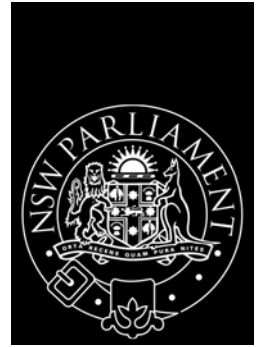


PARLIAMENT OF NEW SOUTH WALES



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

Report on the Eleventh General Meeting  
with the Police Integrity Commission

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Together with Questions on Notice,  
Transcript of Proceedings and Minutes

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## Membership and staff

<b>Chair</b>	The Hon Kerry Hickey MP, Member for Cessnock
<b>Members</b>	Mr Peter Draper MP, Member for Tamworth
	Mr Malcolm Kerr MP, Member for Cronulla
	Mr Paul Pearce MP, Member for Coogee
	Ms Sylvia Hale MLC
	The Hon Charlie Lynn MLC
	The Hon Lynda Voltz MLC
<b>Staff</b>	Ms Pru Sheaves, Committee Manager
	Mr Jonathan Elliott, Research Officer
	Ms Hilary Parker, Committee Officer
	Ms Nina Barrett, Assistant Committee Officer
<b>Contact Details</b>	Committee on the Office of the Ombudsman and the Police Integrity Commission Parliament of New South Wales Macquarie Street Sydney NSW 2000
<b>Telephone</b>	02 9230 2737
<b>Facsimile</b>	02 9230 3052
<b>E-mail</b>	<a href="mailto:ombopic@parliament.nsw.gov.au">ombopic@parliament.nsw.gov.au</a>
<b>URL</b>	<a href="http://www.parliament.nsw.gov.au/ombudsmanpic">www.parliament.nsw.gov.au/ombudsmanpic</a>

## 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 are set out in s.31B(1) 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 the

Functions of the Committee

- 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:

- 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.
- 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.
- 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.
- A referral or notification under this section is to be in writing.
- In this section, a reference to the Minister is;
  - in the context of an appointment of Ombudsman, a reference to the Minister administering section 6A of this Act;
  - 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
  - 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*.

The Committee also oversees the Information Commissioner. The Committee's functions are set out in section 44 of the Information Commissioner Act. Under section 5 of that Act the Committee has the power to veto the appointment of the Commissioner.

## Chair's foreword

The eleventh General Meeting with the Commissioner and the executive of the Police Integrity Commission was held on 21 May 2009. The General Meeting provided an opportunity for the Committee to focus on a wide range of issues arising from the Annual Report for 2007-2008, recent Commission investigations and a recent Special Report to Parliament made by the Inspector of the Police Integrity Commission.

Much of the discussion during the General Meeting focused on the relationship between the Police Integrity Commission and the Inspector of the Police Integrity Commission, and this provides the basis for the commentary in the report.

It is worthwhile noting that the crux of the dispute between the Commission and the Inspector seems to be application of a judicial standard of procedural fairness to a commission of inquiry. As both the Commission and the Inspector are independent of each other, it seems that there is space for disagreement to exist between them without adversely affecting the operations of either.

While the Committee in no way acts as an adjudicator between the Commission and the Inspector, it does have the power to monitor and review the functions of both the Commission and the Inspector. As such, the Committee has resolved to conduct an inquiry into the way in which complaints made against the Commission are examined, and the procedures in place between the Commission and the Inspector to enable this. I anticipate public hearings will be held in October 2009 and the report of the inquiry tabled in both Houses in November 2009.

This was the first General Meeting with the Commission that has occurred since I became Chair of the Committee. General Meetings are a valuable tool for the Committee to perform its work of monitoring and reviewing the functions of the Police Integrity Commission. This report is a consensus document and I would like to thank the Members of the Committee for the constructive and bipartisan approach they bring to the work of the Committee, in particular the exercise of its oversight role.



The Hon Kerry Mickey MP  
Chair



## List of recommendations

That the Committee conduct an inquiry into the way in which complaints made against the Commission are examined and the procedures used to enable this. .... p 8



## Chapter One - Commentary

- 1.1 On 21 May 2009, the Committee met with the Commissioner of the Police Integrity Commission and his executive officers for the Eleventh General Meeting. This was the second time the Committee had met with the Commissioner during the 54<sup>th</sup> Parliament. As with previous General Meetings, the Committee sent questions on notice to the Commissioner about matters raised in the Commission's Annual Report for the year ending June 2008. Some of these questions were asked on a confidential basis as they dealt with certain aspects of some complaint reports made by the Inspector of the Police Integrity Commission which at that time were not on the public record. The Inspector subsequently tabled these reports to Parliament as part of his *Special Report Pursuant to Section 101 of the Police Integrity Commission Act 1996*. As such, the Commissioner of the Police Integrity Commission agreed that the responses to these questions could be placed in the public domain. The answers to questions on notice can be found in Chapter Two of this report.
- 1.2 While a number of issues were discussed during the General Meeting, including Project Rhodium which is the risk assessment the PIC commissioned of the NSW Crime Commission, the meeting was dominated by issues raised in the Inspector's Special Report to Parliament, the Commission's Operation Alford and the ongoing disagreement between the Commission and the Inspector regarding two of the complaint reports contained within the Inspector's Special Report to Parliament. All of these complaint reports were referred to by the complainant's surname during the General Meeting. For the sake of continuity with the transcript, the individual complaint reports will be referred to within the commentary in the same way. No discourtesy to the complainants is intended.

### The Inspector's Special Report to Parliament

- 1.3 In a letter dated 26 March 2009, the Committee wrote to the Inspector, urging him to consider making a special report to Parliament, pursuant to s101, of the *Police Integrity Commission Act 1996* (the Act). The Committee's request was consequent upon four complaint reports which had been made by the Inspector, in relation to three of the Police Integrity Commission's operations: Whistler, Mallard and Rani. The Inspector's complaint reports had found, in each case, that the Commission had failed to accord the complainants procedural fairness.
- 1.4 S101 of the Act, provides for the Inspector to make, at any time, a special report to the Presiding Officer of each House of Parliament on:
- (a) any matters affecting the Commission, including, for example, its operational effectiveness or needs,
  - (b) any administrative or general policy matter relating to the functions of the Inspector.
- 1.5 The Inspector's view, that the Act (as currently constructed) did not provide him with the power to make public those complaint reports, was raised with the Committee on a number of occasions during 2008.<sup>1</sup> Changes to the Act are currently being drafted and it is expected that legislation will be brought before the Parliament during the 2009 Spring session that will enable the Inspector to publish complaint reports.

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<sup>1</sup>Committee on the Office of the Ombudsman and the Police Integrity Committee, [Report on the Ninth General Meeting with the Inspector of the Police Integrity Commission](#), 2009, pp. 2-13.

Commentary

- 1.6 The Committee's letter to the Inspector expressed concern that the four complaint reports, taken together, might suggest a pattern of failure by the Commission to accord procedural fairness and that the current impasse on publishing complaint reports would mean that such matters could not therefore be brought to the attention of Parliament. Noting the Inspector's previously expressed views that s101 of the Act contemplates special reports of a "one-off nature" and not individual complaint reports, the Committee's letter envisaged that such a report would be generic in nature, dealing with substantive matters and not the details of individual complaints.<sup>2</sup>
- 1.7 In response to the Committee's request, the Inspector made a special report to Parliament on 2 April 2009. The four individual complaint reports were included as part of this special report. The Inspector stated that:
- Those Reports, in my opinion, speak for themselves, and there is nothing I wish to add to them in this Special Report, subject to the matters referred to below.
- However, in deference to the Committee's concerns ... as to the effect of my four Reports "taken together", and as to whether they "suggest a pattern of failure by the Commission to accord procedural fairness," and that this Special Report deal "with substantive matters and not the details of individual complaints", I would respectfully make the following observations.
- In my opinion my Reports when read as a whole, and having regard to the fact that they deal with complaints arising from three separate public Reports made by the Commission to the Parliament, containing adverse opinions damaging to the reputations of those involved, do reveal systemic and substantive problems underlying the practices and procedures adopted by the Commission as identified in my reports, and which have produced the following unacceptable consequences.<sup>3</sup>
- 1.8 The Inspector noted that the Commission had agreed to accept recommendations made in his reports intended to limit the damage done to reputations, and that it would also seek advice from Senior Counsel as to the appropriateness of its relevant practices and procedures in the light of the Inspector's complaint report in relation to Operation Rani.<sup>4</sup>

## The complaints against the Commission (briefly summarised)

### **Detective T. S. Briggs**

- 1.9 The Commission's Operation Whistler investigated allegations of use of excessive force by Wagga police while arresting Allan Frederick Hathaway on 6 February 2003. Briggs (the complainant in the Inspector's report) was the most senior police officer to first arrive at the scene. The Commission's investigation report considered Briggs to be an 'affected person' for failing in his duty to ensure that the critical incident arising from Hathaway's arrest was dealt with according to the established guidelines for managing and investigating a critical incident and for giving untruthful evidence in Wagga Local Court in relation to the arrest of Hathaway.
- 1.10 The Commission expressed the opinion that the Commissioner of Police should consider taking reviewable management action against Briggs under s173 of the *Police Act 1990*.

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<sup>2</sup> Inspector of the Police Integrity Commission, [Special Report of the Inspector of the Police Integrity Commission pursuant to Section 101 of the Police Integrity Commission Act 1996](#), 2009, pp.3-4

<sup>3</sup> Ibid. p.6.

<sup>4</sup> Ibid. p.4-5.

- 1.11 Operation Whistler was tabled in Parliament in December 2005. In August 2007, Briggs complained of a lack of procedural fairness to the Inspector, who in December 2007 upheld the complaint.
- 1.12 In acknowledging the Inspector's conclusions, the Commission deleted sections of their electronic copy of their report on Operation Whistler and wrote to the Presiding Officers of both Houses informing them of the changes to the report. However, a second complaint report made by the Inspector in March 2008, upheld a complaint made by Briggs of a denial of procedural fairness regarding further material in the Operation Whistler report. These again related to issues where allegations were made about the complainant that had not been tested in evidence.
- 1.13 The Inspector's 2008 report found that nothing effective had been done by the Commission to rectify any damage caused to the complainant's integrity and reputation in the Operation Whistler report. The Inspector was of the view that the Commission's report could only be corrected by means of a corrective issued by the Commission, separate from the report. Furthermore it was the Inspector's opinion that the PIC had no power to alter a report once it has been tabled in Parliament.<sup>5</sup>
- 1.14 In response to the Inspector's second complaint report, the Commission commenced Operation Alford. Operation Alford is discussed in some detail in the section below.

#### **Detective Senior Constable Alison Brazel**

- 1.15 The Commission's Operation Mallard was an investigation into allegations of improper interference by Superintendent Adam Purcell in the NSW Police Force investigation of an allegation of sexual assault reported to Waverley Police on 20 November 2004. Detective Senior Constable Alison Brazel (the complainant in the Inspector's report) was in charge of the investigation, which was subsequently suspended in February 2005.
- 1.16 The Commission's investigation report named Brazel as an affected person, being the subject of an allegation that at Commission hearings she gave evidence that she knew was false or misleading in a material particular. The Commission was of the opinion that consideration should be given to prosecuting her for giving false or misleading evidence to the Commission, an offence under section 107 of the PIC Act.<sup>6</sup>
- 1.17 In December 2007, the Inspector made a complaint report in which he concluded that the Commission had denied Brazel procedural fairness. It was the Inspector's opinion that the Commission should have given Brazel sufficient warning during the course of her evidence that she was at risk of being the subject of an adverse finding and set out the critical issues or factors so that she had an opportunity to provide additional relevant material in her defence.
- 1.18 The Inspector found that the Commission should have admitted and considered fairly medical evidence and submissions which related to Brazel's memory and concentration. The Inspector also concluded that the Commission had no authority to provide the Director of Public Prosecutions with Brazel's confidential medical reports.

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<sup>5</sup> See: Inspector of the Police Integrity Commission, [RE: Complaint by Detective T.S. Briggs of the NSW Police](#), 2007.

See also: Inspector of the Police Integrity Commission, [RE: Complaint concerning aspects of the Whistler Report by Detective T.S. Briggs of the NSW Police](#), 2008.

<sup>6</sup> Police Integrity Commission, [Report to Parliament: Operation Mallard](#), 2007, p.iii.

Commentary

- 1.19 The Inspector recommended that the Commission take all reasonable steps to limit damage to Brazel's reputation caused by the adverse opinions in the Operation Mallard report and inform those accessing the report on the Commission's website of the Inspector's findings and his recommendation that no reliance should be placed on the Commission's opinions in the report which are adverse to Brazel.
- 1.20 While disagreeing with the Inspector's opinion, the PIC has placed a notation in the investigation reports section on their website, directing the reader's attention to the Inspector's findings. A copy of this notation can be found at Appendix 2.

### **Ms Stephanie Young**

- 1.21 The Commission's Operation Rani was an investigation into the NSW Police Force investigation of the disappearance of Bathurst woman, Ms Janine Vaughan, on 7 December 2001. Stephanie Young (the complainant in the Inspector's report) was a civilian employed by the NSW Police Force at Lithgow. The Commission's investigation report named Young as an affected person, being the subject of an allegation that she had deliberately produced a false document to the Commission and had given false evidence about it. The Commission was of the opinion that consideration be given to the prosecution of Young for knowingly giving false or misleading evidence, an offence under section 107 of the PIC Act.<sup>7</sup>
- 1.22 In March 2009, the Inspector made a complaint report, in which he concluded that the Commission had denied Young procedural fairness by withholding from her the purpose of the hearings at which she was compelled to give evidence; failing to give her notice that it intended to call an expert witness to give evidence against her; and failing to disclose, during the hearing, a report prepared prior to the hearing by the expert witness and which it relied on in making its adverse conclusions about Young's testimony.
- 1.23 The Inspector recommended that the Commission:
- take all reasonable steps within its power to limit the damage thus far caused to the Complainant's reputation by the publication of the adverse opinions concerning her;
  - halt, if possible, further damage likely to flow in particular from the continuation of the publication of the adverse opinions placed by the Commission on the Commission's website for all to see;
  - add a notation on its website where the relevant material appears clearly informing the reader of the Inspector's findings and recommendation and stating that, in the light of those findings, no reliance adverse to the Complainant should be placed on the opinions concerning the Complainant by any person or other legal entity; and
  - promptly provide an opportunity for the Complainant to be heard as to the content of the notation and on other measures the Commission should take in the light of this recommendation.<sup>8</sup>
- 1.24 The Commission disagreed with the Inspector's opinions regarding the procedural fairness accorded Ms Young, but agreed to the Inspector's recommendation at paragraph 101 of the Young Report that it seek written advice as to the

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<sup>7</sup> Police Integrity Commission, [Report to Parliament: Operation Rani](#), 2007, p.76.

<sup>8</sup> See: Inspector of the Police Integrity Commission, [RE: Complaint by Ms Stephanie Young Concerning the Police Integrity Commission](#), 2009.

appropriateness of its practices and procedures in light of the Young Report, and whether any changes should be made. At the General Meeting the Commissioner advised that they were expecting an opinion from Mr Peter Hastings QC.<sup>9</sup>

## Operation Alford

- 1.25 The genesis of Operation Alford lay in the Inspector upholding a complaint by Briggs of a denial of procedural fairness by the PIC in the report on Operation Whistler. The Commission accepted the Inspector's findings and sought to remedy the situation by deleting sections of the online Operation Whistler report. However, following another complaint by Briggs of a denial of procedural fairness, the Inspector was of the opinion that "the Commission neither had nor has any power or function authorising it to make the alterations to the Report that it has purported to make."<sup>10</sup> Furthermore, the Inspector noted that: "Upon the Report being made public by a Presiding Officer in the Parliament it attracted the privileges and immunities referred to in Section 103 of the Act."<sup>11</sup> While Operation Alford sprang primarily from complaints by Briggs, it also looked at complaints about procedural fairness from three other officers: Jackson, Philpott and Diessel.
- 1.26 The Commission began Operation Alford in April 2008.<sup>12</sup> In November 2008 the PIC decided to conduct private hearings as part of the investigation and summonsed the four officers. Legal representatives of Jackson and Briggs made submissions that the hearings and the investigation should not proceed. To further explore these issues, the Commission held a preliminary hearing in private on 8 December 2008 where all the witnesses were represented. Following the private hearing and after further consideration, the Commission decided that in the circumstances it would be appropriate to discontinue the investigation. In doing so, the Commission did not necessarily accept the submissions made on behalf of the officers.<sup>13</sup> The Commissioner gave evidence during the General Meeting that the report on Operation Alford will be tabled in Parliament during this current year.<sup>14</sup>
- 1.27 Just prior to the beginning of the General Meeting, the Inspector sent a fax to the Chair of the Committee outlining his concerns regarding the preliminary hearing held on 8 December 2008.<sup>15</sup> In this correspondence the Inspector expressed his concerns regarding the Commission's suppression orders for the preliminary hearing. As a consequence of this correspondence the Committee asked three supplementary questions of the Commission regarding their use of a public interest test when deciding if hearings are to be held in public or private; the use of suppression orders at directions hearings; and Commission notations on their website regarding the Inspector's findings.<sup>16</sup>

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<sup>9</sup> Transcript of the Eleventh General meeting with the Police Integrity Commission 21 May 2009, p 36.

<sup>10</sup> Inspector of the Police Integrity Commission, [RE: Complaint concerning aspects of the Whistler Report by Detective T.S. Briggs of the NSW Police](#), 2008, p 4.

