



ANNUAL REPORT



FOR THE YEAR ENDED

30 JUNE 2004

REPORT BY THE

INSPECTOR OF THE

POLICE INTEGRITY COMMISSION



The Hon Dr Meredith Burgmann MLC
President of the Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

The Hon John Aquilina MP
Speaker, Legislative Assembly
Parliament House
Macquarie Street
SYDNEY NSW 2000

August 2004

Dear Madam President & Mr Speaker

In accordance with section 102 of the *Police Integrity Commission Act 1996*, I as Inspector of the Police Integrity Commission, hereby furnish to each of you for presentation to Parliament the Annual Report of the Inspector for the year ended 30 June 2004.

The Report has been prepared in accordance with the requirements of the *Police Integrity Commission Act 1996* ("*the Act*").

Pursuant to section 103(2) of the Act, I recommend that the Report be made public forthwith.

Yours faithfully

The Honourable Morris Ireland QC
Inspector of the Police Integrity Commission

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PRELIMINARY OBSERVATIONS

This is my third Annual Report to Parliament as Inspector of the Police Integrity Commission, my appointment having commenced on 12 June 2002.

These preliminary observations, in accordance with precedent, although repetitive in nature, are directed towards keeping clearly in mind the purpose and origin of the Office of the Inspectorate. It is central to the accountability of the Police Integrity Commission.

In February 1996, Justice James Wood published the first interim report of the Royal Commission into the NSW Police Service.

Chapter five (5) of that report is of particular importance. A new system was proposed to deal with Police complaints and corruption investigations in NSW.

The proposal took into account that within the NSW Police Service (as it was then entitled)¹ there was a pattern of corruption urgently to be addressed so that public confidence could be restored.

There was general acceptance by the Royal Commission that a focused, sophisticated and aggressive approach was necessary to uncover and combat serious police misconduct and corruption. The debate largely centred on the model then appropriate for NSW and the agency or agencies which should be tasked with appropriate responsibility. All the existing agencies were carefully considered.

The Royal Commission concluded that the model which needed to be adopted was one in which:

- The Police Service retained a meaningful role in dealing with management matters, customer service complaints, and certain matters of misconduct;
- There was both oversight of the Police Service, and an external responsibility to investigate serious corruption.

After careful consideration it was resolved that a new “*purpose built agency*” (which came to be called the **Police Integrity Commission**) should be established.

It was emphasised that it will:

¹ By the Police Service Amendment (NSW Police) Act 2002 No S1. Schedule 1. the title Police Service of New South Wales was changed to NSW Police.

- Provide a fresh approach to the problems;
- Be purpose built, with specific focus upon the investigation of serious police misconduct and corruption; and
- Be free of the institutional baggage attached to an anti-corruption system which had failed to deal with corruption of the kind revealed by the Royal Commission.

The principal function of the Police Integrity Commission was seen to be the detection and investigation of serious police corruption. A key function being to assemble admissible evidence when investigations reveal criminal conduct and to furnish such evidence to the Director of Public Prosecutions.

Consideration was then given to the accountability of this new, very powerful, ongoing body to ensure that it be open to public review and accountable to Parliament.

The first avenue of accountability acknowledged that there is always a risk that an agency that is heavily committed to covert investigations, relies upon informants, and possesses powers which are both coercive and of a kind which might involve substantial infringement of rights of privacy, may overstep the mark.

For this reason the Commission decided that there be a “*watchdog*”, able to respond quickly and effectively to complaints of misconduct and abuse of power, without risking secrecy of operations, or confidentiality of informants and witnesses. That “*watchdog*” was designated the **Inspector of the Police Integrity Commission**.

Hence it was proposed that the Office of the Inspector of the Police Integrity Commission be created by the legislation governing the agency. The Office, it was suggested, might be held by a serving or former Supreme Court Judge and given powers to:

- Audit operations of the Police Integrity Commission;
- Deal with complaints of abuse of power and other forms of misconduct on the part of its employees; and
- Report to Parliament on matters affecting the Police Integrity Commission and its operational effectiveness and needs.

