty on the part of the affected person in adequately defending their reputation publicly. Amongst other things, such might be the case where:

- the nature of the evidence to be aired would make it inherently difficult for the person affected to make a rational response;
- the credibility of any relevant witness is so poor as to not warrant the public airing of allegations, or the identification of the person affected; or
- the relevant allegations are not sufficiently serious, or they do not give rise to a sufficiently important matter of public interest, so as to require their investigation in a public forum.

[See Practice Note 9 - Suppression of evidence at a public hearing]

[16] Notice to provide a statement of information or to produce documents or things

16.10 The Commission's powers under Part 3 of the PIC Act to require, by notice, a public authority or public official to produce a statement of information,⁵⁰ or to require any person to produce documents or other things,⁵¹ may be exercised for the purposes of an investigation, whether or not a hearing before the Commission is being held.⁵²

16.20 It is an offence for a person, without reasonable excuse, to fail to comply with a notice.⁵³

Time for compliance

16.30 Generally, the Commission will allow a reasonable time for compliance with a notice. However if the power is to be effective on occasions the Commission may require the production of documents or things forthwith, for example, where the possibility exists for documents to be tampered with or destroyed, or the exigencies of the investigation demand immediacy.

Extension of time

16.40 The Commission will strictly enforce the requirements of a notice. A person who wishes to seek an extension of time for compliance must make a written

⁵⁰ s 25 PIC Act

⁵¹ s 26 PIC Act

⁵² s 31 PIC Act

⁵³ ss 25(4), 26(3) PIC Act

application within a reasonable time prior to the deadline for production, setting out in full the reason(s) why the notice cannot be complied with.

16.50 In the absence of a prior written request and the approval of an extension of time by the Commission, it should not be assumed that no action will be taken in relation to a failure to strictly comply with the notice.

Documents in the hands of third parties

16.60 It is one thing for the Commission to have the power to compel the production of documents or things, but another for them to be effective. Where relevant documents are in the possession of an agent or other third person who is amenable to the direction of the person to whom the notice is directed, the Commission will maintain the requirement for production unless it is shown to its satisfaction that the person is unable to properly procure possession of the documents from the agent or third person.⁵⁴

Legal advice

16.70 No requirement exists for the Commission to afford a person the subject of a notice to produce documents an opportunity to obtain legal advice prior to compliance. The power is coercive and its exercise is subject only to the provisions of s 27 inasmuch as a person can establish a ground to have the notice set aside. Ordinarily, the time allowed for compliance will be sufficient to enable the recipient of a notice to obtain legal advice, or to perform any other tasks preliminary to compliance with the notice.

[See Practice Note 10 - Compliance with notices]

[17] Privilege in relation to notices

17.10 Pursuant to s 27(2), the Commission must set aside the requirement of a notice for any person to produce a statement of information, or any document or other thing, if satisfied that any person has a ground of privilege whereby the person might resist a "like requirement" in proceedings in a court of law.

17.20 However, by virtue of s 27(3), no objection on the grounds of public interest may be asserted in response to a notice, nor may "any privilege of a public authority or public official in that capacity", or any duty of secrecy or other restriction applying to a public authority or public official, be asserted.⁵⁵

17.30 The Commission construes these provisions to the following effect:

- A natural person or private corporation may assert a privilege available at law to the person or corporation.
- The privilege must be a substantive privilege that would found a complete objection to the production of documents in a court of law, such as the privilege against self-incrimination or legal professional privilege, as opposed to a residual discretion exercisable by the court to regulate access to documents once produced.

⁵⁴ See for example *Australian Securities Commission v Dallegles Pty Ltd* (1992) 36 FCR 350; 108 ALR 305

⁵⁵ s 27(3) PIC Act

- A "like requirement" is a requirement with the similar function of requiring the production of documents for the purposes of proceedings in a court of law - essentially, a subpoena. The common law governs the privileges available at the ancillary stage of a trial or hearing.⁵⁶
- Unless persuaded otherwise, the Commission is of the view that provisions of the *Evidence Act 1995* relating to statutory forms of privilege and qualified privilege that may be asserted as an absolute or discretionary bar to the adduction of evidence will not be available.
- Public interest immunity, which any person has standing to claim in a court of law⁵⁷ in objection to the production of documents or the giving of evidence, may not be asserted.⁵⁸
- No form of privilege may be asserted by a public authority or a public official in their official capacity, including legal professional privilege.
- Whether a public official is seeking to assert a privilege in their official or private capacity will depend upon the circumstances. Where, for example, a public official is served with a notice to produce the records of a public authority, any privilege would prima facie inhere in the public authority, and be claimed by the public official in an official capacity.