<sup>11</sup> Inspector of the Police Integrity Commission, [RE: Complaint concerning aspects of the Whistler Report by Detective T.S. Briggs of the NSW Police](#), 2008, p 4.

<sup>12</sup> Police Integrity Commission Annual Report 2007-2008, p 27.

<sup>13</sup> Answers to questions on notice, see page 20 of this report.

<sup>14</sup> Transcript of 11<sup>th</sup> General Meeting with the Police Integrity Commission 21 May 2009 p1, 5.

<sup>15</sup> The text of this letter can be found at pages 11-13 of the transcript of the 11<sup>th</sup> General Meeting with the Police Integrity Commission 21 May 2009.

<sup>16</sup> The full text of the supplementary questions and answers can be found at pages 22-24 of this report.



## Commissions of inquiry and procedural fairness

- 1.28 Each of the Briggs, Brazel and Young Reports revolve around the role of the Commission to provide procedural fairness to witnesses called before it. It should be noted that the Commission has always agreed with the Inspector's reports regarding Briggs<sup>17</sup>, and has taken a number of actions to remedy the situation with varying degrees of success. It is the Committee's hope that Operation Alford will successfully address the Commission's denial of procedural fairness to Briggs, and allow the Commission to respond to additional complaints regarding procedural fairness from other officers named in Operation Whistler.
- 1.29 There is a precedent for the Commission in publishing a second report to address procedural fairness issues in a preceding report. In October 1998 the Commission tabled in Parliament the Report on Operation Jade, and in April 1999 tabled in Parliament a supplementary report on Operation Jade which corrected some of the adverse findings made in relation to a particular witness and apologised to that witness.
- 1.30 In both the Brazel and Young Reports, however, the PIC disagrees with the Inspector's opinions that these people were not accorded procedural fairness. Much of the questioning during the General Meeting related to the Commission's obligation to provide procedural fairness. The Commissioner described the Commission's obligations regarding procedural fairness in some detail:
- ...one of the recognised heads that triggers an obligation to accord procedural fairness is that the Commission, and in particular its public work and particularly its reports, can damage reputations. The risk of harm or threat of damage to reputation is what triggers, essentially, the Commission's obligations in relation to its hearings and reports: to ensure that a person is made aware of what an allegation or a possible adverse opinion may be expressed about; to be made aware of the evidence or the information that the Commission may rely upon in order to express or found that opinion and associated recommendation; to have an opportunity to comment on that material or evidence; and to make submissions, which the Commission is obliged to consider and carefully take into account as regards any adverse or contrary opinion it may be expressing.<sup>18</sup>
- 1.31 The crux of the issue in the Inspector's complaint reports regarding Brazel and Young seems to lie in what the Commissioner described as "the application of principles and rule of practice and procedure that may apply in courts and other statutory tribunals automatically to commissions like the PIC".<sup>19</sup> The Committee has previously noted in other reports, most particularly the *Ten Year Review of Police Oversight in NSW*<sup>20</sup>, the Commission is not a judicial body, the rules of evidence do not apply, and it is not able to make findings of guilt or innocence. Therefore, the rules of procedural fairness in relation to investigative commissions are not hard and fast. Hall notes:
- ... the application of rules of procedural fairness to specific issues at particular stages of the proceedings of a commission of inquiry often require a balancing of the individual's interests and the public interest which the Commission is required to advance. Additionally the requirements of procedural fairness will vary during a commission of

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<sup>17</sup> Transcript of the 11<sup>th</sup> General Meeting with the Police Integrity Commission 21 May 2009 p 24

<sup>18</sup> Transcript of 11<sup>th</sup> General Meeting with the Police Integrity Commission 21 May 2009 p6.

<sup>19</sup> Transcript of 11<sup>th</sup> General Meeting with the Police Integrity Commission 21 May 2009 p7.

<sup>20</sup> Committee on the Office of the Ombudsman and the Police Integrity Commission, *Ten Year Review of Police Oversight in NSW*, 2006, p. 12.



inquiry's information-gathering stage and the later stage of proceedings when submissions as to findings are made.<sup>21</sup>

## The nature of the relationship between the Commission and the Inspector

- 1.32 Both the Inspector and the Commission are independent of each other. The Inspector cannot direct the Commission, and the Commission cannot direct the Inspector. Thus recommendations made by the Inspector to the Commission are not enforceable. This means that there is clearly space for conflict to exist between the offices without adversely impacting on the operations of either. Should a situation of serious conflict arise between the Inspector and the Commission regarding particular recommendations or complaint reports, clarification can and should be sought from the Supreme Court.
- 1.33 The independence of both the Commission and the Inspector is mirrored in both those offices' relations with the Committee. The Committee cannot direct either office, nor is it bound to accept recommendations from them. The Committee does not play an adjudicative role in conflicts between the Commission and the Inspector. Indeed nothing in its establishing legislation authorises the Committee:
- (a) to investigate a matter relating to particular conduct, or
  - (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, a particular matter or particular conduct, or
  - (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or a particular complaint.<sup>22</sup>
- 1.34 However the Committee is able to monitor and review the functions of both the Commission and the Inspector.<sup>23</sup> As such, it may be timely for the Committee to conduct a tightly focused inquiry into the way in which complaints made against the PIC are examined and what procedures to enable this are in place between the PIC and the Inspector.

**RECOMMENDATION 1:** That the Committee conduct an inquiry into the way in which complaints made against the Commission are examined and the procedures used to enable this.

<sup>21</sup> Hall, P.M. (2004). *Investigating Corruption and Misconduct in Public Office: Commissions of inquiry – powers and procedures*. LawbookCo, Pyrmont, p 717.

<sup>22</sup> Section 95(2) *Police Integrity Commission Act 1996*.

<sup>23</sup> Section 95(1)(a) *Police Integrity Commission Act 1996*.

## Chapter Two - Answers to questions on notice

### **Matters arising from the Report on the Tenth General Meeting with the Police Integrity Commission**

*At the last General Meeting the Commission gave evidence that, in its view, searches remain a risk area for misconduct by police. Given an opportunity to do so, the Commission expressed its interest in examining police compliance with their own policies and procedures in this area.*

#### **Question 1**

**Does the Commission still perceive there to be a similar level of risk, and has there been an opportunity to conduct further research in this area?**

#### **Answer**

Considering the opportunities and temptations police face when locating stolen goods, illicit drugs and/or money, it remains the Police Integrity Commission's (PIC) view that the searching of premises is a high risk policing function. This risk is compounded by a general reluctance on behalf of suspected offenders to complain of theft by police during searches.

Acknowledging these risks, the PIC therefore intends to conduct research into compliance by the NSW Police Force (NSWPF) with relevant policy and procedures during the conduct of searches, as existing projects conclude and resources become available. The project is likely to include:

- a compliance audit methodology (for example, whether or not the execution of the search warrant was video taped and whether or not an independent observer was present) and
- conventional research methods to review policies and compile various statistics from complaints data.

The project is currently in the planning stage. The PIC will be in a position to advise on scheduling in the near future.

### ***Police Integrity Commission Amendment (Crime Commission) Act 2008***

#### **Question 2**

**How does the Commission plan to oversight the Crime Commission?**

#### **Answer**

Essentially, the PIC intends to oversight the NSW Crime Commission (NSWCC) in much the same way that it oversees the NSWPF - through the conduct of investigations, the oversight of complaints management, and in misconduct prevention activities.

Under the amendments to the *Police Integrity Commission Act 1996* (PIC Act), the Commissioners of the NSWCC and the NSWPF as well as chief executive officers of other public authorities are required to report suspected misconduct by a NSWCC officer to the PIC. Where appropriate, the PIC will conduct investigations into complaints of the most

serious forms of misconduct. In addition, the PIC may independently initiate investigations in response to internally developed intelligence, absent a complaint.

In the normal course of events, all complaints not investigated by the PIC will be referred to the NSWCC similar to arrangements in place between the PIC and the NSWPF. The approach to the oversight of the NSWCC complaints management will differ somewhat to that applied to the NSWPF in recognition of the differing nature and functions of the two agencies. The PIC only oversees a small proportion of the complaints made about NSWPF. The majority are overseen by the Office of the NSW Ombudsman. As there is no other agency with a corresponding oversight responsibility in respect of the NSWCC, the PIC anticipates that it will oversee a more significant proportion of complaints about NSWCC officers but this will become clearer over time.

The PIC also proposes to conduct misconduct prevention oriented research in order to identify those areas in which the NSWCC may be at risk of misconduct and provide advice on how those risks might be reduced. The PIC's Project Rhodium, mentioned below, is an example of such work.

These 'oversight' activities are integrated to some extent in that trends identified in complaints (to the extent that there might be 'trends' when considering the relatively small number of complaints made each year in respect of the NSWCC) can influence investigation selection, and, complaints trends and investigation outcomes may contribute data to, or influence selection of, research projects. Research, in turn, can drive subsequent investigation selection if particular practices are identified as at risk of misconduct, or where investigation outcomes may support change.

### **Question 3**

**Does the Commission need to adopt any special measures or develop any additional expertise to do so?**

#### **Answer**

Additional resources have been provided to the PIC to accommodate the new jurisdiction. These resources provide for a replication of existing capabilities. It is not presently envisaged that any further "special measures or additional expertise" will be needed to assist with the oversight of the NSWCC.

### **Question 4**

**Has the Commission been sufficiently resourced to undertake the additional responsibility of overseeing the New South Wales Crime Commission?**

#### **Answer**

Following the passage and commencement of the *Police Integrity Commission (NSW Crime Commission) Amendment Act 2008* giving the PIC oversight for the NSWCC, the PIC received an initial funding supplement to its 2008-09 budget in the way of \$669,000 recurrent funding, split between \$335,000 for employee related expenses and \$334,000 for other operating expenses. An additional capital expenditure allocation of \$85,000 was also provided for.

As a result of representations from the PIC based on its assessment of the anticipated increased workload associated with this additional responsibility, the PIC has been allocated

Answers to questions on notice

for 2009-10 and onwards additional recurrent funding of \$293,000. This sum has been directed to funding two additional permanent operational positions as well as legal fees associated with the engagement of an Assistant Commissioner relating to the NSWCC and in particular on going work associated with Operation Rhodium being the systems review of the NSWCC that Assistant Commissioner Peter Clark, SC is undertaking.

Together with its overall budget situation, the PIC considers this additional funding sufficient to meet its primary functions in relation to the NSWPF as well as its additional responsibilities for overseeing the NSWCC.

### **Question 5**

**Has Assistant Commissioner Clark reported on his assessment as to the capacity of the Crime Commission to identify and manage risks of serious misconduct involving Crime Commission officers? If yes, what were his principal findings and recommendations?**

#### **Answer**

The PIC's Project Rhodium is a broad based assessment of the NSWCC's capacity to identify and manage the risk of serious misconduct by its officers consistent with the terms of reference that formed the subject of a request by the former Minister for Police, the Hon David Campbell MP, in his capacity as Chair of the NSWCC's Management Committee. The project is being coordinated by PIC Assistant Commissioner Peter Clark, SC. Methods used by the PIC in carrying out the project include:

- Conducting interviews with members of the Management Committee, executive and senior members of NSWCC staff and senior members of partner agencies;
- Obtaining and reviewing policies and other relevant documents from the NSWCC concerning strategies to prevent misconduct;
- Undertaking a review of relevant literature and legislations;
- Obtaining and reviewing information from other agencies including the ICAC and NSWPF as well as the Police Ministry;
- Obtaining and reviewing complaints made against the NSWCC; and,
- Consulting with the NSWCC on the results of the project.

At the time of writing the draft Project Rhodium Report has been provided to the Commissioner of the NSWCC for consideration and comment as part of the consultation process. It is expected that this process will be concluded during mid May 2009. The report will then be finalised and delivered to the Management Committee. As such it would be premature at this stage to canvass any findings or recommendations that the final report may contain.

### **Question 6**

**Are there any other matters related to this new responsibility that the Commission would like to bring to the attention of the Committee?**

#### **Answer**

There is little that is particularly new to the PIC in the oversight of the NSWCC. The legislation extending the jurisdiction and describing respective responsibilities and

processes is similar to that concerning the PIC oversight of the NSWPF. The complaint management processes that have been implemented are fundamentally the same. Investigation processes, similarly, have required little, if any adjustment.

Some information management systems have been modified in order to accommodate new reporting requirements. However, information security systems, given the high standards that have been applied within the PIC, have required no change to accommodate additional, highly sensitive information obtained from the NSWCC.

The increase in the PIC budget as referred to in answer to question 4 above is sufficient to meet the additional work associated with complaints management, investigations and prevention activities.

The new responsibility does require that the PIC becomes familiar with the business processes of the NSWCC. These processes are quite different from the NSWPF and enliven different risks. For example, the NSWCC devotes considerable resources to the identification and seizure of assets under the *Criminal Assets Recovery Act 1990 (NSW)*. The NSWPF, proportionally engages in much less activity of this type. However, the PIC will use well established methods to develop an understanding of the NSWCC's business processes and the associated risks. The PIC may review policies and procedures, interview staff and others who may assist, conduct research and utilise relevant expertise within the PIC or knowledge obtained through other PIC activities.

## **Matters arising from the Commission's Annual Report 2007-2008**

### **Projects Manta and Odin**

*The results of the Commission's research under Projects Manta and Odin would seem to be highly relevant to the development and implementation of an Early Intervention System for the NSWPF. (AR pp 32-34)*

#### **Question 7**

**How is the Commission ensuring that its work on these Projects and the work of the Steering Committee and the Project Team on the EIS are complementary and not duplicative?**

#### **Answer**

Project Manta, Project Odin and the EIS project are all focused on the identification and management of misconduct risks. However, the scope and purpose of these projects, as articulated in their respective planning documents, differ. Furthermore, they are intended to strengthen, or assist in the development of, different misconduct prevention systems of the NSWPF.

Project Manta is concerned with misconduct risks at the command level. A key principle underpinning this project is that such things as the size, location and types of duties performed can vary - sometimes markedly - from command to command and that, consequently, the types of misconduct risks faced by commands can also vary.

The two reports that will be produced as part of Project Manta will seek to improve the way in which commands identify, communicate and manage the misconduct risks different commands face. An analogy can be drawn between command-level misconduct risk

management and the management of occupational health and safety (OH&S) risks. In the same way as OH&S involves identification and management of workplace hazards, such as the presence of unsecured and dangerous chemicals in the workplace, so too can command-level misconduct risk management be seen as dealing with misconduct hazards. An example of a misconduct hazard might be the presence of licensed premises within the boundaries of a local area command that is frequently mentioned in intelligence reports as being the venue for low level drug distribution. The treatment strategy for that hazard might be a direction from the commander that officers avoid these premises both while off duty, or on duty, unless directly involved in policing functions. In the same way as OH&S is not concerned with managing accident prone individuals in the workplace, Project Manta is not concerned with identifying and managing officers who, for whatever reason, may be more prone than others to engage in misconduct.

Project Odin and the PIC's work in relation to the development of the EIS complement Project Manta insofar as they are directly aimed at assisting the NSWPF in managing the misconduct risks presented by individual officers. However, it is important to note that Project Odin and EIS are concerned with very different types of risks. The EIS, when implemented, will be focused on identifying and managing officers who are showing the first signs of problematic behaviour which may, possibly, lead to misconduct if left untreated. To that end, an EIS is a predictive tool. Project Odin, by contrast, is concerned with improving the way in which the NSWPF manages officers who, as a result of existing evidence of misconduct (eg sustained misconduct complaints), have demonstrated that they are at risk of engaging in future acts of misconduct.

As noted above, the scope and purpose for each of the three projects that are the subject of this question above are markedly different. The PIC is ensuring that its work on these projects is not duplicated by systematically managing them in such a way that, as they are progressed, they remain in keeping with their respective scopes and purposes. It is relevant to note that all three projects are being managed by the same unit within the PIC. This arrangement assists in ensuring that they each remain within scope.

### ***Question 8***

**What processes are in place to ensure that results from Projects Manta and Odin, including any recommendations the Commission may make, are brought to the attention of, and taken into account by, the EIS Steering Committee and Project Team?**

### ***Answer***

All three projects are being developed and managed within the same team by the same unit within the PIC. Staff from this unit participates in the EIS Steering Committee and Project Team. Similarly, representatives of the NSWPF, the NSW Ombudsman and, in some cases, the NSW Police Association involved in the respective consultation processes are also involved in EIS. In the event that there are findings and recommendations arising from Projects Manta and Odin that are relevant to EIS, these arrangements ensure that they can be taken into account by the EIS Steering Committee and Project Team.

### ***Question 9***

**When will the Commission's reports on these Projects be completed?**

### ***Answer***

With regard to Project Odin, the PIC issued a draft report for consultation purposes to the NSWPF in September 2008. The PIC has just concluded a lengthy and detailed consultation process and is currently making arrangements to finalise its report. No release date has been set. However, the PIC is aiming to furnish the report to Parliament before the end of June 2009.

Two reports will be issued for Project Manta. In March 2009, the PIC provided the NSWPF with a draft copy of the first report for consultation purposes. The consultation process for this document has commenced and will likely not be concluded until sometime in June 2009. No release date has been set for the first report and, given that the consultation process is still in its infancy, it would be premature to project one. The second report for Project Manta is currently being drafted. The PIC will provide further information about the timing of the release of the second Project Odin report in its 2008-09 Annual Report.