Part 6 of the *Police Integrity Commission Act 1996* makes those statutory provisions for the Office of the Inspector.

ROLE OF THE INSPECTOR

The position of the Inspector of the Police Integrity Commission (*the Inspector*) derives its authority from the *Police Integrity Commission Act 1996 (the Act)*.

The Inspector is appointed by the Governor with the advice of the Executive Council. The Joint Committee on the Office of the Ombudsman and the Police Integrity Commission is empowered to veto the proposed appointment which is required to be referred to the Committee by the Minister².

The Office of the Inspector may be a full-time or part-time Office, according to the terms of the appointment. A person is eligible (if otherwise qualified) for re-appointment but may not hold the Office of Inspector for terms totalling more than 5 years.

On 12 June 2002 I was appointed by the Governor as Inspector of the Police Integrity Commission for a period of three years on a part-time basis effective from date of appointment, following the retirement of the Hon. M.D. Finlay QC at the conclusion of his two terms of Office (of 3 years followed by an additional 2 years).

The Inspector's duties under the *Police Integrity Commission Act 1996* are to investigate complaints against the Commission's staff, to audit its operations, effectiveness and compliance with the law, and to report to the Joint Committee on the Office of the Ombudsman and the Police Integrity Commission. That Committee has the function of monitoring and reviewing the exercise by the Commission and the Inspector of their functions³.

The Inspector is required to report annually to Parliament and may make Special Reports on any matters affecting the Commission or on any administrative or general policy matter relating to the functions of the Inspector.⁴

The Inspector's principal functions as provided by Statute⁵ are:

- (a) *to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and*
- (b) *to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and*

² Schedule 2 Police Integrity Commission Act 1996 and Section 31BA of the Ombudsman Act 1974

³ Section 95(1)(a) Police Integrity Commission Act 1996

⁴ Sections 101, 102 of the Police Integrity Commission Act 1996

⁵ Section 89 of the Police Integrity Commission Act 1996

(c) *to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.*

The Inspector may exercise the functions of the Office on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Ombudsman, the ICAC, the New South Wales Crime Commission, the Joint Committee or any other agency⁶. The Inspector is not subject to the Commission in any respect⁷.

"*The Minister*" in the paragraph above is the Minister for Police. The Honourable John Watkins MP, was the Minister for Police during the reporting year.

POWERS OF THE OFFICE OF THE INSPECTOR

To perform its function, the Office of the Inspector has been given extensive powers to investigate any aspect of the Commission's operations or any conduct of officers of the Commission⁸.

It is also empowered to make or hold inquiries and for that purpose it has the powers, authorities, protections and immunities of a Royal Commissioner⁹. It was not found necessary to hold a formal inquiry involving hearings during the reporting year. The approach adopted by this Office has traditionally been to restrict the use of costly, time-consuming, formal inquiry hearings to complaints which necessarily involve a formal hearing in order to resolve some factual conflict critical to the complaint.

The Attorney General has advised the Minister for Police that the Legal Representation Office has approval to provide legal advice and representation for persons whose testimony at a formal hearing may warrant legal representation. During the reporting year it has been necessary on one occasion, to which reference is later made, to seek the assistance of the Legal Representation Office.

THE OFFICE

The Inspectorate has suitable office premises, within the Sydney Central Business District separate from the Police Integrity Commission which is located at 111

⁶ Ibid, s89(2)

⁷ Ibid, s89(3)

⁸ Ibid, s90

⁹ Ibid, s91

Elizabeth Street, Sydney. The postal address of the Inspectorate is GPO Box 5215 SYDNEY NSW 2001. The office telephone number is (02) 9232 3350 and the facsimile number is (02) 9232 3983. The email address is *inspect@tpg.com.au*. One full-time staff member is engaged in the office.

The office operates appropriate computer systems which are maintained by Information Technology Services.

I also have a small office at the Police Integrity Commission where I have full access to the electronic records of the Commission. There I can access, in complete security, the Commission's records of its operations.