Self-incrimination and corporate records

17.40 The privilege against self-incrimination is not available to a corporation. Accordingly, where an officer of a corporation is required to produce the corporation's records, the officer cannot legitimately object to the production on the grounds that the document tends to incriminate himself or herself personally.⁵⁹

17.50 There is a distinction between the mere production of a corporation's records by an officer, which as a testimonial act serves as real evidence as to the existence of documents answering the call, and the giving of evidence by the officer as to the corporation's affairs. In the latter situation the testimonial act is personal to the officer and therefore capable of attracting the privilege against self-incrimination.⁶⁰

Voluntary production and preservation of the privilege against self-incrimination

17.60 Pursuant to s 28, a person, other than a body corporate, who is required by notice to produce a statement of information or any document or other thing may, if the person objects to production on the grounds of self-incrimination at the time, voluntarily produce the statement or document or thing. The person will thereby be entitled to a "use protection" in that the document may not be used in any proceedings against the person (other than proceedings for an offence against the PIC Act).

[See Practice Note 11 - Privilege in relation to notices]

⁵⁶ *Akins v Abigroup Ltd* (1998) 43 NSWLR 539; *Eso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49

⁵⁷ *Young v Quin* (1985) 4 FCR 483; 59 ALR 225

⁵⁸ see s 27(3)(a)

⁵⁹ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477

⁶⁰ *ibid.*

[18] Procedures for objecting to notice

18.10 The Commission has settled procedures for objecting to the production of documents or things under a notice, which must be strictly adhered to.

[See Practice Note 12 - Procedure for objecting to notice]**[19] Summons to produce documents or give evidence at a hearing**

19.10 The Commissioner may summon a person to appear before the Commission at a hearing in order to give evidence or to produce documents, or both.⁶¹

19.20 The person presiding at a hearing of the Commission may require a person appearing at the hearing to produce a document or other thing.⁶²

[20] Privilege in relation to giving evidence or producing documents or things at a Commission hearing

20.10 A witness summoned to attend or appearing before the Commission at a hearing cannot refuse to answer any question or produce any document or other thing on the ground of self-incrimination, "or on any other ground of privilege, or on the ground of a duty of secrecy or other restriction in disclosure, or on any other ground".⁶³

20.20 The Commission considers the express and plenary terms of s 40(2) to exclude all forms of privilege, including legal professional privilege, save and except for one qualified exception.

Limited right of legal practitioner or "other person" to claim legal professional privilege

20.30 Subsection 40(5) entitles a legal practitioner or "other person" to refuse to answer a question or to produce a document or other thing, on the basis that it would disclose a privileged lawyer-client communication for the purpose of the provision or receipt of legal services in relation to the appearance, or reasonably anticipated appearance, of a person at a hearing of the Commission.

20.40 Thus, to the extent that legal professional privilege does exist in relation to a Commission hearing, it operates only to exclude evidence of confidential communications for the purposes of the client's appearance before the Commission.

20.50 The Commission does not consider s 40(5) to entitle *the client* of a lawyer to assert legal professional privilege in refusing to answer a question etc. The provision is expressly directed to a "legal practitioner" and, although it refers also to an "other person", these words are not in the Commission's view properly read to include the client of a relevant legal practitioner. If it were the legislature's intention to allow the

⁶¹ s 38(1) PIC Act

⁶² s 38(2). Note that, while the provision reads "person appearing at the Commission", this appears to be a drafting error. Subsection 35(2) of the *Independent Commission Against Corruption Act 1987*, from which s 35 of the PIC Act is drawn, reads "person appearing at the hearing" and it is otherwise clear from the context of the subsection that it operates at a hearing of the Commission.