The PIC's involvement in the development of the EIS is ongoing and consists of providing advice both in writing and orally, for example in meetings with the NSWPF and other project stakeholders. The PIC is not currently preparing any written report in relation to EIS.

### **Project Marrella**

#### ***Question 10***

**Can the Commission provide an update on its research into the correlation, if any, between class sizes at the NSW Police College and subsequent instances of misconduct by graduates? (AR p 35)**

### ***Answer***

Project Marrella aims to test the perception that student police officers trained in larger than usual classes are more likely to engage in misconduct once they become police officers than those trained in smaller classes. In particular, Project Marrella concentrates on a police officer's first two years of service, while they are probationary constables. Complaints against police officers are used in this project as an indicator of misconduct.

There are many factors that can influence the likelihood of a NSWPF officer receiving a complaint against them. For example, it is possible that NSWPF officers working in a high crime area could receive more complaints against them than officers working in an area with less crime, simply because officers working in high crime areas have more contact with the public. Taking factors that have the potential to affect the likelihood of an officer receiving a complaint into consideration is therefore another important aspect of this research. Some of the data regarding other potential factors that could influence the likelihood of an officer being the subject of a complaint were retrieved from records available to the PIC while other data sets were requested and received from the NSWPF.

As at Mid April 2009, the PIC is in the process of analysing complaints and other data to determine if a relationship exists between the size of the class in which an officer is trained and their likelihood of receiving a complaint against them in their first two years of service. The analyses have been challenging because the data used for this project was not organised in a way that is conducive to research. It required extensive reorganisation and cleaning before it could be used in any analyses. The analyses are progressing well and are currently being finalised. The report on the project is also being prepared.

## Unauthorised Disclosure of Confidential Information

### **Question 11**

**What has been the response of the NSWPF to the recommendations made in the October 2008 report on unauthorised disclosures? (AR pp 35-36)**

### **Answer**

The PIC has received no formal response from the NSWPF in connection with the strategies for future action outlined in its paper on unauthorised disclosure of confidential information. The PIC meets with senior staff from the NSWPF Professional Standards Command (PSC) on a quarterly basis to discuss misconduct prevention and complaint management issues. The PIC has indicated to PSC that it wishes to be updated at the next meeting. At the time of writing, the Commission was seeking to arrange a time for a meeting and may be able to provide an oral update at the meeting with the Committee.

## Tracking Commission Recommendations:

### **Operation Abelia**

### **Question 12**

**Is the Commission satisfied with the progress of the NSWPF in relation to fully implementing the remainder of the recommendations of this report (AR p 42)?**

### **Answer**

In July 2008, the PIC indicated to representatives of the NSWPF Safety Branch that it was keen to see the remaining Abelia recommendations implemented before the end of June 2009. To that end, the PIC, with the agreement and support of Safety Branch, arranged for quarterly meetings to take place between representatives from the two agencies to more closely monitor progress in the implementation of these recommendations and attempt to resolve any issues that were impeding progress. As at the time of writing, there were two further meetings scheduled to take place before the end of the financial year - one at the end of April, the other at the end of June.

The PIC would like to reserve comment on how effectively the NSWPF has performed in implementing the remaining Abelia recommendations until after 30 June 2009. That said, progress has been slow and a heightened effort on the part of the NSWPF will be required if the remaining recommendations are to be implemented by the end of June.

Updated advice as to the NSWPF's progress in implementing the Abelia recommendations will be provided in the Commission's 2008-2009 Annual Report.

### **Operation Mallard**

### **Question 13**

**Has the Minister for Police responded to the Commission's recommendation that consideration be given to creating a statutory offence of unauthorised release of confidential police information? (AR p 45)**

### **Answer**

No. The PIC is yet to receive a written response from the Minister. However, the PIC has received verbal advice from the Ministry for Police that the matter is under consideration.



## Appendix 4: Statistical Data on the Exercise of the Commission's Powers

### **Question 14**

**The Commission reports that the Commission exercised its powers under s. 25 of the PIC Act (power to obtain information) 47 times in 2007-08. This is a large increase in the use of this power compared to the previous two years (12 times in 2005-06 and 6 times in 2006-07). Can the Commission explain the reason for such an increase? (AR p 64)**

### **Answer**

Of the 47 notices issued under section 25 of the PIC Act for 2007-08, 42 of those were in relation to Operation Horseshoe (page 27 AR). This was an investigation into allegations of false declarations by serving police officers to avoid liability for traffic infringements. Given the large number of officers and other persons initially of interest to the investigation each was asked to provide a statement of information in relation to infringement notices which had been issued to them. The PIC has now concluded inquiries undertaken as part of Operation Horseshoe. As a result of the investigation a number of briefs of evidence were referred to the DPP and one officer has already been prosecuted and sentenced after pleading guilty to the offence of obtaining benefit by deception. The PIC will report further on this investigation in its Annual Report for 2008-09.

### **Question 15**

**The Commission also reports a large increase in the number of warrants it issued under the *Telecommunications (Interception and Access) Act 1979*. It issued 91 warrants compared to 51 warrants in 2005-06 and 40 warrants in 2006-07. Can the Commission explain the reason for such an increase? (AR p 65)**

### **Answer**

Numbers of warrants issued under the *Telecommunications (Interception and Access) Act 1979* fluctuate considerably from year to year. For example, a previous low of 36 warrants in 2002 was followed by a high of 81 in 2003. Based on use so far this year, there are likely to be in the vicinity of 100 warrants issued this financial year but only in the vicinity of 60 warrants for the 2009 calendar year.

While a range of factors may come into play, the number of warrants issued during the year is largely dependent on the nature of the operations and the use made by targets of the many telecommunications services available. Some investigations into current criminal activity are particularly susceptible to telecommunications interception, while investigations of past criminal activity may be less susceptible. Some targets routinely use multiple telecommunications services, or there may be a larger number of targets in an investigation. PIC investigation of these targets, particularly those involved in current criminal activity, is likely to lead to an increase in the number of warrants issued during the year.

## **Parliamentary privilege**

*In his report on the ICAC investigation of the Hon Peter Breen MLG, the then ICAC Inspector, Mr Graham Kelly, was critical of the lack of consideration and understanding of parliamentary privilege matters arising in relation to an investigation involving the Parliament of NSW and a search of parliamentary premises.*

### **Question 16**

**Does the PIC have search warrant protocols in place which address the issue of parliamentary privilege?**

#### **Answer**

As a matter of past practice, the PIC has had few occasions to execute search warrants generally as part of its investigations. For example, over the last three reporting years, the PIC has executed only one search warrant (p 64 AR). The power of the Commissioner to issue a search warrant under s 45(2) of the PIC Act also never been exercised since the PIC's inception.

The PIC has an extensive procedure dealing with the approval, application, issue and execution of a search warrant as part of an investigation and related procedures for dealing with items and other property seized pursuant to authority granted under the warrant.

In the unlikely event that the PIC considered it necessary to execute a search warrant as part of its investigations on the office of a Member of Parliament, (including a Parliament House office, electorate office and residence of the Member) then together with the procedure referred to above, the PIC considers the protocol provided for in Chapter 5 of the Protocols for Execution of Search Warrants on Members' Offices prepared by the Privileges Committee of the Legislative Counsel (Report 33, February 2006) is an appropriate procedure to adopt and follow. The PIC understands that the protocol has yet to be adopted by the Council and the related suggestion of a common approach by both Houses has also yet to be acted upon (Dr Gareth Griffith, "*Parliamentary Privilege: Major Developments and Current Issues*" Background Paper no 1/07).

### **Question 17**

**Who, in the Commission's opinion, should determine the extent to which parliamentary privilege applies to material seized from a parliamentarian's office?**

#### **Answer**

As the ICAC Inspector noted in his Report on the investigation of allegations involving Mr Breen, the issue of Parliamentary privilege is complex with there being divergent opinions as to its scope and its application in particular situations, though ultimately, the question of whether any Parliamentary privilege claimed does or does not exist is a matter for the Parliament itself (at para 11.4.1). The latter proposition, which the PIC readily accepts, is reinforced by the two reports of the Standing Committee on Parliamentary Privilege and Ethics regarding parliamentary privilege and the seizure of documents by the ICAC (Report No 25, December 2003 and Report No 28, March 2004). This is also reflected in the protocol set out in Chapter 5 of the Report Privileges Committee referred to in answering Question 16 above.

### **Matrix management structure**

*At the Ninth General Meeting, the then PIC Commissioner Griffin said that during his term of office he had reduced the levels of bureaucracy at the Commission by introducing a matrix management structure. His view was that matrix management fosters a greater sense of responsibility in individual team members.*

*However, in his report on the ICAC Breen investigation, the ICAC Inspector was also critical of the matrix management structure in place in the ICAC at that time, and found that it meant that senior management did not take responsibility for reviewing all the relevant issues surrounding the execution of the search warrant on Mr Breen's parliamentary office.*

### **Question 18**

**Is the PIC, including the investigative teams, currently structured on matrix management principles? If so, are there clear lines of responsibility and accountability for decisions and actions taken?**

### **Answer**

The reference to matrix management by the ICAC Inspector in the report of the Breen investigation as alluded to in this question is by no means clear. In relation to the PIC, whatever may have been previously thought to be the position, the PIC is not currently structured according to matrix management principles.

The PIC has a functional organisational structure, which means that its work areas are separated according to their key functions. This structure is simple and ensures that PIC staff have a clear understanding of their employment accountabilities and can easily identify reporting lines. The PIC's functional structure consists of two divisions, Operations and Prevention & Information. These divisions are supported by the PIC's Legal Services, Human Resources and Finance areas.

While the PIC does not use a matrix management structure its Investigations Unit (IU) does use cross functional work teams, which is a principle of matrix management. Investigation work teams may be cross functional depending on a particular operation or investigation in that the operational team may consist of investigators and lawyers who work together on the investigation or other investigations as well. The advantage of using cross functional teams is it provides greater flexibility in responding to the fluid nature of investigations and creates resource efficiencies because resources can be shared between teams.

This does not mean that the IU has a matrix management structure. The preferred structure of the IU is a functional structure, which requires Investigators to report to the Chief Investigator who subsequently reports to the Director, Operations. Further, Lawyers report to the Commission's Solicitor even though they may work with Investigators on assigned investigations. The functional structure has the advantage of ensuring that PIC staff have clear reporting lines that do not change on a case by case basis.

The use of matrix management principles does not extend to other parts of the PIC.

**If so, are there clear lines of responsibility and accountability for decisions and actions taken?**

All of the PIC's Branches have clear lines of responsibility and accountability for decisions and actions taken. This information is documented in the PIC's organisational structure and employment position descriptions. Position descriptions identify reporting lines and accountabilities.

## **Operations Whistler, Alford, Mallard and Rani**

*The PIC Inspector has made two reports in relation to complaints by Detective T.S. Briggs arising from the Commission's Operation Whistler, and reports on complaints by Brazel and Young in relation to Operation Mallard and Operation Rani respectively. In each case, he found that the Commission had failed to accord procedural fairness to the complainants.*

### **Question 19**

**What measures has the Commission taken to ensure that procedural fairness is guaranteed in the future and there is no recurrence of the circumstances that led the Inspector to find denial of procedural fairness in each of these cases?**

#### **Answer**

In responding to this question the Committee will no doubt appreciate that the PIC does not agree with the Inspector's findings in relation to Operation Rani and Operation Mallard that it breached its obligations of procedural fairness to each of the respective complainants as set out in each of his relevant reports.

While not wishing to downplay its seriousness, the failure to accord procedural fairness to Mr Briggs in Operation Whistler arose as a result of an oversight whereby certain opinions adverse to Mr Briggs (regarding issues which had been raised during the PIC's hearing) were published in the Whistler Report but did not appear in the submissions which were served on Mr Briggs prior to the publication of the Whistler Report. Because the opinions did not appear in the submissions Mr Briggs was entitled to assume they would not appear in the Report. This was a technical failure to ensure that the Report only contained adverse material which had appeared in submissions. The PIC is confident that more careful checking of the content of such matters as the contents of Counsel Assisting's submissions will prevent a recurrence of this oversight in the future.

### **Question 20**

**When was Operation Alford discontinued and why? Were any findings reached before it was discontinued? (AR pp27-28)**

#### **Answer**

The background to the commencement of Operation Alford is referred to at pages 27 - 28 of the AR.

During the course of preparing material for consideration as part of Operation Alford, it became apparent that evidence given by the subject officers in subsequent proceedings touching on matters canvassed as part of Operation Whistler was relevant to the allegation that they had given untruthful or unreliable evidence in the Wagga Wagga Local Court in the initial proceedings against Mr Hathaway. This allegation was part of the Magistrate's complaint that led to the commencement of Operation Whistler and the subject of complaint by Mr Briggs to the Inspector after it appeared in the Whistler Report.

The PIC amended the original purpose of Operation Alford to include an examination of the evidence given by the officers before the PIC and in the subsequent proceedings, most notably civil proceedings brought in the Supreme Court by Hathaway against the State of NSW for damages in relation to assault and malicious prosecution. Messrs Briggs and

Jackson and Ms Philpott all gave evidence in those proceedings in 2008 and Ms Deissel had been summonsed but was not required to give evidence.

The four subject officers were subsequently notified in November 2008 by the PIC of the amendment to the purpose of the investigation. Relevant material was collated and copies provided to the each of the officers.

In November 2008 the PIC also determined to hold private hearings as part of the investigation and summonsed each of the four officers (that is, Messrs Jackson and Briggs and Ms Philpott and Ms Diessel) for that purpose. After service of the summonses, the legal representatives for Messrs Jackson and Briggs made submissions that the hearings as well as the investigation for which the hearings were being held could and should not proceed. In summary, these submission rested on claims of apprehended bias in the PIC, that the PIC was functus (that is, the same matters had already been considered and determined by the PIC and it was therefore prevented from revisiting them) and the investigation involved an abuse of process. Lengthy written submissions in support of these grounds were made on behalf of Mr Jackson. To explore the issues further the Commission held a preliminary hearing in private on 8 December 2008 with all witnesses represented.

Following that hearing and after further consideration of the issues as submitted including advice from Mr Robberds, QC, Senior Counsel assisting the PIC, it was determined without necessarily accepting the submissions made on behalf of the officers, that in the circumstances it would be appropriate to discontinue the investigation.

On 30 January 2009 the PIC wrote to the legal representatives for each of the four officers and advised that the Operation Alford investigation had been discontinued and set out short reasons for this decision.

As the Committee may be aware, on 23 April 2009, Justice Simpson of the Supreme Court of NSW handed down her judgment in the matter of Allan Frederick Hathaway v the State of NSW. As anticipated, many of the issues proposed to canvas in Operation Alford were dealt with by her Honour as set out in her judgment.

The PIC is currently drafting a Report to Parliament setting out the history of the Operation Alford investigation before the decision was taken to discontinue the matter. After complying with its obligations of procedural fairness in relation to each of the relevant officers as part of the process of preparing the report, it is anticipated that the Report will be presented to the Parliament in this calendar year.

### **Question 21**

**Did the management structure in place in the Commission at the time Operations Whistler, Rani and Mallard were conducted and reported on contribute, in any way, to the circumstances that led the PIC Inspector to find that the Commission had failed to accord procedural fairness.**

### **Answer**

The PIC does not consider that the management structures in place at the time of Operations Whistler, Rani and Mallard in any way contributed to the circumstances that led to the Inspector's findings in relation to the matters referred to.

## **Question 22**

**What is the Commission's response to the PIC Inspector's findings in his complaint reports, Briggs, Brazel and Young?**

### **Answer**

In relation to Inspector's report dealing with Mr Briggs' complaint, the PIC commenced Operation Alford to which reference has already been made in the 2007-08 AR and in answer to these questions on notice as set out above. That investigation was also directed to addressing the position of other officers who were affected in a similar way but were not the subject of the inspector's reports.

In relation to the report dealing with Ms Brazel, notwithstanding that the PIC does not agree with the findings set out in the Inspector's report, the PIC agreed to place a notation on its website in relation to the opinions expressed regarding Ms Brazel in the Operation Mallard Report. As recommended by the Inspector, the PIC extended to Ms Brazel the opportunity to be heard on the content of that notation and took into account the matters raised on her behalf. That notation, added to the PIC's website edition of the Operation Mallard Report on 2 April 2009, reads as follows:

The Commission's opinions expressed at paragraphs 4.49 and 4.50 together with the related recommendations at paragraphs 4.51 and 4.52 of the Report were the subject of complaint to the Inspector of the Police Integrity Commission. In a Report dated 23 February 2009 the Inspector found that in expressing its opinions as to Ms Brazel the Commission failed to accord procedural fairness to her and that therefore "no reliance adverse to [Ms Brazel] should be placed on the opinions concerning [Ms Brazel] by any person or other legal entity".

While the Commission does not agree with this finding nevertheless the Commission does consider it appropriate in the circumstances to make this notation.

In relation to the report dealing with Ms Young's complaint, as foreshadowed in the PIC's letter to the Committee of 9 March 2009, the PIC has briefed Mr Peter Hastings, QC, to advise on the contents of the Inspector's Final Report. Upon receipt of that advice the PIC will consider its response to the findings and recommendations contained in the Final Report and, in particular, whether a review of the PIC's relevant practices and procedures as referred to in paragraph 101 of the Final Report is in fact required.