FINANCES

The financing of the office of the Inspectorate falls within the operating expenses of the Ministry for Police.

As the Inspector of the Police Integrity Commission is not a Department nor a Department Head for the purposes of the *Annual Reports (Departments) Act 1985*, the requirements placed by that Act on those bodies do not apply to the preparation of an annual report by the Inspector.

Similarly, the provisions of the *Annual Reports (Statutory Bodies) Act 1984* do not apply since the Inspector is not a person, group of persons or body to whom Division 3 of Part 3 of the *Public Finance and Audit Act 1983* applies nor is it prescribed as a statutory body by the *Annual Reports (Statutory Bodies) Act*.

FREEDOM OF INFORMATION LEGISLATION

The Office did not receive any FOI applications in 2002/03 for documents held by this Office. There is therefore no information to give in terms of clause 9(1) of the *Freedom of Information Regulation 2000* and Appendix B in the FOI Procedure Manual.

The Inspector of the Police Integrity Commission is part of the Ministry for Police for the purposes of the reporting requirement in Part 2 of the *Freedom of Information Act 1989*. Hence, this agency's "*policy documents*" are included by the Minister in the *Summary of Affairs* for the Ministry of Police provided to the Government Printing Service for publication in the Government Gazette.

REPORT OF OPERATIONS

In this report the term "monitoring" is used to include the auditing of the operations of the Commission for the purpose of monitoring compliance with the law of the State and to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.

Monitoring and related activities have included regular meetings with the Commissioner of the Police Integrity Commission, Mr Terence Griffin and (prior to 31 December 2003) the Assistant Commissioner, Mr G.E. (Tim) Sage, to discuss the issues of the day, longer term strategies and to review representative samples of operational files. On 16 January 2004 Mr Sage resigned to take up a position with the Australian Crime Commission. Since that time these discussions have included the Executive Officer, Mr James Slater. As needs arise separate discussions with senior officers of the Commission take place.

In fulfilling my function under s.89(1)(a) and (1)(c) of the Act, I have available to me a designated office at the Commission where I have a computer providing electronic access to all the material on file at the Commission (with the exception of some Telecommunication Interception (T.I.) material). This includes the records of the Commission's various operations. Periodically and at random, I access such operations in absolute security. I have a print-out facility should I require it.

My regular meetings with the Commissioner and the Executive Officer identify the operations in which there has been activity, such as the issue of new warrants. This enables me to examine retrospectively such new warrants to ensure that all necessary approvals and administrative actions were completed in the process of obtaining and executing a warrant. In doing so I am also able to consider issues of propriety.

The Commissioner and his staff have been fully cooperative. The Commissioner has provided me with unreserved access to any officer of the Commission whom I may wish to interview. The operations of the Commission, as observed by me, were in compliance with the laws of the State.

ASSESSMENT OF PROCEDURES

Pursuant to s.89(1)(c) of the Act, the Inspector has the function of assessing "*the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.*"

This statutory requirement was taken from and is, in its terms, almost identical with s.8(3)(a)(iii) of the Commonwealth "*Inspector-General of Security and Intelligence Act 1986*".

I assess the general procedures of the Commission, as I have seen them, to be effective and appropriate relating to the legality and propriety of its activities.

Each operation of the Commission involves a preliminary assessment by the Commission through its Operation Advisory Group (OAG).

The concerns as to timeliness in some of the Commission's procedures which were expressed by the former Inspector appear now to be addressed routinely. It is important that this aspect of operations continues to be closely monitored.

The Commission has limited resources. These it is required to apply to issues which are oft times competing for the application of those resources.

I have ongoing discussions with the Commissioner focussing on this question of timeliness and of the adoption of procedures likely to achieve the best and most balanced outcome of the Commission's productivity.