⁶³ s 40(2) PIC Act

privilege to be claimed in its restricted fashion by the client in whom the privilege inheres, there would have been no need for the provision to refer expressly to a legal practitioner. The legal practitioner would be duty bound to claim the privilege on behalf of the client in the absence of the client's consent to disclosure, and the Commission could not rightfully subvert the privilege by requiring disclosure from the practitioner. Read in its proper context, the phrase "other person" is not indicative of the client of a legal practitioner, but rather other persons who may be privy to confidential lawyer-client communications, such as staff employed by a legal practitioner.

20.60 Similar provisions to s 40(5) may be found in other State and Commonwealth statutes that are concerned with the functions of investigative agencies. Some such provisions require as a condition precedent the provision of information by the lawyer as to the client's identity and whereabouts.⁶⁴ Contrary to the views of a learned author,⁶⁵ and consistent with judicial interpretation of similar provisions,⁶⁶ the Commission does not consider a provision such as s 40(5) to be confirmatory of any intention to preserve legal professional privilege in the face of the express and wide exclusionary terms of s 40(2). Rather, the provision appears to do precisely the opposite inasmuch as, by entitling the privilege to be claimed in the limited circumstances and by the limited persons described, it confirms that the terms of s 40(2) *must* exclude legal professional privilege in any general sense.

20.70 There are powerful reasons in the public interest why a person should not be entitled to refuse to disclose information to the Commission on the basis of the privilege. Police or former police who are alleged to have engaged in corruption would be entitled to keep potentially incriminating documents and information from

⁶⁴ See for example s 18B(4) *New South Wales Crime Commission Act 1985*

⁶⁵ See Stephen Donoghue, *Royal Commissions and Permanent Commissions of Inquiry*, Reed International Books, 2001. In concluding that legal professional privilege survives the general abrogation of "any other ground of privilege" under s 18B(1) of the *New South Wales Crime Commission Act 1985*, the author reasons that s 18B(4) (which is similar but not identical to s 40(5) of the PIC Act) has the effect of expressly and generally preserving the privilege:

"... by providing that a person is entitled to refuse to disclose a privileged communication, expressly preserves legal professional privilege. The provision must therefore take precedence over the general exclusion in the NSWCC Act of any other ground of privilege"

⁶⁶ *Corporate Affairs Commission of NSW v Yuill* (1991) 172 CLR 319; *Australian Securities Commission v Dallegles Pty Ltd & Ors* (1992) 36 FCR 350; 108 ALR 305. In *Yuill* Brennan J (at ALR 324) rejected the proposition that a provision of such a kind (there, s 308 of the *Companies (NSW) Code* as it then was) confirmed the general preservation of the privilege. Rather, it was confirmatory of the general abrogation of the privilege, and its limited preservation only insofar as a legal practitioner could be excused from being required to reveal confidential communications in certain circumstances. It is noted that in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561; [2002] HCA 49 the High Court took a different approach to that taken by the earlier Court in *Yuill*, in relation to the substantive question of whether the legislation in question excluded legal professional privilege by necessary implication. In both cases the relevant legislation contained no express abrogation of privilege. The reasoning of Brennan J in *Yuill* as to the effect of s 308 of the *Companies (NSW) Code* was neither specifically nor implicitly disapproved. Moreover, it is notable that the general application of legal professional privilege to investigative and other non-curial settings had been recognised only after the introduction of the legislation under consideration in *Yuill* (in *Baker v Campbell* (1983) 153 CLR 52). To the extent that Brennan J's reasoning might have been flawed, it was because it could not have been Parliament's intention to abrogate a privilege that did not exist at the time the legislation was enacted. However, the alternative hypothesis was that s 308 was explicable on the basis that it was intended to apply an otherwise unavailable privilege in an investigative setting in a limited way (so held Gaudron and McHugh JJ). In the case of the PIC Act, the general scope of legal professional privilege was firmly entrenched at the time of its enactment. Subsection 40(5) of the PIC Act may therefore be logically reasoned to apply legal professional privilege in a limited way, in circumstances where it is otherwise abrogated by the express and broad terms of s 40(2).

the inquiry, whereas they would not otherwise be entitled to refuse to claim the privilege against self-incrimination, or any other ground of privilege.