## Answers to supplementary questions on notice



ABN 22 870 745 340

Your ref: OMB 407-01  
Our ref: 19856/12

20 July 2009

The Hon Kerry Hickey, MP  
Chair  
Committee on the Office of the Ombudsman and  
Police Integrity Commission  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Hickey

### Re: Additional Questions on Notice - 11<sup>th</sup> General Meeting

I refer to your letter of 25 June 2009 seeking responses to three further questions on notice arising from the 11<sup>th</sup> General Meeting with the Commission.

The Commission responds as follows:

#### Question

1. *Does the Commission use a public interest test when deciding if hearings are to be held in public or private?*

#### Answer

Yes. In deciding whether to hold hearings in public or private the Commission has regard to the relevant provisions of the PIC Act. Section 33 of the PIC Act deals with public and private hearings and relevantly provides as follows:

- (1) *A hearing may be held in public or in private, or partly in public and partly in private, as decided by the Commission.*
- (2) *Without limiting the above, the Commission may decide to hear closing submissions in private etc.*
- (3) *In reaching these decisions, the Commission is obliged to have regard to any matters that it considers to be related to the public interest.*

So far as sub section 3 is concerned, the Commission follows clause 2 of its Practice Notes which are available on its website and which provide as follows;

#### **The discretion to hold public or private hearings**

2.10 *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 [s32(3)]*

*Such a requirement involves a discretionary 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 [O'Sullivan v Farrer (1989) 168 CLR 210, per Mason CJ, Brennan, Dawson and Gaudron JJ at 216]*

*2.20 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.*

*2.30 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 below.*

**Question**

2. *Are directions hearings usually subject to suppression orders? Have such orders ever been lifted and under what circumstances has this occurred?*

**Answer**

Directions hearings are rarely conducted by the Commission. When they are held it is usually in conjunction with a scheduled public hearing in order to hear and deal with preliminary applications on behalf of persons summoned to appear at the public hearing that the applicant does not wish to be heard or dealt with in public, for example, applications for evidence or identities of persons not to be published. In such circumstances the directions hearing is conducted as a private hearing, prior to the public hearing, with related non publication orders under section 52 of the PIC Act. Depending on the nature of the matters canvassed and whether any applications are granted, the Commission gives consideration as to whether the non-publication order should be varied or lifted to allow for publication of the proceedings of the directions hearing as part of preparing its final investigation report.

Other than the preliminary hearing conducted as part of Operation Alford, the most recent of such hearings, conducted as a private hearing, was held in relation to Operation Lantana. The Commission held a preliminary hearing on 13 February 2009 followed by a public hearing from 16 – 19 February 2009. The nature of the issues



dealt with during the preliminary hearing for Operation Lantana is not such that the Commission considers the non-publication order should be varied. That investigation has now been concluded and the Report to Parliament is being prepared.

*Question*

3. *Will the Commission be placing a notation on their website regarding the Inspector's findings of lack of procedural fairness regarding particular officers?*

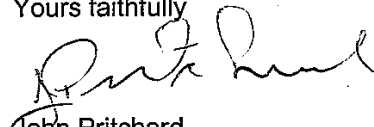
**Answer**

In relation to those officers who have been the subject of reports prepared by the Inspector in which the Inspector expressed a view that the officers had been denied procedural fairness by the Commission, the Commission has placed a notation on its web site relating to the relevant investigation report in one of those matters, being the Mallard report relating to Sergeant Alison Brazel. That notation, which was a response by the Commission to the recommendations in the Inspector's final Brazel report, was added before the Inspector's report was made public by virtue of it being included as part of the Inspector's Special Report to Parliament under section 101 of the PIC Act and presented to the Parliament on 2 April 2009.

As the Inspector's reports in both the Brazel and Young matters have now been made public, the Commission has recently proposed in correspondence with the Inspector that in both matters a notation be added alongside each respective investigation report on its website noting that the opinions expressed in those reports regarding each of Ms Brazel and Ms Young have been the subject of a report by the Inspector and providing a link to the report on the Inspector's website. The existing notation relating to Ms Brazel noting the Commission's disagreement with the Inspector's conclusions would be deleted at the time that link and notation are added. This would also represent the Commission's response to the recommendation at paragraph 100) of the Inspector's report relating to Ms Young about which the Commission has previously corresponded with the Committee.

In relation to the Inspector's report dealing with Mr Briggs and the other officers identified by the Commission as having been denied procedural fairness in Operation Whistler, the Commission considered adding a relevant notation alongside the Operation Whistler report on its website. Having discussed the matter further with Senior Counsel assisting the Commission however, the Commission came to the view that the most suitable way of addressing the issue of denial of procedural fairness was a report to Parliament as part of Operation Alford. The affected witnesses have been advised accordingly. Preparation of that report is well advanced and it is anticipated that it will be presented to Parliament in the near future.

Yours faithfully



John Pritchard  
Commissioner

## Chapter Three - Transcript of proceedings

**NOTE:** The Fifteenth General Meeting with the Police Integrity Commission was held at Parliament House, Macquarie Street, Sydney, on 21 May 2009 at 10am.

**JOHN PRITCHARD**, Commissioner, Police Integrity Commission,

**ANDREW NATTRESS**, Director, Operations, Police Integrity Commission,

**ALLAN KEARNEY**, Director, Prevention and Information, Police Integrity Commission, and

**MICHELLE O'BRIEN**, Commission Solicitor and Manager, Legal Services Unit, Police Integrity Commission, affirmed and examined:

**CHAIR:** The Committee has received a submission from you dated 29 April 2009. The submission consists of responses that you have provided to questions on notice in relation to your 2007-08 annual report. Do you wish those submissions to form part of your formal evidence?

**Mr PRITCHARD:** Yes.

**CHAIR:** Would you like to make an opening statement?

**Mr PRITCHARD:** No, other than to welcome the opportunity to meet with the Committee again. I am happy to turn the hearing over to members for any questions they wish to ask or queries they wish to raise.

**CHAIR:** I have a number of questions arising from the publication of a special report to Parliament concerning investigations into three complaints. The Commission established Operation Alford in response to the Inspector's report concerning complaints made by Senior Constable Briggs. Will the report on this investigation be tabled in Parliament?

**Mr PRITCHARD:** That is envisaged.

**CHAIR:** The Inspector's report on the complaint made by Sergeant Alison Brazel is critical of the Police Integrity Commission process of ensuring that all relevant information is obtained from officers called to give evidence and considered during the reporting phase of the operation and the way in which the Commission ensures that all relevant evidence is obtained after public hearings and during the drafting of the reports.

**Mr PRITCHARD:** We generally hold public hearings towards the end of an investigation. Hearings are held for the purposes of an investigation. However, hearings are not investigations in themselves. It does not always follow that material or information that has been collected during an investigation will necessarily be, or needs to be, canvassed, aired or brought out during the public hearing. Certainly, when the Commission turns to writing its report of the investigation for which the public hearing was held, those matters in the report are generally the matters that were canvassed or dealt with either at the public

hearing, those that are somehow regarded as relevant or those that became relevant post the hearing. Then there is a process by which that material is identified. If it is to be included in the report, it is provided to the relevant witnesses or parties who may be affected by it for any further comment on the basis that the Commission considers that material also to be relevant with regard to the final report it proposes to prepare.

I appreciate that these commissions operate in such a way that it is often perceived that the public hearing is, first, the investigation; and, secondly, the conclusion of the investigation. That can be the case on many occasions, but it is not necessarily the position. Information could have been received as a result of the public hearing, material could have been produced or further leads or areas of inquiry could have opened up as a result of the hearing that must be pursued. It may well be that the report is not produced or attention is not turned to producing it until those further matters and so on are canvassed. Sometimes that can result in further hearings being held, both public and private. We identify that information, assess its relevance and whether it is something that has already been aired in a public hearing or attention has been drawn to it in relation to the relevant witness or party. If it is to be referred to or relied upon in the annual report—and certainly if it is to be relied upon for any opinions as to misconduct and so on and any related recommendations—we identify it and provide it to the relevant parties.

**CHAIR:** If evidence is received after investigation and the report has been drafted, how is that incorporated in the Commission's opinions on an affected person?

**Mr PRITCHARD:** It can take many forms. If we think it is merely a matter that needs to be brought to the attention of a relevant party for the purposes of some submission or whether they wish some further action to be undertaken on behalf of the Commission then it is provided for that purpose. As I said, people often get the idea that the hearing is the investigation and everything that is aired or tendered becomes evidence for the investigation. That is misleading. Some of these investigations leading up to public hearings can take years. Public hearings are not meant to be occasions merely to present all the results of an investigation over a period of so many days; public hearings are targeted to achieve certain ends as part of the investigation.

We are mindful that often things may arise and it may be that further hearings are required, private or public. It may be that it is a matter that can simply be provided to the relevant party on the basis that an indication is given that the Commission proposes to rely on that as well. It may be that in order to comply with our obligations in that area we are bringing it to the relevant party's attention for consideration or any submission that the party may wish to provide in response to the Commission. As a general point, there is no set detailed procedure. Investigations vary. They are not something that can be wrapped around some kind of detailed practices and procedures so that one size fits all. They each have their own different circumstances and a great degree of flexibility is required to meet the different circumstances of each matter. Obviously some general principles apply and we bear them in mind when we receive further information or something else comes to light after a hearing.

**CHAIR:** Does the Commission generally give notice to people that they may be considered affected persons and therefore the subject of adverse comment?

**Mr PRITCHARD:** Yes, we do. The major vehicle used to do that is the submissions of Counsel Assisting. Counsel Assisting submissions are traditionally used as the means by

which notice is given to affected persons. Counsel Assisting will usually identify those persons whom they consider are affected persons as defined under the Act and will then set out the evidence or material that relates to that person and therefore whether the Commission should consider any opinion about misconduct in relation to that person and whether any related recommendation should be made. We ensure that when Counsel Assisting submissions are received—certainly now—that we meet to discuss them with the Commission Solicitor, the relevant investigator and the relevant lawyer and to ensure that all the matters that we think on the evidence presented during the hearing or anything further that might be needed are identified.

Those submissions are then provided not only to the affected persons but also a wider range of persons who have an interest, one way or another, in the hearings or the investigation itself. They serve to identify to those people: here is what is suggested as being the evidence in relation to you and also the opinions of misconduct that may be open, it is suggested to the Commission, in relation to you. If not, on occasion Counsel Assisting may not necessarily identify everything that the Commission considers relevant, and we will supplement the submissions of Counsel Assisting with a letter that identifies what we consider those other issues to be. As a general rule, any adverse opinions, shall I say, or comments or conclusions about a person are identified for that person to consider and then respond to.

In some jurisdictions it is a bit different. In Western Australia there is a specific provision in the Crime and Corruption Commission Act that requires the Commission to identify, by way of putting on notice, adverse opinions or comments that may be expressed about a particular person. We would say to a large extent that simply puts it in statutory form and in another way the submissions of Counsel Assisting perform that function before this Commission and, certainly from my experience, before the Independent Commission Against Corruption as well, as an example of another commission.

**Mr PAUL PEARCE:** I would not mind pursuing this issue a little but it travels into areas that have been identified as confidential.

**CHAIR:** We will be dealing with confidential matters at the end of the hearing.

**Mr PAUL PEARCE:** I ask that it be noted because there are some issues, particularly in response to Counsel Assisting in relation to one of the matters, that very much touch upon what has just been said by Mr Pritchard.

**CHAIR:** Has the Commission addressed the matter of timeliness in this process?

**Mr PRITCHARD:** To what aspect of timeliness do you refer?

**CHAIR:** In giving notice to people that they are going to be adversely affected by being named in a report, et cetera.

**Mr PRITCHARD:** The general process is that after the public hearing, in the absence of any need to identify any further inquiries or material, a timetable is laid down for service of Counsel Assisting submissions and submissions in reply. I am mindful of the report that was done by former Inspector Ireland in relation to practices and procedures of the Commission following the Malta inquiry where timeliness was an issue, and we are ever mindful of that.

There is no need, and we do everything we can to ensure that people who are the subject of our investigations have their positions clarified as quickly as possible. I say again, as much as we aim now for the final report in relation to a matter to be published within three months of the date of final submissions, which is our time line that we aim to comply with—

**CHAIR:** I was referring to alerting people about being named in the reports, et cetera. Is there no time-line drag there at all? Does that happen pretty quickly?

**Mr PRITCHARD:** It depends. It is rare that a person would be called before a public hearing in circumstances where that is the first time that they have become aware that the Commission has an interest in them. Very often there will be private hearings in the lead-up to a public hearing, for example. A person may have been approached for an interview and they may have declined, or a request may have been made of a person for some information. The idea that the first time somebody who is, shall we say, an affected person or a person of interest as regards some allegation of misconduct hears anything is when they appear in the witness box at a public hearing—to the extent that view is held—is misconceived.

Public hearings generally come towards the end of an investigation, by which time people are generally aware—in the sense that they are someone against whom allegations have been made—and the fact they have been summonsed to a hearing, makes them generally aware of the Commission's interest per se, if not the particular reason why the Commission is interested in them. That is not to say that on occasions—and I would suggest it is quite permissible under the prevailing law—a person in a public hearing does not have an allegation put to them for the first time. I would suggest to you that that is quite permissible, but it does not generally happen that way.

They may not know all the material that is the basis for that allegation being put to them until they are at the public hearing. I would resist any suggestion that the Commission is under some obligation to go through some sort of disclosure of what its case is, or what material it has to provide to a witness, before they are obliged to answer. Again, without being too legalistic, the prevailing law suggests that it is not obliged to. I do not know whether that answers your question.

**CHAIR:** It answers my next question.

**Mr PRITCHARD:** I suppose I should stop now after what you have indicated, but if it has not been made aware to a witness by the nature of their examination before a hearing that the Commission wishes to put matters to them, or in some other way it has some issue with the veracity of the evidence they have given, then when the submissions of Counsel Assisting are prepared that is when, if it has not become apparent by then, it will be more than apparent in those submissions.

**CHAIR:** Mr Pritchard, do you feel that the Commission does not have to ensure that all relevant information is disclosed to witnesses when they are called to the Commission?

**Mr PRITCHARD:** No, I am not saying that. Of course, if we have relevant information—if by "relevant" you mean it is relevant in the sense that it may well form the basis of, first, an allegation; and, secondly, an opinion may be expressed—then, yes, if it is available at that time and there are no other tactical reasons which may mean that is not an

occasion at which to put all the evidence, then normally it will be. But, as I said before, these can often be movable feasts: they are investigations. They do not follow any set or rigid format because each one varies and very often you will receive information afterwards.

It is the nature of the investigative process that people can often come forward at a time after or at different times. If that information is considered relevant to an allegation or an opinion then it is made available to the person. I would resist any suggestion that the Commission either deliberately or in any other way withholds from people information that it considers may be relevant to its opinion but, nonetheless, feels that it does not want to make available to a person affected. I reject that completely.

**CHAIR:** Has the Commission considered the Inspector's recommendations in each of his reports and will the Commission be acting on the Inspector's recommendations?

**Mr PRITCHARD:** I think we expanded upon this in relation to a particular question on notice. In relation to the Brazel report, we have placed a notation on the Commission's website, which has been set out in response to that question, that notes the Inspector's views—albeit the Commission disagreed, but nonetheless. The Inspector had a view about the opinion that was expressed and that reliance should be placed upon it. That is now available on the website in relation to the Mallard report. In relation to the Young matter, I anticipate receiving Mr Hastings' advice imminently, and by that I mean today—as I understand it following my conversation with him yesterday. It was in that report that the Inspector recommended that senior counsel's advice be obtained as to the appropriateness of the Commission's practices and procedures. That is a large part of what Mr Hastings was asked to consider but he was also asked to consider the contents of the Inspector's report.

You will appreciate, as we made clear in relation to the Brazel and the Young matters, that we do not agree with the Inspector in relation to the views he expresses and the opinions that he formed in relation to those reports. Upon receipt of Mr Hastings advice, we will consider that and then give some thought as to what our practices and procedures currently are and whether they require any change. In relation to the Briggs matters, you are obviously aware of the Alford matter, and the Alford investigation is the vehicle that has been chosen as the most appropriate vehicle we consider to address or remedy the issues that the Inspector raised in his two reports. We accept that not only in relation to Mr Briggs but there were other officers who were similarly affected in a way that the Inspector identified in those reports that we are endeavouring to use the Alford report to address also.

I take some comfort in that the Inspector's reports in that respect certainly in relation to the Whistler report that was tabled some three and a half years ago, and the Rani matter and the Mallard matter are now 18 months old. We have taken on board some of the views that the Inspector has in relation to internal procedures. I think even in relation to the most recent reports the Commission did last year in Pegasus and Luno, some of that is reflected in that report.

**CHAIR:** I have a final question before I open questioning to members. Can you explain to the Committee what you understand to be the Commission's obligation to provide procedural fairness?

**Mr PRITCHARD:** I do not know how much time you have.

**Mr MALCOLM KERR:** There is no time constraint. The Commission will appreciate that this is a very important matter and of great interest to the Committee as well as to the public.

**Mr PRITCHARD:** Absolutely, and I can assure you from the time that the Commission has been devoting to these matters that it is a matter of great interest as well.

**Mr MALCOLM KERR:** Mr Chairman, I do not want the Commissioner to feel that he is constrained by time.

**Mr PRITCHARD:** I take it as a challenge, Mr Kerr. I think you have to bear in mind the nature of what the Commission does. The Commission is an administrative body that conducts investigations and, on occasions, may report on those investigations. Under its Act it is permitted to express opinions about people's conduct in those reports and to make recommendations. Essentially, a large part of the starting point is that what the Commission does does not affect people's rights or entitlements; there is nothing that the Commission does that in any way impacts directly on a person's interests, entitlements or obligations.