As part of my assessment, I have regard to the records of those operations requiring legislative sanction. For example, I have a weekly report regarding applications for warrants under the *Listening Devices Act 1984* and relating to section 19 reports under that Act. Also, I receive reports on Notices issued to obtain information (s.25 of the Act); Notices to obtain documents or other things (s.26); Authority to enter public premises (s.29); the summoning of witnesses (s.38); and the issue of Search Warrants, and the issue of authorities to conduct Controlled Operations.

Applications to obtain information (s.25 of the Act) or to obtain documents or other things (s.26 of the Act) can only be made "*for the purposes of an investigation.*" The Commission has in place systems requiring requests for such applications to be written and to identify the relevant investigation. These may be seen by the Inspector.

The Commission has issued a code of conduct which sets out the standards of behaviour all Commission staff are to observe.

The security of the operations of the Commission is of paramount importance. The reasons for such security being clear from the final report of the Royal Commission. It is also important that the exercise of the Inspector's functions should not put at risk the confidentiality of informants and witnesses.

The Act provides that information, acquired through the exercise of the Inspector's functions, shall not be divulged except in accordance with a direction of the Inspector certifying that it is necessary to do so in the public interest.¹⁰

¹⁰ Section 56 of the Police Integrity Commission Act 1996

IMPLEMENTATION OF THE REPORT ON THE PRACTICES AND PROCEDURES OF THE POLICE INTEGRITY COMMISSION
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The Report on The Practices and Procedures of the Police Integrity Commission was tabled in Parliament on 18 June 2003. The executive summary and the recommendations arising from the review of the Commission's practices and procedures were incorporated in the annual report of this Inspectorate for the year ending 30 June 2003.

The Commission accepted without demur the recommendations set out in the report.

The majority of recommendations were implemented by November of 2003 with the remainder being implemented and incorporated in the Commission's two publications Practice Notes and Practice Guidelines which were published in July 2004.

The following schedule sets out the recommendations made and the steps taken by the Commission in their implementation.

A number of recommendations call for no change in the procedures which the Commission follows. This course has been adopted in order to make plain that some of the changes suggested in submissions received by me during the inquiry conducted into the practices and procedures of the Commission have been considered but are not recommended.

Recommendation	Implementation
1. The PIC has a broad mandate to investigate police misconduct. Provided that the PIC acts within the scope of its mandate the PIC should conduct its investigations in such a manner as it considers fit, free from interference from external influences.	Noted – No action required.
2. The PIC should not engage external assistance on its Operational Advisory Group.	Noted – No action required.
3. The Operational Advisory Group must remain fully appraised of the status of investigations and ensure that investigations are appropriately project managed.	Noted - Consistent with the Commission's present approach.
4. There should be no interference with the	Noted - No Action required.

way in which the PIC elects to convene public or private hearings.	
<p>5. That the PIC develop and publish guidelines in relation to its practices concerning the non-publication of names.</p> <p>6. That the guidelines set out the statutory and common law requirements and the manner in which the PIC will interpret these in considering applications for non-publication orders.</p>	<p>Completed in November 2003. These recommendations are the subject of comprehensive consideration and guidance in Part 3 [15] of the PIC Practice Guidelines 2004, and in the PIC Practice Notes 2004 [10]</p>
7. That no change be made to proceedings followed by the PIC with regard to notification or otherwise of the General Scope and Purpose of Proceedings.	Noted – No change required.
8. The PIC should develop conflict management guidelines which would regulate the granting of leave to counsel to appear for more than one individual or organisation or an individual and an organisation.	<p>Completed in November 2003. This subject has been compendiously addressed in the PIC Practice Guidelines Part 2 [6] under the heading “Joint representation and conflicts of interest” and in Practice Note 2.</p>
9. The PIC should, as soon as the general scope and purpose of the hearing is determined, require counsel wishing to appear for more than one party to provide written submissions seeking leave to appear. Consideration should be given to the inclusion of a declaration from counsel that counsel is free of any conflict.	<p>Implemented in November 2003. In addition to the content of the Practice Guidelines in Part 2 [4.10-4.40], Practice Note 2.20 requires:</p> <p><i>“Applications for leave to represent more than one person at a Commission hearing must be supported by written submissions addressing:</i></p> <ul style="list-style-type: none"> • <i>Whether and how the legal practitioner has turned their mind to the potential for conflicts of interest to arise in relation to their respective clients;</i> • <i>The steps that have been taken to avoid the occurrence of any such conflicts;</i> • <i>Why no real or perceived prejudice would flow to the Commission’s investigation as a result of the joint representation.</i> <p><i>In its discretion, the Commission may require a legal practitioner to provide a</i></p>