20.80 Notwithstanding legal professional privilege may be asserted by a natural person or corporation in response to a requirement under a notice pursuant to s 26 of the PIC Act, no inconsistency arises between the availability of the privilege in relation to the Commission's notice powers, and its almost complete abrogation at a hearing of the Commission. To the contrary, the respective provisions illustrate Parliament's desire to afford appropriate levels of protection for individuals under the Commission's considerable powers. Were the privilege to be unavailable in relation to the Commission's notice power, which is exercised independent of any hearing, no protections would be afforded in relation to the subsequent use to which the information might be put against the person concerned. On the other hand, the requirement for a person to answer questions or to produce documents or things at a hearing regardless of any privilege, is mitigated by the restrictions imposed by s 40(3) in relation to the subsequent use of the information against the person.

[See Practice Note 13 - Privilege at a hearing]

[21] Objection to giving evidence or producing documents or things

21.10 Although a witness is not excused from answering any question or producing any document or other thing at a hearing, the witness may nevertheless make an objection in relation to the evidence or production. The effect of an objection is implicit in s 40(4)(b), which holds that the protections of s 40(3) will not be invoked if the witness does not object to giving the answer or producing the document or thing. Where an objection is made, pursuant to s 40(3) the relevant answer, document or thing, once given or produced, is rendered inadmissible in evidence against the witness in any civil or criminal proceedings.⁶⁷

21.20 A witness may make a general objection to the giving of evidence or the production of documents or things at a Commission hearing. In such a circumstance the Commissioner or person presiding may declare that all or any classes of answers given or documents or other things produced will be regarded as having been given or produced under objection.⁶⁸

21.30 It is the practice of the Commission to warn a witness, after being sworn, of the duty to give evidence and to invite them to elect to make a general objection. The warning takes the following form:

Before this hearing proceeds any further, I want you to understand that you must answer all questions that are asked of you here unless I tell you that you do not have to answer.

You should also understand that you are entitled to object to giving an answer. If you do object you must nevertheless give the answer but the answer you give is not admissible in evidence against you in any civil or criminal proceedings except:

1. [where relevant] disciplinary proceedings and proceedings under Division 1C of Part 9 of the Police Act 1990 with respect to an order under s 181D of that Act;

⁶⁷ But may be used in any disciplinary proceedings and in relation to certain decisions and proceedings under the Police Act 1990, including ss 173 and 181D.

⁶⁸ s 41 PIC Act

Appendices

2. a prosecution for perjury should you give evidence to me that you know to be false or misleading in a material particular;
3. a prosecution for an offence which you may have committed or you may commit under the legislation that governs this Commission; and
4. proceedings for contempt under that legislation.

Do you understand what I have just said to you?

Do you wish to object now to giving all the answers that you will give during this hearing?

[If so]

I make a declaration pursuant to s 41 that all answers given by this witness will be regarded as having been given on objection by the witness.

[If not]

I do not make a declaration pursuant to s 41 but I remind you that you may still object to answering a question when it is asked.

[See Practice Note 14 - Warning to witness]

[22] Parliamentary privilege

22.10 The PIC Act does not affect rights and privileges under the doctrine of parliamentary privilege.⁶⁹

22.20 The Commission does not take this provision *per se* to bring it within the ambit of the expression "court or other place out of parliament" for the purposes of Article 9 of the *Bill of Rights 1688*, the statutory instrument by which parliamentary privilege is incorporated into Australian law. Whether an investigation or hearing by a body such as the Commission is a place out of parliament in relation to which the privilege will apply would seem to remain unsettled under New South Wales law.⁷⁰

22.30 Until such time as the question is definitively resolved, the Commission considers itself bound by the privilege.

22.40 Where a question of parliamentary privilege arises during an investigation or hearing of the Commission, the Commission will invite the Speaker of the Legislative Assembly or the President of the Legislative Council (as the case may be), to make submissions on the relevant issue and, if need be, to appear at a private hearing to determine the question.

[See Practice Note 15 - Parliamentary privilege]

⁶⁹ s 145

⁷⁰ See for example *R v Murphy* (1986) 5 NSWLR 18, in response to which the Commonwealth enacted s 16 of the *Parliamentary Privileges Act 1987 (Cth)* to avoid doubt as to the breadth of parliamentary privilege at the federal level in relation to court and tribunal proceedings. A commission of inquiry is defined under the legislation to be a "tribunal" for the purposes of s 16.