But one of the recognised heads that triggers an obligation to accord procedural fairness is that the Commission, and in particular its public work and particularly its reports, can damage reputations. The risk of harm or threat of damage to reputation is what triggers, essentially, the Commission's obligations in relation to its hearings and reports: to ensure that a person is made aware of what an allegation or a possible adverse opinion may be expressed about; to be made aware of the evidence or the information that the Commission may rely upon in order to express or found that opinion and associated recommendation; to have an opportunity to comment on that material or evidence; and to make submissions, which the Commission is obliged to consider and carefully take into account as regards any adverse or contrary opinion it may be expressing.

That is a general summary. There are certainly many aspects related to it. But the other thing I would like to emphasise about it is that it is concerned with process, as the name suggests. It is not so much concerned with the result that may be achieved. It is not a case of looking at an opinion that the Commission has expressed and disagreeing with it or having some problems with it and then working backwards and thinking it must have been arrived at through a wrong process—that is putting the cart before the horse. What it is concerned with is process. But there are so many other aspects. We have an obligation to act fairly in the exercise of powers, we understand that, but the nature and content of the obligations of procedural fairness with that vary, again, from investigation to investigation. There is no set fixed body of rules or detailed procedures.

What I would say in this context and what I think there is a need to guard against in relation to these commissions is unnecessarily and unjustifiably judicialising—if I can use that word—commissions of inquiry such as the PIC. By that term I mean the application of principles and rules of practice and procedure that may apply in courts and other statutory tribunals automatically to commissions like the PIC, because while we may fall under that general genus of an administrative body, we are very different from a lot of other tribunals that fall under that. We are certainly not courts, and the Act provides that we are to exercise our powers and functions with as little formality as possible: we are not bound by the rules of evidence but we still have an obligation to act fairly.

I think it is important to bear that in mind and to be on guard about turning what is effectively investigation into litigation. I do not know whether that answers your questions about general principles of procedural fairness. I appreciate that the Committee's interest is probably more in the context of the public work that the Commission does—most notably, its hearings and its reports. But, together with those other matters that I have referred to in relation to Counsel Assisting submissions, they perform the role of putting a person on notice about any adverse opinion that the Commission may be open to make. Are there any specific questions?

**Mr PAUL PEARCE:** In light of your answer—if I could be guided by the Chair here—and in relation to the Young matter, how does your answer sit with the way certain evidence was handled by Counsel Assisting in the Young matter?

**Mr PRITCHARD:** You might have to identify which evidence you are talking about.

**Mr PAUL PEARCE:** It is in confidential. I just wanted some clarification.

**CHAIR:** At this point I think we will leave that because we are going to have to get into specifics.

**Mr PAUL PEARCE:** I am trying to hedge around that.

**CHAIR:** I refer you to the Committee's functions in paragraphs 2 (a), (b) and (c).

**Mr PAUL PEARCE:** I am familiar with that, Mr Chair. On a more general comment, you make the point in relation to the PIC Act—I think section 20—relating to the Commission not being bound by the rules of evidence, et cetera, and that it can exercise its functions with as little formality and technicality as possible. Given the nature of that and given that there are within the judicial process significant protections offered to people by virtue of those rules of evidence, does that not therefore put a greater onus on you to ensure procedural fairness—and very strict procedural fairness—to make sure that somebody is not ambushed?

**Mr PRITCHARD:** I am not sure I agree with that. "Ambush" is an emotive term. It depends what you mean. If some of the matters that are referred to in the report of the Young matter were to be carried over to requiring the Commission to act in a certain way, it would in some respects—and I do not say this lightly—seriously emasculate the ability of the Commission to do its job. As I said, "ambush" is emotive, but we are under—

**Mr PAUL PEARCE:** I withdraw the term "ambush".

**Mr PRITCHARD:** I am not saying it is wrongly used and, to a large extent and if you want to be frank about it, that is what these commissions do, in the sense that very often, particularly in a private hearing situation, the Act provides that when a person is called to a public hearing the obligation of the Commission is to announce the general scope and purpose of the hearing. The key word there we say is "general", and that often means that it will be expressed in a general way and allegations will be put to people, and very often the most obvious manifestation of that is having telephone calls played to someone. We are under no obligation to disclose our case, if I can put it that way, to a witness before they are called in, and very often they are ambushed. They are told, "We would like you to listen to



this phone call" or "We would like you to listen to this conversation". And they would have had no prior notice certainly of an investigative strategy or tactic like that being used.

But, as I said, if you are going to start applying rules and procedures that might apply in courts because it is thought to be fairer to somebody, I suppose that is a wider policy debate that might have merit that goes beyond maybe the confines of this discussion. At the moment, and when these bodies were set up—I do not think it is completely irrelevant to have regard to the history of why these bodies were set up—it was recognised that there was a deficiency or a gap in existing procedures or avenues available to investigate entrenched corruption. Corruption by its very nature is secretive; it is often very hard to even work out that it has occurred let alone actually find out what has happened. So there is a sort of trade-off that, all right, in order to get to the bottom of something and to find out and investigate misconduct and public corruption, it is seen that that may mean that procedures that otherwise might apply in other areas do not apply to these commissions. So it depends.

In terms of ambushing, there does come a point where, particularly at the report-writing stage, and particularly in relation to anything that the Commission proposes to do in a public way, it is required to say, "Here is the material that we are relying on in order to support an opinion that may be adverse to you that we are about to express. You now know what we now know and you can respond to it and you can make submissions and we will consider those." As I said, I reject any suggestion—and, to the extent that the Inspector suggests in his report, I reject it completely—that the Commission at any stage withheld evidence or relied on material or in any way withheld exculpatory material from that particular person. There is no basis for that whatsoever.

**Mr PETER DRAPER:** Operation Odin is looking at the way the police force manages officers at risk of future corrupt behaviour or misconduct. Do you still intend tabling a report into that operation before the end of June?

**Mr PRITCHARD:** I do not know whether we will be doing it by the end of June.

**Mr KEARNEY:** I think the end of June might be a little bit optimistic; it may be a couple of weeks after that. But the intention is that the report be published. I might just indicate that I think our response mentions that we intend to table it in Parliament. However, it is more than likely that the report will be published on our website and made available to interested parties.

**Mr PETER DRAPER:** Project Marrella is looking at class sizes resulting in inappropriate behaviour or misconduct. Can you give us an update on how that is progressing?

**Mr KEARNEY:** I can, if you just give me a moment. I may have some dates here that might assist. No, they are not immediately coming to me. We are in the midst of preparing a short research paper arising from Project Marrella looking at class sizes and whether a propensity to engage in misconduct may be linked to class size. That work is now being finalised internally. We would expect that probably within the same time frame as Odin—the end of the June-July period. Likewise, it would be published on our website.

**The Hon. LYNDA VOLTZ:** If I could ask a question about the oversight of the Crime Commission? You state that you will be overlooking it in the same way as the police officers

and that some complaints may be referred back for their own investigation. Does the Crime Commission have a complaints unit?

**Mr PRITCHARD:** It probably does not have a dedicated complaints unit. It has capacity, given the nature of its functions, to conduct investigations into matters that would be appropriate to refer back to it. So, to that extent, it would really depend a lot on the nature of the matter, and the section requires consultation with the Commission in relation to matters that we propose to send back for investigation. We take that into account. It has trained investigators; it is an investigative body. So that helps it to some extent, relative to, say, a lot of other public authorities and so on that would not have that capacity because it is not what they do.

Prior to the PIC taking over responsibility for the Crime Commission, as with all other public sector agencies, it had a capacity to deal with internal complaints. We are looking at that aspect as part of the systems review that we are currently doing of the Crime Commission. So, in short, it has the capacity and it would depend very much on the nature of the matter that is being referred as to whether that capacity is such that it can be able to conduct its own inquiries in relation to the matter that we refer.

**The Hon. LYNDA VOLTZ:** How will you decide on the referral back? Will it be on the seriousness of the nature of the complaint—the ones that are referred back to the Crime Commission?

**Mr PRITCHARD:** Generally the section requires us to focus on serious misconduct by Crime Commission officers. We started with treating all matters as perhaps something that requires at least some careful looking at by the Commission, without being too precious about the serious nature of it, if I can put it that way, because it is just a new jurisdiction we have obtained. But some matters do not necessarily raise issues of misconduct but might raise matters more of maladministration, if I can put it that way, and it is probably best left to the Commission to deal with the particular person. Generally, if it raises a misconduct issue, it is something that we may at least have a look around ourselves to establish that there is nothing in it before we send it back.

**The Hon. LYNDA VOLTZ:** Have you received many complaints about the Crime Commission?

**Mr PRITCHARD:** In preparation for a question of that kind—I think Mr Kearney can correct me—we have received 25 complaints in relation to the Crime Commission to date since 1 July last year. Of those 25, we have referred one back to the New South Wales Crime Commission, 17 are the subject of some more detailed assessment on behalf of the Commission, and the others are the subject of investigation.

**The Hon. LYNDA VOLTZ:** Do you anticipate tabling the Project Rhodium report in Parliament?

**Mr PRITCHARD:** Again in anticipation of that question, at the moment it is being prepared as a report for submission to the Management Committee of the Crime Commission, because it is on behalf of the Management Committee that the request was made originally to the ICAC by the previous Minister for the report to be done. We recognise—and I have had some discussions with Assistant Commissioner Clark in relation

to this—that there will be some public interest in the report. So, given the nature of the content of the report, it does delve in some detail into the Crime Commission's operations. Mr Bradley might have some views about the appropriateness of some of the information in it being made public, particularly in the area of informants; it is a very sensitive area.

I can only really say to you at this stage that it is a matter that we may have to give consideration to a bit further, and in particular raise with the Management Committee. But at the moment I can only say it has not been ruled out. It is not being done as an investigation report because we are not actually exercising investigatory powers. But, as I said, I appreciate that there is a large amount of public interest, and no doubt a large amount of interest on behalf of this Committee, in the report. There may be some other views by other persons about the appropriateness of that, which we will have to canvass.

**The Hon. CHARLIE LYNN:** Commissioner, I refer to a letter I have only just received, dated today, from the Hon. Peter Moss, QC, Inspector of the Police Integrity Commission. In the letter, which I assume you have, the Hon. Peter Moss says he composed the letter from home "following my departure from my office yesterday afternoon".

**Mr MALCOLM KERR:** Mr Chair, I wonder whether, in the interests of transparency, the letter might be read.

**CHAIR:** I have not read the letter. We have only just received it—

**Mr PRITCHARD:** I received a copy of it just prior to coming—

**CHAIR:** We really have not considered the letter as a Committee yet. We can deal with it by way of questions on notice if you like. To be quite honest, I have not had time to read the letter. We can discuss the matter at the end of the evidence, if you want to do it that way.

**The Hon. CHARLIE LYNN:** Just by way of clarification, the first part of the letter—

**Mr PAUL PEARCE:** Mr Chair, if we do not deal with it now, I am not sure at which point we can deal with it.

**The Hon. CHARLIE LYNN:** Firstly, the Hon. Peter Moss says that he composed the letter from home—

**Mr MALCOLM KERR:** Mr Chair, I do not think this evidence would make any sense unless the letter is read onto the record, so the questions can be looked at in their appropriate context.

**The Hon. CHARLIE LYNN:** I will read the letter. It is addressed to you, Mr Chair, from the Hon. Peter Moss, QC, the Inspector of the Police Integrity Commission. It reads:

Dear Mr Hickey

RE: SCHEDULED APPEARANCE OF PIC BEFORE YOUR COMMITTEE TODAY

- 1) I begin by apologising for the fact that this letter has been necessarily written in some haste (and composed from home, following my departure from my office yesterday afternoon), given the circumstances that I refer to in the paragraphs below. However, for reasons which will also appear from those paragraphs, and from the content of the correspondence between myself and the Commission which is attached, I consider it is *most important*, and in the *public interest*, that yourself and your Committee, notwithstanding the obvious time constraints, be made aware of the contents of correspondence that has recently passed between the Commission and myself in respect of Operation Alford, and, in particular, the private hearing that took place in the Commission on 8 December 2008, and which has been the subject of suppression Orders by the Commission ever since.
- 2) First, I enclose copies of the following correspondence:
  - (i) Letter to the Commissioner from the Inspector dated 1 May 2009
  - (ii) Letter to the Inspector from the Commissioner dated 6 May 2009
  - (iii) Letter to the Commissioner from the Inspector dated 6 May 2009
  - (iv) Letter to the Commissioner from the Inspector dated 20 May 2009
  - (v) Letter to the Inspector from the Commission dated 20 May 2009
  - (vi) Letter to the Commissioner from the Inspector dated 21 May 2009
- 3) The Committee will observe, from the terms of my letter to the Commission dated 6 May 2009, my grave disquiet as to the effect of the making of the Commission's suppression Orders made on 8 December 2008, which continue to keep the relevant issues shielded from public scrutiny, despite the obvious issues of public interest and Commission accountability involved.
- 4) With a view to ensuring that my concerns were known to the Committee prior to the Commission's scheduled appearance before it on 21 May 2009, I suggested to the Commission in my letter dated 6 May 2009, that copies of the relevant correspondence be provided in advance of the scheduled hearing to your Committee.
- 5) Not having received a response to that letter, and in particular, not having received confirmation from the Commission that the correspondence would be provided by the Commission to your Committee, I wrote the letter dated 20 May 2009, again raising the matter.
- 6) Following my return home from my office yesterday afternoon, I received by way of e-mail the Commission's letter dated 20 May 2009, which informed me, in particular, that the Commission had not forwarded the relevant correspondence to your Committee as suggested in my letter dated 6 May 2009, and that, in effect, it was up to me to provide copies of the correspondence to your Committee.

- 7) I have no objection, of course, to the Commission taking that attitude, but the timing of that communication has made it impossible, for me to provide the correspondence to the Committee in a timely manner.
- 8) Nevertheless, notwithstanding the difficulties created by this last minute communication by the Commission, I respectfully urge the Committee to have careful and considered regard to the correspondence referred to above, and, in particular, to note the continuing effect of the suppression Orders made on 8 December 2008. A copy of this letter has today been provided to the Commission.

Yours sincerely

The Hon Peter Moss, QC  
Inspector of the Police Integrity Commission

**CHAIR:** What is your question?

**The Hon. CHARLIE LYNN:** My first question related to his indication of whether he was just writing this after hours or whether he has departed from his position.

**CHAIR:** That may be a matter that we have to raise with the Inspector. I do not think the Commissioner is in a position to answer that question. I may be wrong.

**The Hon. CHARLIE LYNN:** My question is in regard to it—

**CHAIR:** I am just concerned about our terms of reference. That is why we have them in front of us.

**The Hon. CHARLIE LYNN:** May I ask the Commissioner this, because I think the question is relevant to this letter. Commissioner, if you regard it okay for the Hon. Peter Moss to provide information to the Committee, why would you not do so?

**Mr PRITCHARD:** I did not have a problem with the Inspector providing correspondence to the Committee. If he wants to provide correspondence to the Committee, he can. I do not see why he has to ask me to provide it. Obviously, he can communicate directly with the Committee. All I simply replied back to him was—and you can appreciate that in relation to Operation Alford there is a large amount of correspondence that has been going back and forth between us and the Inspector—if the Inspector wants to provide information to the Committee, I am not quite sure why he needs to ask me. It is a matter for him. That was what I replied in the letter of yesterday: "If you want to provide correspondence, I would have thought you are best placed to do that." I did not have a problem with the Inspector providing all the correspondence he wants to provide that may have passed between us. But I really would have thought that is a matter for him.

**The Hon. CHARLIE LYNN:** Mr Chair, may I ask that we ask the Hon. Peter Moss to provide that correspondence?

**CHAIR:** I have not gone through it succinctly, but from reading the opening paragraph it appears that it is attached to the letter.

**Mr PRITCHARD:** That is some of it.

**CHAIR:** I think that if he attaches all of it, it would be quite an interesting read in a couple of months. I think he has attached all he thinks we need to know. I may be wrong. I am happy for the Committee to write to the Hon. Peter Moss to ask him.

**The Hon. CHARLIE LYNN:** May I go to the report, and specifically to the matters arising from the report of the tenth general meeting, paragraph 22, which says:

In relation to the Inspector's report dealing with Mr Briggs' complaint, the PIC commenced Operation Alford ...

Paragraph 22 continues:

In relation to the report dealing with Ms Brazel, notwithstanding that the PIC does not agree with the findings set out in the Inspector's report, the PIC agreed to place a notation on its website in relation to the opinions expressed regarding Ms Brazel in the Operation Mallard Report. As recommended by the Inspector, the PIC extended to Ms Brazel the opportunity to be heard on the content of that notation and took into account the matters raised on her behalf. That notation, added to the PIC's website edition of the Operation Mallard Report on 2 April 2009 reads as follows:

The Commission's opinions expressed at paragraphs 4.49 and 4.50 together with the related recommendations at paragraph's 4.51 and 4.52 of the Report were the subject of complaint to the Inspector of the Police Integrity Commission. In a Report dated 23 February 2009 the Inspector found that in expressing its opinions as to Ms Brazel the Commission failed to accord procedural fairness to her and that therefore "no reliance adverse to [Ms Brazel] should be placed on the opinions concerning [Ms Brazel] by any person or other legal entity".

While the Commission does not agree with this finding nevertheless the Commission does consider it appropriate in the circumstances to make this notation.