	<i>statutory declaration to the effect that he or she is free from any conflicts of interest in relation to the intended joint representation.”[2.30]</i>
10. If the general scope and purpose of the hearing changes and/or the nature of the investigation becomes such that the general scope and purpose might change, then the PIC should consider convening a special hearing if, in its opinion, those changes might have the effect of producing a conflict of interest in counsel appearing.	Implemented in November 2003 via Practice Note 2.
11. Where a notice to produce is issued the PIC should strictly enforce compliance with the notice, including where necessary, use of its powers under section 26(3) of the Act.	Noted and accepted.
12. Parties served with notices to produce should be given reasonable time within which to comply with such notices except in circumstances where, in the view of the PIC, evidence is in jeopardy of being lost or destroyed or where parties might collude to defeat the purpose of the notice.	Noted and consistent with the Commission’s approach as codified in Part 3 [16] of the PIC Practice Guidelines.
13. No change should be made to the current procedures in place at the PIC to determine privilege over documents.	Noted and accepted. No change required.
14. The PIC should establish an internal Practice Guidelines Committee which should include the Commissioner, the Assistant Commissioner and the PIC Solicitor.	Implemented in July 2003.
15. The PIC should formulate uniform Practice Guidelines dealing with, amongst other things: <ul style="list-style-type: none"> • Legal representation and conflicts of interest; • The placement of evidence before the PIC; and 	<p>This recommendation was substantially implemented in November 2003, with the publication of the Practice Guidelines and Practice Notes.</p> <p>Implementation was completed with publication of Part 4 of the Practice Guidelines in July 2004.</p>

<ul style="list-style-type: none"> • The production of documents. 	
<p>16. The PIC should publish the Practice Guidelines on its Internet site and maintain hardcopies for persons without Internet access.</p>	<p>This recommendation was implemented in November 2003. As at January 2004, the Practice Guidelines and Notes have been published in Volume 4 of the Butterworths service “Criminal Practice and Procedure NSW” (R N Howie QC and P A Johnson SC). They will also receive publication in the soon to be published text “Investigating Corruption in Public Office” by Peter Hall QC.</p>
<p>17. The PIC should ensure that the Presiding Officer (with the assistance of Counsel Assisting) firmly controls the course of the proceedings by requiring parties to adhere to orders to produce documents, regulating the extent of the evidence led and ensuring by determining in open hearing timetables for submissions and requiring undertakings from counsel as to adherence. Counsel should be informed that the matter will be listed for mention, out of court hours, seven days prior to the submissions deadline date. Counsel should be requested to attend the mention and advise of progress.</p>	<p>Noted and accepted.</p>
<p>18. That the PIC employ the term “interim public hearing” when it is expected that investigations will be ongoing at the conclusion of a public hearing. The purpose of this recommendation is to highlight the fact that a public hearing may be but one step, and not the final step, in the investigation process.</p>	<p>Noted and accepted.</p>
<p>19. No change should be made to the PIC’s discretion to refer matters to NSW Police pursuant to section 77 of the Act.</p>	<p>Noted – no action required.</p>
<p>20. The PIC should retain complete discretion as to the use which NSW Police may make of confidential information provided with draft referrals or reports.</p>	<p>Noted – no action required.</p>
<p>21. A process should be in place between</p>	<p>Noted and accepted. With the publication</p>

<p>the PIC and NSW Police to deal with circumstances where NSW Police consider that a confidential information order should be waived. NSW Police should indicate what information it wishes to use and the purpose for which the information is intended to be used. The PIC should retain an unfettered discretion to authorise the release of such information.</p>	<p>of Part 4 of the Practice Guidelines, which explain and streamline the process for obtaining the release of information pursuant to the secrecy provisions of the Act, there does not appear to be any need for a special process to be implemented vis a vis NSW Police. However, the Commission will reconsider the matter should difficulties arise.</p>
<p>22. The Practice Guidelines Committee should develop and publish guidelines on the release of information in accordance with the advices it has received on the PIC's obligations in relation to section 56(4)(c) of the Act. The guidelines should use examples of circumstances in which information may be released and circumstances where information may not be released.</p>	<p>Implemented in July 2004 with the completion of Part 4 of the Practice Guidelines "Disclosure of Information" segment and in particular the comprehensive assistance provided in Practice Note 17.</p>
<p>23. The Practice Guidelines Committee should publish a "Request for information" form which would guide applicants through a series of questions matching the guidelines.</p>	<p>This recommendation was implemented in July 2004. A Form "Application for Disclosure of Information and Documents" has been developed and is available as an appendix to the Practice Notes and also on the Commission's website.</p>
<p>24. Both the guidelines and the Request for Information form should be available on the PIC's Internet site.</p>	<p>This recommendation has been implemented.</p>

COMPLAINTS

During the reporting period the Inspectorate dealt with 18 complaints relating to the activities of the Commission.

Some of the complaints are summarised below. Such summaries attempt to avoid identifying Complainants or confidential informants. The Report also avoids publishing material reflecting the internal working and methodologies of the Commission and the legal advice of lawyers employed by the Commission to provide

the same in pursuit of its functions, which are not matters in the public interest to be disclosed.

- One (1) complaint related to the refusal by the PIC to release information relating to a current operation pursuant to s.56(4)(c) of the Police Integrity Commission Act 1996. The Commission was acting within the ambit of its available discretion and the complaint was accordingly dismissed.
- One (1) putative complaint in the nature of a personal grievance was made against an officer of the PIC.

The Complainant was put in touch with the Legal Representation Office to assist in the preparation of the complaint. Following receipt of advice from a solicitor from the Legal Representation Office the complaint was not pursued.

- Two (2) anonymous complaints were received. One such complaint relates to a serving police officer and the other, an unrelated matter, relates to an officer of the Police Integrity Commission. In both instances other agencies have received identical complaints. Whilst the situation in each case is being monitored the usual doubts as to motivation on the part of anonymous Complainants cannot be overlooked. Both matters are presently unresolved.
- One (1) complaint was generated as a result of a major operation conducted by the PIC. My Report on the Preliminary Investigation conducted into this complaint exemplified the need for the Commission to implement the conflict of interest management guidelines which have been formulated and introduced during the reporting period.

To recognise this need and to address it, falls far short of supporting any contention that not to have established such guidelines prior to the hearing in question amounted to sanctionable impropriety or any form of misconduct.

- Three (3) complaints were dealt with by exchange of correspondence which satisfied the Complainants as to the propriety of the declination on the part of the Commission to undertake investigation of their complaints.
- One (1) complaint relates to events which occurred many years ago. Substantial resources have been devoted to this investigation. One aspect has been resolved and the Commission has furnished a report. The second aspect is in its final stages and is expected shortly to be resolved.

- One (1) complaint against an officer of the Commission related to a civil dispute regarding real property which was unrelated to the officer's duties. The Complainant accepted the position as made plain to him in correspondence.
- Two (2) complaints relate to dissatisfaction with criticisms levelled at the Complainants in two recent Commission reports to Parliament. One complaint has been dealt with to finality, the other is in the course of preliminary investigation.
- One (1) complaint which related to the declination of the Commission to undertake a further investigation had already been the subject of an investigation conducted by NSW Police.

The exercise of available discretion by the Commission not to undertake a particular investigation is not open to challenge except in an extreme case such as where no reasonable, competent decision maker in the position of the Commission would have declined to undertake further investigation of the complaint. In my view this was not such a case.