It seems to me that that last comment is unfair: either she was accorded procedural fairness or she was not. That seems to contradict the statement—

**CHAIR:** If I may interrupt. The Committee's terms of reference are very clear. Paragraph (2) of our terms of reference states:

(2) Nothing in this Part authorises the Joint Committee:

(a) to investigate a matter relating to particular conduct, or

(b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, a particular matter or particular conduct, or

(c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or a particular complaint.

I think that covers what we are talking about. What I suggest is that when we go into evidence in camera we have a look at some of the issues there.

**The Hon. CHARLIE LYNN:** Mr Chair, I was not seeking to re-investigate it. I just thought that that cancelled out the point.

**CHAIR:** I am just trying to stick to our terms of reference, because at the end of the day they are our terms of reference. I am happy to consider a question on a particular broader spectrum in camera, if you want to talk about specifics in that and how it affects the broader outcomes. I am happy for that to be looked at.

**Mr MALCOLM KERR:** I want to deal with some of the matters arising from Mr Pearce's questions to the Commissioner. Commissioner, in terms of a traditional approach to your investigations, I think you said—and I do not want to verbal you—that you did not necessarily apply judicial rules and procedures to the investigation. Is that right?

**Mr PRITCHARD:** No, I do not think that is right. What I am saying is that an automatic application of rules and procedures from courts, without more, is something that I think is to be guarded against. That is not to say that there are some procedures that apply to a court that may be relevantly applied to the proceedings of a commission like the Police Integrity Commission. All I am simply saying is that a holus-bolus or wholesale application of them is unnecessary and unjustified.

**Mr MALCOLM KERR:** Could you give the Committee some examples of those rules and procedures that you think are inappropriate?

**Mr PRITCHARD:** For example, if I can start from the general proposition, we do not conduct litigation. We are not an agency that determines or adjudicates on disputes or issues between parties. We conduct investigations. This is an issue—in fact, it is probably a good example to use in relation to the Young matter—and my view remains that the Commission was not obliged to provide a copy of a report that it proposes to rely on in a private hearing prior to that hearing being held. Things like pre-trial disclosure, disclosing your case, things of that nature are concepts that apply in a judicial process that do not apply to an investigation. Is it suggested that when the police conduct an investigation that before they go and interview anybody they have to provide the case or the evidence or the very matters that they are going to ask them about?

**Mr MALCOLM KERR:** Police do have to provide a brief.

**Mr PRITCHARD:** In a court.

**Mr MALCOLM KERR:** In a court, yes.

**Mr PRITCHARD:** Indeed, but we are not a court. When we hold hearings, the hearings are held for the purposes of an investigation. The hearings are not held to determine the issues.

**Mr MALCOLM KERR:** But courts are also there to determine the truth of allegations or complaints.

**Mr PRITCHARD:** You must have gone to a different law school than I did, Mr Kerr.

**Mr MALCOLM KERR:** Really? Courts are not there to determine the truth of the matter?

**Mr PRITCHARD:** Again, that is probably a good comment. Because if you were to go back to the situation, say, leading up to the establishment of the ICAC or the establishment of the various royal commissions in the other States in Australia that have led to the establishment of standing bodies, I think you will find that the argument was in many cases, certainly in courts, that courts are not the best place to determine the truth, as it were, and that is why these bodies have been set up. It was acknowledged that the rules and procedures that might apply to a court in terms of getting the truth were not working.

In our hearings we can coerce evidence to be given, but with some privilege or some protection around the use of that evidence later on. In a court you cannot be made to incriminate yourself. In our hearings you can. I think you have to accept, therefore, that the nature of the hearings that we conduct is fundamentally different. They are not court proceedings; they are not litigation. That is a concern and a fear that, I think, has to be guarded against. If the Commission has to start conducting itself or commissions start conducting themselves in the way of litigation, I would have thought to a large extent the very purpose of their establishment is going to be defeated.

**Mr MALCOLM KERR:** As you say, the Commission is a very powerful body. A police officer, a citizen or a journalist could think that he or she is taking part in a private conversation and that conversation could be intercepted by the Commission. So there are a number of civil rights involved in relation to the exercise of your power.

**Mr PRITCHARD:** Yes.

**Mr MALCOLM KERR:** And there is a public interest in protecting those civil rights in accordance with the public interest.

**Mr PRITCHARD:** I am sorry, I do not—you go on, I will listen.

**Mr MALCOLM KERR:** You infringe upon a person's civil rights to a private conversation in the interception of a telephone conversation that would not normally be available.

**Mr PRITCHARD:** Is that a question or a proposition?

**Mr MALCOLM KERR:** That is the question.

**Mr PRITCHARD:** Are you putting that as a question?

**Mr MALCOLM KERR:** I am putting that as a question, yes.

**Mr PRITCHARD:** To the extent that telephone conversations are played in public, then it may well be said to be a question or a breach—not a breach, I think that word carries connotations—but it may be intrusive into the privacy of a person. I would concede that.



**Mr MALCOLM KERR:** That is why I said civil rights that are in accordance with the public interest. Sometimes the public interest will override an individual's right.

**Mr PRITCHARD:** Are you asking me as a question or are you putting that as a proposition?

**Mr MALCOLM KERR:** No, I am asking a question. I do not want to put propositions to you that you do not agree with.

**Mr PRITCHARD:** Perhaps I could short-circuit this. There is an elaborate regime established for commissions of this kind applying for and then using conversations they record, either by telephone or other listening devices. That legislative scheme also provides a very detailed regime for the use of that product in the course of the Commission's investigations. That may mean—and I think I know the matter that you are referring to, in particular—that conversations, telephone conversations, for example, are played in a public hearing context where a person may otherwise think, or be entitled to think, that it was a private conversation, and it becomes public.

But I would say to you that the legislation that allows it to happen recognises that but nonetheless decides or has determined—the legislature has determined—that it is permitted or that it is an adverse effect, if I can put it that way, that nonetheless is balanced against the need to obtain or use that material so long as it is obtained pursuant to the legislation that allows it. There seems to be this idea prevailing that because a person's reputation is damaged or because some privacy is breached, therefore, per se, the Commission has done something wrong. That is not correct.

**CHAIR:** If I may cut to the chase, Mr Pritchard, the way I perceive it some opinions say that the Commission should be showing more procedural fairness in its investigations. The Commission itself says, no, we should not because we are only investigating the outcomes of rumours or accusations, so we do not feel we need to show procedural fairness. Is that how it is?

**Mr PRITCHARD:** No, Mr Chair, I want to correct you on that. We acknowledge that we have an obligation to act fairly and we acknowledge that we have obligations of procedural fairness. The nature and content of those particular rules, those particular requirements, vary. It varies depending on taking into account the nature of the Commission's functions and it varies, often, depending on the nature of the investigation. I reject completely this suggestion that somehow or other whenever we hold a public hearing that we just play every telephone conversation or every other private conversation that we have ever recorded and just play it without any consideration being given to editing it or taking excerpts out that are relevant to what we are interested in. The fact is that the legislation for telephone intercepts allows private conversations to be played in a public setting. If it is suggested to me that that is not the case, well, I am sorry, I think you need to go and look at the legislation.

That is not to say that we do not have a further obligation to ensure that there are not any unnecessary breaches of privacy, that there are not any unnecessary aspects of the content of a particular conversation that are not relevant to our investigation. We do take that into account. We are mindful of the fact that, very often, personal matters can be picked

up as a result of a conversation. I am sure you only need to apply commonsense to realise that whenever any two people have a conversation the subject matters can chop and change very quickly. To suggest that you can edit a telephone conversation in such a way that the private matters or purely irrelevant matters are easily compartmentalised from that which you are interested in defies commonsense.

**CHAIR:** It is a bit like a committee meeting.

**Mr PRITCHARD:** Yes, it could be like that. And even in circumstances where—look, I think I know the matter Mr Kerr is referring to and I will not go into it, but it can sometimes be—

**Mr MALCOLM KERR:** I was just asking in relation to general matters, general principles.

**Mr PRITCHARD:** Clearly, if you have got a telephone conversation you have two persons to the conversation. One person could be the person who is of interest to you, not the other person. In circumstances like that we generally try as best as we can to advise people who otherwise are not the subject of our inquiry or who otherwise are not people against whom we are making allegations that "Your name may be mentioned in this matter. You may like to appear." But to suggest that we have to do that weeks in advance or some time out is not correct because we do not have to telegraph exactly what it is that we may or may not be doing in a public hearing. It is a difficult weighing exercise; it is a difficult balancing exercise. But I think it has to be said, and the courts dealing with these bodies have acknowledged, that with the legislature allowing these bodies to have the powers they do there is a compromise; there is a balance between, yes, there could be some damage to reputation, yes, there could be some harm to reputation, but it does not follow from that therefore that there has been denial of procedural fairness.

What you have to do is weigh it up and take it into account, and you do everything you can to avoid it. There is a simple way, a simple answer to all of this: we just will not do public hearings. It is as simple as that. That is the end of it; we will not do them. That is easy; we can deal with it quite easily. But the fact that you can, and the fact that you can allow this material to be used, particularly of a private conversation nature, means it is inevitable that some people will be unhappy that something that they thought might otherwise be a private conversation has not been. That is why the legislature has decided to enact this rather elaborate regime to ensure that if you are going to do that you follow these steps.

**Mr PAUL PEARCE:** Mr Pritchard, I have listened to what you have said. I refer again to section 20 of the Police Integrity Commission Act in relation to the rules of evidence. I accept what you have said in terms of the legislature's view. Would you like to comment on that relative to comments by Evatt J., which are recorded in the Inspector's draft report in relation to the Brazel matter, where he said:

Some stress has been laid by the present respondents—

**Mr MALCOLM KERR:** Mr Chair, can we have the case?

**Mr PAUL PEARCE:** I am coming to that. It is 50 CLR 228 at page 256. I am sure Mr Kerr will be able to look that up.

**Mr MALCOLM KERR:** I am just an ordinary person. I am trying to follow these complex legal arguments.

**Mr PAUL PEARCE:** Evatt J. said:

Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, "bound by any rules of evidence." Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer "substantial justice."

As I recall, this determination referred to an immigration tribunal matter that subsequently went before the Federal Court. I may be wrong because, as you can imagine, there was a fair amount of material before us. When we look at this issue of the non-applicability of the rules of evidence in your proceedings, there is a judicial finding in relation to that type of clause in the Federal Court. Do you want to comment on that?

**Mr PRITCHARD:** I vaguely remember the case that you are citing, Mr Pearce. There are a couple of things I would say. I do not suggest that because the section says we are not bound by the rules of evidence, therefore, we just throw them out the window. We have a standard of proof that we are required to meet, which we set out in all our reports, which is often referred to in a shorthand way as the Briginshaw standard. That is a rule of evidence, to a large extent, which we are obliged to comply with as to the—

**Mr MALCOLM KERR:** Mr Pritchard—

**CHAIR:** Let Mr Pritchard finish.

**Mr MALCOLM KERR:** I was only going to ask for the definition of that standard for ordinary people like me.

**CHAIR:** Having more lawyers on the Committee than laypeople creates problems.

**Mr PRITCHARD:** Reasonable satisfaction, I think is the shorthand way of describing it. It is a civil standard of proof, falling short—anyway I do not want to get into that. The suggestion appears to be that somehow or other we just operate according to whatever whim we decide on a particular day.

**Mr PAUL PEARCE:** That is not what I am suggesting.

**Mr PRITCHARD:** That may be a bit unfair. Some of those decisions do apply in circumstances where tribunals in question do affect people's rights. The Immigration Review Tribunal, the Refugee Review Tribunal, the decisions they make—those tribunals adjudicate

or determine issues between parties and the decisions they make directly affect a person's rights. That influences to a very large extent the nature and content of the particular rules of procedural fairness that the particular body has to comply with. As I said before, I do not for one second diminish the importance that the harm or threat of damage to a person's reputation that these agencies can do is to be minimised.

But, at the end of the day, no decision that we make results in any police officer being dismissed. No decision we make results in anyone being prosecuted. We recommend certain action; we recommend other agencies consider doing things. After they have received our recommendation and considered it, they may decide to do nothing, in which case that is the process; that is how it works. But we are mindful of the fact that that section is not a licence or a blank cheque to just take into account any information that we consider may be remotely relevant or that in any way could be the basis, no matter how unreliable, how incredible or how tenuous or anything it is.

We have now elaborate practice guidelines and directions on our website as a result of the previous report that Inspector Ireland did into the practices and procedures, which sets out how we apply our procedures in relation to public hearings. I suppose what I am getting at is they are flexible, but to suggest that we are not mindful of the need to act fairly—and as best it can be described, and even how the courts described it, as the test that ultimately is applied, that is, is there any unfairness—I would reject that completely. I speak as someone who has been in these bodies, in these commissions, for some eight years now but previous to that I had acted for people appearing before these bodies. I would be the first to acknowledge that when you appear before these commissions, certainly the advice I used to give to clients appearing before these commissions is "Submit, there's not much you can do."

But you do realise when you appear for somebody that you are stacked against a body that has enormous powers and can do enormous damage. I would be the first to acknowledge that. At the same time, those powers have been given for good reason. They have been given for a reason because it is considered that the nature of what you are investigating—misconduct, entrenched corruption—is by its nature secretive and difficult to establish. It means, therefore, that rules or procedures that might apply in a court to get to the truth of a matter do not necessarily apply in the Commission. That is not to say that they may not be useful or applied in circumstances, but they are modified; they are not the same.

**Ms O'BRIEN:** I do not know whether it will assist the Committee, but for the benefit of clarification, what needs to be borne in mind in this debate is that while the processes the Commission engages in in the course of an investigation are, indeed, not bound by the same rules of court that you might find in a prosecution where you have to serve a brief and disclose your case, the Commission accepts—and section 20 is a good example—that, notwithstanding the particular provisions of its legislation, as a matter of general law commissions such as the PIC and the ICAC are bound by the requirements to accord procedural fairness. In the case of a commission like the PIC, that requirement is enlivened when the Commission gets to a point where it is going to exercise its power in a way that may cause damage to someone's reputation. That happens at the point where the Commission publishes a report and it becomes a public document.

The Commission accepts that, and always has since it commenced operation in 1996; before it publishes opinions that may be viewed as adverse to people, those people are given the opportunity to know what the Commission is contemplating and what the

evidence is that it relies upon. While it may be that in the course of an investigation or a hearing someone is asked questions based on material in the possession of the Commission that they have not seen, by the end of that process they will know in the same detail as the Commission knows what the content of that material is and the manner in which the Commission intends to rely on it to express its opinion. So that is the point at which any suggestion of ambush or any other word you want to use falls away because the Commission accepts quite plainly that before it publishes opinions or recommendations it, as a matter of fairness, makes available to the parties affected by those opinions what that material is and what use the Commission intends to make of it.

**Mr PAUL PEARCE:** From your comments, which I agree in principle are points of law that should be followed, how does that commentary fit with the Inspector's view in relation to certain material in the Young matter?

**Ms O'BRIEN:** The Commission is not entirely sure because the facts are that in the Young matter the expert evidence that the Commission relied upon was first made available to Ms Young during the hearing that the Commission held and that subsequently, prior to the publication of the Commission's report to Parliament—

**Mr PAUL PEARCE:** Actually, that is disputed by Young's—

**Ms O'BRIEN:** What is disputed?

**Mr PAUL PEARCE:** That the material was made available in its entirety.

**Ms O'BRIEN:** If I may finish, the fact is that the full text of the expert's report was made available to Ms Young's legal representative for comment prior to the publication of the Commission's report to Parliament.

**Mr PRITCHARD:** You have to accept, Mr Pearce, there are some issues that we have in dispute with the Inspector in relation to that. So that may influence the standpoint from which we come.

**Mr PAUL PEARCE:** You have to understand that as a Committee we are seeing your reports and those of the Inspector operating on our behalf and they appear to be in conflict.

**Mr PRITCHARD:** That is right.

**Mr PAUL PEARCE:** And the correspondence certainly bears that.

**Mr PRITCHARD:** In fact, it is why, in response to the questions on notice, I felt it was necessary to ensure that this Committee was seized of the reasons why we disagreed with the Inspector. As part of his drafting of the special report to Parliament, we specifically requested the Inspector to include all the correspondence passing between us and him in relation to the Brazel and Young complaints so that as a matter of public interest if there is going to be disagreement between us, the reasons or the basis of that could be seen. And in support of that we refer to a report of a similar committee as this in Western Australia, which had been dealing with issues in dispute between the Inspector and the Commissioner over there where the Commissioner took the route of presenting his own special report to Parliament to counter what were the Inspector's criticisms of reports that he had prepared.

That is not a route that I have ever considered appropriate but, nonetheless, the committee in reviewing the relations between the two bodies over there suggested that when the Inspector prepared a report to Parliament that was critical of the Commission it should include all submissions that the Commission had made so that as a matter of public interest the reasons for the difference could be there for everyone to see. But the Inspector declined to do that.

**CHAIR:** Why do you believe the Inspector and you have two entirely different perspectives of that particular case? How do you believe you have become polarised on this issue? I think that is a fair—

**Mr PRITCHARD:** No, it is a fair question, Mr Chair. I am just trying to choose my words carefully. I suppose my biggest or larger difference with the Inspector would be that I do think he is applying rules of practice and procedure from courts and other sorts of statutory decision-making tribunals that are not necessarily, or justifiable to be, applied to a commission such as the PIC.

**CHAIR:** But in respect of the particular issue of the Young case, you are saying that her legal representative received all the information. From what I have read, we are being told quite a different version of events.

**Mr PRITCHARD:** No.

**CHAIR:** If the Commission is saying, "Yes, we have given out all this information to her legal representatives" and the Inspector is saying, "No, they have not applied procedural fairness". How was this position reached?

**Mr PRITCHARD:** I think I understand where you are coming from. There are two aspects to it. In relation to the particular expert's report, which the Commission referred to in its report, as Ms O'Brien said, that was provided. As we attempted to explain in our submissions to the Inspector, it was the basis of the expert examination during the private hearing at which Ms Young was present. I do not know whether you have seen our hearing room, but the way the Commission's hearings operate is paperless, if I can put it that way. When documents are shown they are flashed up on screens as opposed to hard copy, to which the witness, the witness's lawyer, the Commissioner and Counsel Assisting all have access. So when the expert gave her evidence, portions of the report were flashed on screens and referred to, which everyone could see. After the hearing a full copy of the report was provided to her lawyer as part of the submissions of Counsel Assisting in order for a response prior to the report being prepared.

I think the other issue you may be referring to is what the Inspector seems to regard as exculpatory material that the Commission did not provide. In that respect, to the extent that information was provided, that is correct. But in our view, on any proper analysis of it, it was not exculpatory and it was not relied on by the Commission when it came to write that part dealing with Ms Young in the report. I think that is where we have some disagreement with the Inspector about further inquiries that were done, which in our view—and I think even the Inspector used the word himself in his report—were inconclusive on the issue. They took the matter no further, neither for nor against. We do not consider ourselves to be under any obligation to provide that material because it was not material that we relied upon

or referred to in the report in support of the opinions that we expressed. That may be where we have another issue of disagreement of a factual kind perhaps.

**CHAIR:** I think first we probably need to organise a trip to see your hearing rooms.

**The Hon. CHARLIE LYNN:** In your report in the case of Brazel and Young you refer to a technical failure to ensure that the report only contained adverse material that had appeared in submissions.

**Mr PRITCHARD:** What are you reading from?

**The Hon. CHARLIE LYNN:** I am referring to operations Whistler, Alford, Mallard and Rani. You said the PIC Inspector has made two reports in relation to complaints by Detective Briggs arising out of the Commission's Operation Whistler and reports on complaints by Brazel and Young in regard to Operation Mallard and Operation Rani respectively. In each case he found that the Commission had failed to accord procedural fairness to the complaints. Then your response to that seemed to be that this was a technical failure to ensure that the report only contained adverse material, which had appeared in submissions. Inspector Peter Moss in his letter to you states:

- 9) In each case adverse opinions were published concerning them in the Whistler Report, in respect of which they were given no prior notice by the Commission, and thus no opportunity to be heard, such adverse opinions expressly and explicitly calling into question their *integrity* as police officers.

Then he says:

- 10) As the Commission is well aware, these adverse and damaging opinions because they were published in circumstances which denied the officers procedural fairness, were published without authority and must be regarded as void. To suggest that such unauthorised conduct on the part of the Commission could in *any* sense be described as "a technical failure", in my view, goes to the heart of the Commission's ability and preparedness to deal properly with the serious and continuing damage to the reputation of these officers.

Would you care to comment on that?

**Mr PRITCHARD:** Are you reading that from the letter of the Inspector this morning?

**The Hon. CHARLIE LYNN:** Yes, it is dated 21 May.

**Mr PRITCHARD:** Mr Lynn, as we indicated in the answer, I am referring to it as a technical failure, a technical oversight. I am not wishing to downplay its seriousness. The use of the word there is probably regarded more in the way of a legal technicality. But I do not for a moment, and in relation to the Briggs matter, the Whistler report, we have always conceded that there was a breach of procedural fairness there. We have never run away from that. As soon as the complaint was made and the Inspector did his reports we acknowledged that there had been a breach. Not only that, we acknowledged that in relation to other officers who were treated in the same way that they too had been affected. I just want to make that clear.

**The Hon. LYNDA VOLTZ:** Could I clarify how the acknowledgement was done?

**Mr PRITCHARD:** In response to the Inspector's—

**The Hon. LYNDA VOLTZ:** In respect of the concern, where was the acknowledgement done?

**Mr PRITCHARD:** When the Inspector first raised the matter with us we responded to the Inspector and said we accepted that that—

**The Hon. LYNDA VOLTZ:** But that is to the Inspector. How was it publicly acknowledged?

**Mr PRITCHARD:** We wrote to the officers concerned. By way of trying to address the issues that had been identified by the Inspector, we wrote to the officers concerned and indicated that that had been done. I am not sure whether we actually referred to it in the annual report. We did not name the officers. And in relation to the Alford matter, we in large part also proposed to deal with it in a public way. At the time we did attempt to amend the report that was on the website, as a result of the Inspector's reports. But due to legal advice that we had, which everyone seemed to agree on, technically it was not possible to do—the report is what it is, and it cannot be amended. And now for the Operation Alford process we are trying to redress that.

**The Hon. LYNDA VOLTZ:** You are saying that the report still exists on the website?

**Mr PRITCHARD:** The report still exists on the website in the form that it is. It is there because of the advice we received that the report is what it is: it cannot be amended, it cannot be changed. For all its failings, if I can put it that way, it has to be accepted for what it is. As I said, our attempts to amend it had to be reviewed. It is a complex matter. This raises some very difficult, complex issues about legal issues in responding to a report that, legally—and I emphasise legally—is of no effect in any event. We have had advice from Senior Counsel ever since the matters were first brought to our attention. We appreciate that there is an issue here that has to be addressed. How best can we do it?

**The Hon. CHARLIE LYNN:** I go back to a matter I referred to earlier, in paragraph 22 of your response.

**Mr PRITCHARD:** When you say "response"—

**The Hon. CHARLIE LYNN:** Sorry, the response to the questions on notice of the Eleventh General Meeting of the Police Integrity Commission, which are matters in the report of the Tenth General Meeting. I am referring to the issue of procedural fairness to Ms Brazel. It states:

That notation added to the PIC's website edition of the Operation Mallard Report on 2 April 2009 reads as follows:

The Commissioner's opinions expressed at paragraphs 4.49 and 4.50, together with the related recommendations at paragraphs 4.51 and 4.52 of the report,



were the subject of complaint to the Inspector of the Police Integrity Commission. In report dated 23 February 2009 the Inspector found that in expressing its opinions as to Ms Brazel, the Commission failed to accord procedural fairness to her and that therefore no reliance adverse to Ms Brazel should be placed on the opinions concerning Ms Brazel by any person or other legal entity.

There is an additional paragraph, which states:

While the Commission does not agree with this finding, nevertheless the Commission does consider it appropriate in the circumstances to make this notation.

Do you see any reason for that last paragraph? It seems to negate the assertion that she had not been afforded procedural fairness.

**Mr PRITCHARD:** Again, Mr Lynn, firstly, it is the fact. We do not agree with the finding. Secondly, the Inspector does not have any power of direction over the Commission. To the extent that he was expressing a view, he was expressing a view that the Commission does not agree with. I do not see that there is anything inconsistent or anything contrary, unfair or improper in the fact of the Commission's disagreement with the Inspector's views being noted.

**The Hon. CHARLIE LYNN:** I cannot recall your exact earlier words in regard to the impact of the Commission's hearings on the careers of police. It would seem to me that whilst it will not affect their promotion and so forth, the fact that they were mentioned, whether adversely or whatever, or were under investigation, would in reality have a major effect on their future career prospects. Therefore, one would have to be very careful in that regard.

**Mr PRITCHARD:** Do you mean as a matter of principle?

**The Hon. CHARLIE LYNN:** Yes.

**Mr PRITCHARD:** Not just specifically related to this inquiry?

**The Hon. CHARLIE LYNN:** No, as a matter of principle.

**Mr PRITCHARD:** Obviously it is not desirable, but to what extent it becomes an issue from the point of view of that officer in relation to the police or the investigation that is ongoing, the police take advice from us in relation to those issues. But to a large extent they take their own advice as to when they think it is appropriate, and if it is appropriate at all to move on any matters that we may refer. We are mindful that when someone is under investigation that investigation should be conducted as quickly and as effectively as it can be. Any issues should be resolved one way or the other; sometimes they can, sometimes they cannot.

To the extent that the police have their own internal processes or procedures to deal with issues that we raise, that is a matter for them. They do not necessarily hang on every word we say. It is important to bear that in mind; even when we do a public report, we only recommend consideration be given to certain action being taken. We do not actually

recommend that it be taken. We recommend, "You consider taking it". As I said, the police then apply their own processes and procedures to deal with management action, particularly if they propose to take disciplinary action. They have to take into account a whole host of factors that are completely different from whatever the Commission does. We just act as a catalyst to start a process that they then take over. They may do that, and they sometimes do consider what we raise and think, "Well, we have considered that. We are not taking any action. We might disagree with you, but that is the process".

**The Hon. CHARLIE LYNN:** Paragraph 1 of the report I referred to earlier, in regard to the risks, says that the Police Integrity Commission intends to conduct research into compliance by the New South Wales Police Force with relevant policy and procedures during the conduct of searches. That is in regard to searching premises.

**Mr PRITCHARD:** Is this in the answers to the questions on notice?

**The Hon. CHARLIE LYNN:** Yes. It says that you were considering investigation into that, and states, "as existing projects conclude and resources become available". Can you give an update on that? Are your current resources sufficient to allow you to carry out your role?

**Mr PRITCHARD:** I will answer the second part first, and Mr Kearney has more detailed knowledge of the first part. Generally, yes, we have sufficient resources to carry out our functions. We are all affected at the moment by the same problems that all the public sector is experiencing. We had to cut our cloth to suit the circumstances. Generally, I am not coming here with a begging bowl, or anything of that nature. It is difficult to be an agency in the public sector these days. At the moment we have received extra funding for the Crime Commission, as indicated in the answer to the questions on notice. However, we are managing at the moment and I am not in a position to say that there is a task, investigation or project that we would like to do that we cannot do because of the resource factor. In relation to the specific issue of search warrants in the first part of your question, Mr Kearney might be helpful.

**Mr KEARNEY:** The question was whether we had commenced the project. Yes, we have. Recently we received approval internally. We are in the planning stages now. The expected completion date is probably towards the end of the next financial year.

**The Hon. CHARLIE LYNN:** In the report you mentioned the term "matrix management". I have never heard that term before. Could you explain it? I thought your answer was spot on, but could you explain what matrix management is?

**Mr PRITCHARD:** I might have to hide behind my lawyer's cloak! I understand that the Committee itself probably raised it, given the question. The genesis for that question, and the reference to the "matrix management" principle may come from the ICAC Inspector's report—

**The Hon. CHARLIE LYNN:** That is right.

**Mr PRITCHARD:** —dealing with matters relating to Mr Breen, and to that extent I do not completely understand what the ICAC Inspector was referring to when he referred to the matrix management style. In the Police Integrity Commission—and my previous experience

with the Independent Commission Against Corruption is the same—they operate on multidisciplinary or multifunction teams, as it were. We consist of different disciplines, lawyers, investigators and analysts. The matrix style of management, as I understand it, has all those different disciplines lined up according to their particular discipline and they report to a particular head or leader of that particular discipline.

Nonetheless, they may cross over. As regards a matrix management style, I can only say how the Commission operates. It is the multidisciplinary team structure that we operate under. Administratively, there are alignments, depending on the discipline, but when an investigation or a project is undertaken, different persons, depending on their particular skill or discipline, are called upon and a team is formed around that. I fall back on my answer to the question in relation to the matrix management principle.

**The Hon. LYNDA VOLTZ:** In response to a question on notice you said that the Police Integrity Commission is conducting research into compliance by the New South Wales Police Force's relevant policy and procedures during the conduct of searches as existing projects conclude and resources become available, and that they are in the early planning stages. Do you have an idea of when that project is likely to come on line in regard to search warrants?

**Mr KEARNEY:** Yes, that is the project we referred to a moment ago. It has commenced. We are in the planning stages right now.

**The Hon. LYNDA VOLTZ:** It is in the planning stages.

**Mr KEARNEY:** It is a bit complicated, in that we do not know the extent of the documentation—the records associated with searches available with the New South Wales Police Force. When you ask a question you get a long list of things. We need to sift through those to identify what is going to be the most useful to base our research upon. We are in the early stages, but probably in about a year's time we will see some results there.

**Mr PAUL PEARCE:** Are the police cooperating with you in this matter?

**The Hon. LYNDA VOLTZ:** They are providing huge amounts of data, by the sound of it.

**Mr KEARNEY:** Indeed they are. Their interests and ours are pretty closely aligned. Most of our dealings are with the Professional Standards Command [PSC] and it is in their interests as much as our own to prevent misconduct occurring. Yes, they are very helpful.

**The Hon. LYNDA VOLTZ:** Earlier you said that you had asked the Inspector to provide correspondence to the Committee to reflect your views in regard to the Briggs matter. The Hon. Charlie Lynn read out the Inspector's letter in regard to him asking to provide correspondence. While there is a divergence of views, quite often when you have two separate entities there are different views. Do you see a benefit, as you did in Briggs, in ensuring that your views were reflected when the Inspector was being asked about it? You stated that Western Australia had previously followed this line. Is that an appropriate way to do that when there is going to be a difference of opinion? In the Inspector's case, he was obviously concerned about our knowledge of a certain issue and requested that correspondence be provided.

**Mr PRITCHARD:** I am sorry, may I summarise what I understand you are asking? Do we think it is appropriate for the Commission to provide correspondence to the Committee?

**The Hon. LYNDA VOLTZ:** Do you see a benefit, where there may be a divergence of ideas, or an Inspector or the Commission may think that when the other party is turning up there may be a lack of knowledge as to the correspondence between the two groups, if a request is made that certain correspondence be provided? Often there may not be agreement but, rather than us going backwards and forwards over 12 months, at the time that there appears to be different opinions or information you have that the Committee may not be aware of, should that be provided so we do not have to come back 12 months later and ask the question?

**CHAIR:** To add to that, we are probably asking how you arrived at different opinions.

**The Hon. LYNDA VOLTZ:** The correspondence often clarifies the different views, as it does in this case.

**Mr PRITCHARD:** Yes. I think that is important. I would hope, and I say this with some confidence, the areas of disagreement that may currently exist between us and the Inspector will diminish. As I said, I take some comfort that the matters that we are currently dealing with are not of some age, but they are not recent. I do not think I will get into trouble by saying that certainly there have been no complaints in relation to the most recent public report we did in relation to Operation Pegasus and Operation Luno last year. Regarding the more recent public hearings earlier this year, no complaints have been referred to us at this stage in relation to those matters.

I agree that the committee's report in Western Australia that we referred to is a different model. As you may be aware, it is a Parliamentary Inspector model, and to some extent the Inspector is an agent of the committee, as opposed to the model that exists in New South Wales. Nonetheless, the starting point is that it is obviously undesirable that there be disagreement between us and that any scope for that disagreement should be reduced as far as possible. However, where there is disagreement, I agree that it would be desirable for the detailed reasons for each party's views to be made known and available, certainly to this committee if not to the public.

I should clarify the fact that we suggested to the Inspector when he gave us a draft of the special report that he consider including all the correspondence passing between us for that very reason. However, he thought that he had considered those matters that we had raised and it was not necessary to do that. I did not provide that part of the correspondence that passed between us in relation to the special report. However, if the Committee wishes to see it, I certainly do not have a problem.

**The Hon. LYNDA VOLTZ:** My question was more about clarity, but that helps.

**Mr MALCOLM KERR:** You mentioned earlier a reference in the annual report to unnamed officers. Can that reference be read to the Committee?

**Mr PRITCHARD:** Do you mean in relation to Operation Alford?

**Mr MALCOLM KERR:** Yes. There was an acknowledgment by the Commissioner of its failing.

**Mr PRITCHARD:** I agree; I cannot see a reference to unnamed officers in the report itself.

**Mr MALCOLM KERR:** Do you remember telling the Committee there was a reference to it?

**Mr PRITCHARD:** If you say I did, I accept that.

**Mr MALCOLM KERR:** Are you familiar with a book entitled *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures*, by Peter Hall QC?

**Mr PRITCHARD:** I am.

**Mr MALCOLM KERR:** Have you read it?

**Mr PRITCHARD:** Not from cover to cover, but I am well acquainted with certain chapters.

**Mr MALCOLM KERR:** The foreword is by Mervyn Finlay QC, the former PIC Inspector. I think reference was made to procedural fairness rules.

**Mr PRITCHARD:** No, it was former Inspector Ireland. Mr Ireland did the report about the practices and procedures of the Commission following the Malta hearing.

**Mr MALCOLM KERR:** Mr Finlay states:

Royal commissions and commissions of inquiry do not exercise judicial power as their findings do not of themselves have legal consequences. However, because their findings can have both immediate and long-term repercussions they are required to observe the rules of procedural fairness appropriate to the circumstances of the particular case.

Do you agree?

**Mr PRITCHARD:** Yes.

**Mr MALCOLM KERR:** That would be unexceptional.

**Mr PRITCHARD:** I hope that that is what I have said in a roundabout way.

**Mr MALCOLM KERR:** Are you aware of a news item prepared by Channel 7 reporter Robert Ovadia stating that, in effect, the Police Integrity Commission was not providing value for money for its taxpayer-funded budget?

**Mr PRITCHARD:** Are you using that to put a proposition to me?

**Mr MALCOLM KERR:** I am simply asking whether you are aware of that report.

**Mr PRITCHARD:** I am not aware of the specific report. If you are using that as the lead-in to put a proposition to me of a more general kind—

**Mr MALCOLM KERR:** Do you think taxpayers are getting value for money from the Police Integrity Commission?

**Mr PRITCHARD:** I do indeed. I have no doubt whatsoever about that.

**Mr MALCOLM KERR:** Why is that? This is a free kick.

**Mr PRITCHARD:** I do not get many of them. We are not perfect, and I am not suggesting that any of these commissions are. One need only consider some of the decisions made by the Independent Commission Against Corruption that have been questioned in courts and overturned. In fact, in my previous experience with the Independent Commission Against Corruption it was pointed out to me that people generally still think that Mr Greiner is corrupt because of its report, notwithstanding a Court of Appeal decision that overturned it. Sometimes we do not get everything right. I would like to think that where we believe that is the position we acknowledge it and try to do something to rectify it.

In relation to the specific question, I think we are doing a very good job in investigating police misconduct. My experience, having been involved with the Independent Commission Against Corruption and the Police Integrity Commission, is that investigating police misconduct is a different kettle of fish from investigating public sector misconduct. There is no doubt about that. One need only look at some of the statistics in the annual report about prosecutions that arise from the investigations that we have conducted to see that police misconduct is not an area in which we can ever take our eye off the ball. That is not to say the Police Integrity Commission is constantly unearthing revelations like those that came from the Royal Commission. There is clearly still corruption and there always will be. Corruption is like poverty—it will always be with us.

Reference was made to the functions of the Commission and the resources allocated to it to undertake those functions. In addition to the investigations we also do a large amount of prevention work that does not get a lot of attention because it is not as newsworthy. We work very closely with the Police Force in identifying weaknesses in systems and procedures and we continue to unearth misconduct by police on a regular basis. The fact that it may not be given a public airing or that public hearings are not held on a regular basis does not mean there is not a large body of constructive work being done in the area.

The perennial question is what is the alternative. If it is suggested that there will be no police oversight, members should reread the Wood Royal Commission reports, which set out why there needs to be a standalone, dedicated commission related solely to police misconduct and identified the weaknesses and problems associated with the failures of the Independent Commission Against Corruption at the time to deal with the issues that the Royal Commission threw up. In my view those matters are still relevant. The conditions are still there and police are increasingly being given extra powers in relation to all sorts of matters. It is a matter of commonsense that when more power is given there is a greater risk of its abuse. A large element of what we do involves deterrence. Police officers know we

exist. The fact that we are not unearthing corruption does not mean that we do not perform a role in deterring officers who might otherwise stray.

**Mr MALCOLM KERR:** Is it correct that you can make recommendations to the Police Force that it can accept or reject?

**Mr PRITCHARD:** We make recommendations for its consideration.

**Mr MALCOLM KERR:** Are there any outstanding recommendations for which you have neither an acceptance nor a rejection?

**Mr PRITCHARD:** That depends on the nature of the recommendation; that is, if it is a management action.

**Mr MALCOLM KERR:** In your judgement, have any been outstanding for an undue period?

**Mr PRITCHARD:** No, we generally get a response one way or another within an appropriate time. If the Police Force disagrees or says it will not act, we engage in dialogue to understand why. We may or may not change their mind. Mr Kearney may have knowledge of prevention recommendations.

**Mr KEARNEY:** We have responses to all of our outstanding prevention recommendations. Given the process we have in place now, which involves detailed consultation before our views are finalised, by the time we make a recommendation it is usually accepted.

**Mr PRITCHARD:** Are you referring specifically to disciplinary action?

**Mr MALCOLM KERR:** No, that answers my question. Have there been any recommendations made by the Commission that have been rejected by the Police Force that you felt strongly should have been accepted?

**Mr PRITCHARD:** Not strongly. To a large extent we accept that the legislative scheme is such that there will be disagreement. We may agitate but not to the point where the Commission has felt that its views have not been given an airing or appropriate consideration. That is why I think it is important that these bodies do not have a power of direction over those that they oversee. We see a small slice of the operations of the Police Force. At the end of the day, the Police Force is best placed as an organisation to take into account our recommendations and to consider their merits, but not to the point where I would violently object to such an extent that I would take more extreme action under the Act or raise it directly with the Commissioner.

**Ms SYLVIA HALE:** In your answer to question on notice No. 12 you refer to Operation Abelia and say that the Police Force has been slow in implementing the recommendations but that you expect further developments. Are you encouraged by the speed of those further developments or the implementation of the recommendations? What is happening?

**Mr PRITCHARD:** Mr Kearney just mentioned Operation Abelia as an area in which we might have some concerns.

**Mr KEARNEY:** A number of recommendations are outstanding in areas associated with the finalisation of procedures around targeted drug testing, training and support for the complaints management team in terms of what matters it might consider before employing targeted testing as a strategy and evaluation of the impact of its action in response to our recommendations. There are 11 recommendations in that area. It is fair to say that it has taken some time and that Abelia was a big ask of the New South Wales Police Force.

There were 64 recommendations, some of which required legislative change and some of which required wide-ranging changes to recruitment practices and communication of messages to recruits and to police within the organisation. There has also been a lot of movement in the Police Force. There has been a restructure and people move on. Memory in relevant areas about these matters is sometimes not very good. It is a re-education process. Why did we make these recommendations in Abelia? What are we setting out to achieve in our work with new players? It has taken some time, but we have seen progress.

**Ms SYLVIA HALE:** Do you think it is merely a question of staff turnaround and loss of corporate knowledge or whatever?

**Mr KEARNEY:** It is a combination of those things.

**Ms SYLVIA HALE:** How will you overcome that? Do you have any doubt as to whether the recommendations will be fully implemented?

**Mr KEARNEY:** No, I do not have any doubt. They will be overcome through persistence.

**Ms SYLVIA HALE:** Mr Pritchard, you talked about the additional powers that have recently been granted to police. Of course, you would be aware of Parliament's recent legislation empowering police to conduct covert searches. In order to conduct such covert searches they can even gain entry via adjoining premises. The occupants of the premises may not know for a minimum of six months, possibly three years or if at all, that those premises have been searched. Clearly this is a fertile field for potential corruption and yet it is also an area where the possibilities for making a complaint are limited because the individuals who are affected may not even know their premises have been searched, or may not notice if there have been any changes made or material left behind or removed. What are you doing to ensure that there is absolutely scrupulous oversight of the use to which these covert search warrants are put?

**Mr PRITCHARD:** There is nothing specifically that we are targeting in relation to the extra powers. It is clearly an area that if there are any allegations of misconduct or abuse then it is an appropriate or permissible field for us to investigate. So we have not, other than noting the legislation and being generally aware of it—I think the Ombudsman might have a role to play in relation to reporting back—

**Mr PAUL PEARCE:** I think the Ombudsman is specified—



**Mr PRITCHARD:** It is similar to the other function that it has in relation to new legislation of that kind—reporting on the exercise of the powers and so on. We keep a watching brief on that sort of thing. I do not know whether the project we have just commenced, or are about to commence, in relation to the search warrants may lead to something else in relation to looking specifically at warrants of that kind. But there is nothing specifically that we have tailored or targeted in relation to that particular power, other than to be aware of it. We will watch it and see if it is a power that is used, to what extent it is used, and if there are any suggestions of allegations of misconduct surrounding the warrants.

**Ms SYLVIA HALE:** Would it be more for the Ombudsman to determine how the warrants were used or to oversight any procedures in the use of those warrants?

**Mr PRITCHARD:** That would fall within their oversight functions to report on the operation of the legislation, yes.

**Ms SYLVIA HALE:** You would not have any involvement in the preparation of guidelines, or do you expect to?

**Mr PRITCHARD:** It may well be, as Mr Kearney said, that once the powers are bedded down and the police develop their own guidelines or procedures for dealing with them we might take an interest in those and be consulted on any guidelines or procedures that are to be used or applied to them, yes.

**CHAIR:** That could possibly be a question for this afternoon.

**Ms SYLVIA HALE:** Yes.

**The Hon. CHARLIE LYNN:** Commissioner, I refer you to Operation Marrella: research into the correlation between class sizes at the New South Wales police college and subsequent incidents of misconduct by graduates, particularly in the first couple of years. It would seem to me in the use of resources this would be of fairly low priority because I would think the police college would have optimum class sizes and a quality or standard that graduates need to attain. If those class sizes were overloaded because of a political consideration to suddenly increase police numbers, is that quality of training versus quantity.

**Mr PAUL PEARCE:** I suspect this question is leading to an answer.

**The Hon. CHARLIE LYNN:** That is right. I would hope so.

**Mr MALCOLM KERR:** This is a committee; it is not a court.

**The Hon. CHARLIE LYNN:** Commissioner, you refer to this as being a very complex analysis. I refer you to paragraph 2, where you say that police working in high-crime areas are likely to receive more complaints than people working in low-crime areas. Is this sort of analysis really required, because I would think they would have standards in regard to the quality of training in the police college and the numbers they can handle? This sort of research to me would seem to be unnecessary.

**Mr KEARNEY:** I think that is probably the expectation that they do have those kinds of standards. However, it is a perception amongst very senior police, a lot of senior police

that we talk to, that when large tranches of police come through the Academy the standard drops and they end up with a whole lot of problem children that they would not otherwise have had. This has had quite a bit of headway within police ranks for some time now. So we thought we would have a look at it. Is there a drop in standards? Is there anything to demonstrate that there has been a drop in standards when these large classes go through?

**The Hon. CHARLIE LYNN:** I thought that would have been self-evident.

**Mr KEARNEY:** I can canvass the results of the research if you would like.

**Mr PRITCHARD:** There is some research in Queensland that its Crime and Misconduct Commission did when looking at a similar issue. Again, as Mr Kearney said, it is based on suggestions that there were perceptions that with the larger class size there was perhaps the threat or risk of standards declining because of other imperatives, shall we say—and this is reflected within 12 months of a class leaving, in terms of complaints figures and so on. We thought it was an area, as Mr Kearney said, where there have been suggestions by senior officers that there might be some correlation anecdotally—if you put it at that level or as high as that—that the higher the class size, the greater the risk of declining standards, and that could be reflected in complaints. It may well be to a large extent the research has proven that to be not the case, but it has been helpful from the point of view of at least addressing what nonetheless has been a perception.

**Mr MALCOLM KERR:** In terms of recommendations from the Commission—which the Commission no doubt believes would result in better policing in New South Wales—and those recommendations being rejected by the police, is there a public benefit in making that public?

**Mr PRITCHARD:** The rejection?

**Mr MALCOLM KERR:** Yes. The Commission makes a recommendation and the police then reject it, as they are entitled to do.

**Mr PRITCHARD:** I think we do that.

**Mr MALCOLM KERR:** You do that?

**Mr PRITCHARD:** There was certainly a discussion in the Florida recommendations about the search warrant.

**Mr MALCOLM KERR:** Would any rejections be made public?

**CHAIR:** They are in the annual report.

**Mr KEARNEY:** We are required by legislation to report the police response to our recommendations.

**Mr PAUL PEARCE:** Referring back to an earlier discussion, I make the comment that I am aware of the background as to why the Commission was set up—arising from the Wood inquiry into corruption and other issues in the police force. I think the Commission has been effective in rooting out some of the deep-rooted problems in it. A number of members

of the Committee have raised matters in relation to procedural fairness and the like, certainly from my perspective, so we do not have a situation where police who would otherwise be subject to adverse reports are able to get away, if you like, as a consequence of the procedures you are adopting. I recall from reading somewhere amongst this pile of papers that you refer to a senior counsel named Hastings being briefed.

**Mr PRITCHARD:** Yes, Mr Peter Hastings, QC.

**Mr PAUL PEARCE:** Where is that up to and when would you expect that advice?

**Mr PRITCHARD:** As I indicated at the outset, I spoke to Mr Hastings last night. I have deliberately not engaged Mr Hastings because of the nature of the task that we requested he undertake, other than updates. I understand that when I go back to the office after this meeting his advice will be there. As we have said in the letter to this Committee, we will obviously digest it and considerate it and provide it to the Inspector. We will consider from there where it goes. It should be there when I get back this afternoon, so Mr Hastings told me last night.

**CHAIR:** That concludes the public hearing of the eleventh general meeting with the Police Integrity Commission.

**(Evidence continued in camera)**

**(The Committee adjourned at 12.14 p.m.)**

## Appendix 1: Minutes of meetings

### **Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission (No. 14)**

10.30 am Thursday 26 March 2009  
Room 1102, Parliament House

#### **Members Present**

Mr Draper MP	Ms Hale MLC	Mr Hickey MP	Mr Kerr MP
Mr Lynn MLC	Mr Pearce MP	Ms Voltz MLC	

#### **Also Present**

Les Gönye, Hilary Parker, Indira Rosenthal

The meeting commenced at 10.40am.

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### **3. Correspondence**

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*(c) Late item: emailed correspondence from Senior Constable Briggs*  
Resolved on the motion of Mr Kerr, seconded by Mr Draper, that:

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the Committee raise with the Police Integrity Commission at the upcoming General Meeting the reasons for discontinuing Operation Alford and any implications arising from that decision.

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### **6. General Meetings with the Ombudsman and the PIC**

The date for the general meetings, Thursday 21 May 2009, was confirmed with committee members and draft questions on notice for each general meeting were distributed to members for their comment and approval.

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### **Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission (No. 15)**

10.30 am Thursday 2 April 2009  
Room 1136, Parliament House

**Members Present**

Mr Draper MP	Mr Hickey MP	Mr Kerr MP
Mr Lynn MLC	Mr Pearce MP	Ms Voltz MLC

**Apologies**

Ms Hale

**Also Present**

Jonathan Elliott, Les Gönye, Hilary Parker, Indira Rosenthal

The meeting commenced at 10.30am.

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**3. General Business**

(a) *Questions on notice for the General Meetings with the Ombudsman and the Police Integrity Commission*

Resolved on the motion of Ms Voltz, seconded by Mr Kerr, that the Committee approve the draft questions on notice previously circulated to Committee members.

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**Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission (No. 17)**

10 am Thursday 21 May 2009  
Jubilee Room, Parliament House

**Members Present**

Mr Draper MP	Ms Hale MLC	Mr Hickey MP	Mr Kerr MP
Mr Lynn MLC	Mr Pearce MP	Ms Voltz MLC	

**Also Present**

Jonathan Elliott, Donald Misang, Hilary Parker, Pru Sheaves

The meeting commenced at 10.05am.

**Eleventh General Meeting with the Police Integrity Commission**

Mr John Pritchard, Commissioner, Police Integrity Commission; Mr Andrew Nattress, Director, Operations, Police Integrity Commission; and Mr Allan Kearney, Director, Intelligence and Executive Services, Police Integrity Commission, affirmed. Ms Michelle O'Brien, Commission Solicitor and Manager, Legal Services Unit, Police Integrity Commission, took the oath.

Appendix 1: Minutes of meetings

The Commission's answers to questions on notice, dated 29 April 2009, relating to the Annual Report 2007-08, were tabled as part of the sworn evidence. The Chair questioned the witnesses followed by other members of the committee.

**In Camera Evidence**

The Chair commenced the in camera hearing at 12.15pm for the purpose of clarifying matters arising from the PIC Inspector's complaint reports and Operation Alford.

The Chair questioned the Commissioner and Ms O'Brien, followed by other members of the committee.

Evidence concluded, the witnesses withdrew. The committee adjourned at 12.26pm until 2.00pm.

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**Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission (No. 18)**

10.30 am Thursday 25 June 2009  
Room 1102, Parliament House

**Members Present**

Mr Draper MP	Ms Hale MLC	Mr Hickey MP
Mr Kerr MP	Mr Pearce MP	Ms Voltz MLC

**Apologies:** Mr Lynn MLC

**Also Present**

Jonathan Elliott, Hilary Parker, Pru Sheaves

The meeting commenced at 10.34am.

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**2. Correspondence**

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(b) *Correspondence from PIC Inspector* dated 21 May 2009 re Operation Alford suppression orders

Resolved on the motion of Mr Pearce, seconded by Mr Kerr, that the Committee write to the Police Integrity Commission asking the following questions on notice as part of the Eleventh General Meeting held on 21 May 2009:

- i. Does the Commission use a public interest test when deciding if hearings are to be held in public or private?

- ii. Are directions hearings usually subject to suppression orders? Have such orders ever been lifted, and under what circumstances has this occurred?
- iii. Will the Commission be placing a notation on their website regarding the Inspector's findings of lack of procedural fairness regarding particular officers?

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## Appendix 2: Notation to Mallard Report

### **Notation to Mallard Report re Sergeant Brazel<sup>24</sup>**

The Commission's opinions expressed at paragraphs 4.49 and 4.50 together with the related recommendations at paragraphs 4.51 and 4.52 of the Report were the subject of complaint to the Inspector of the Police Integrity Commission. In a Report dated 23 February 2009 the Inspector found that in expressing its opinions as to Ms Brazel the Commission failed to accord procedural fairness to her and that therefore "no reliance adverse to [Ms Brazel] should be placed on the opinions concerning [Ms Brazel] by any person or other legal entity.

While the Commission does not agree with this finding nevertheless the Commission does consider it appropriate in the circumstances to make this notation.

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<sup>24</sup> [www.pic.nsw.gov.au/files/reports/Notation%20to%20Mallard%20Report%20re%20Sergeant%20Brazel.pdf](http://www.pic.nsw.gov.au/files/reports/Notation%20to%20Mallard%20Report%20re%20Sergeant%20Brazel.pdf)  
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