- One (1) Preliminary Investigation which was undertaken related to an apparent discrepancy between hours charged by contractors undertaking technical equipment installation and maintenance for the Commission and the hours of attendance of such persons as disclosed in the routine audit of electronic security records.

A further element examined the propriety of charges made for work done off-premises.

Whilst the investigation established no misconduct or other impropriety the examination of contractual documentation and security procedures which was undertaken led to the making of a series of recommendations directed towards clarification of the chain of authority in IT operations as well as enhancement of security and facilitation of audit of personnel on the PIC premises.

In the circumstances the investigation was fully justified.

The misconception that the Office of Inspector of the Police Integrity Commission exercises an appellate role in relation to the acceptance or rejection of evidence and the opinions expressed in the Commission's reports rather than the statutory function of dealing with complaints of abuse of power, impropriety or other forms of misconduct and/or illegality prescribed by Section 89 of the Police Integrity Commission Act 1996 is apparent in a number of the complaints received.

Experience establishes that almost all complaints can be dealt with by preliminary inquiry.

A preliminary inquiry allows this Inspectorate to conduct a review of a complaint, once the parties, in the course of correspondence processed through this office have identified the issues, with a view to determining whether there is sufficient substance in the complaint to warrant a further inquiry using the full range of statutory powers.

Such preliminary inquiries generally involve seeking information and submissions in turn from the parties to the complaint until the gravamen of the complaint is clearly established and both parties have had every reasonable opportunity to present relevant material and arguments on the issues identified. This usually also involves the accessing of relevant electronic records of the Commission.

The fact that none of the new complaints against the Commission led to full, as opposed to preliminary inquiries, indicates that these more formal processes are not invoked lightly.

TELECOMMUNICATION (INTERCEPTION) ACT 1979 (Cwth)

The *Telecommunication (Interception) Legislation Amendment Act 2000 (Cwth)* which included the Inspector of the Police Integrity Commission as an “eligible authority” was given Royal Assent on 23 June 2000.

Applications for the issue of Telephone Intercept (T.I.) warrants are communicated to me by the Commission’s T.I. Manager. The formalities associated with access to the foundational material upon which reliance is placed in seeking the issue of T.I. warrants and access to the product of such warrants is recorded to facilitate the statutory audit of such access by the NSW Ombudsman.

These arrangements have been working satisfactorily.

FUTURE OPERATIONS

The functions of the office of the Inspector may be regarded as twofold:

First, that of auditing the operations of the Commission for the purpose of monitoring compliance with the law of the State¹¹ and assessing the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities¹².

¹¹ s. 89(1)(a) of the Act

¹² s. 89(1)(c) of the Act

The procedures in place to fulfil the above functions are several. One being by regular conferences with the Commissioner and the Assistant Commissioner. Another by conferences from time to time with senior officers of the Commission.

A further procedure is by regular access to the computer in my room at the Commission. Without giving details, this enables me to closely follow operations in complete security.

Another procedure is to look at the records of those operations requiring legislative sanction.

The law of the State which imposes obligations in relation to the keeping and inspection of interception records is the *Telecommunication (Interception)(NSW) Act 1987* (“*the State Act*”). Section 10 of the Act imposes an obligation upon the Ombudsman to inspect the records of each eligible authority “*at least twice during each financial year, beginning on or after 1 July, 1988*”.

The Police Integrity Commission is an “*eligible authority*” for the purposes of the State Act (s3). Thus, it is clear that the Ombudsman, and not the Inspector of the Police Integrity Commission, is the designated authority for the purpose of ensuring that the Police Integrity Commission **complies with its record keeping responsibilities** (emphasis added) under the State Act and other relevant obligations under the TI Act.

Second, that of dealing with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission¹³.

Section 90 of the Act empowers the Inspector to investigate any aspect of the Commission’s operations or any conduct of officers of the Commission and entitles the Inspector to full access to the records of the Commission. It provides that the Inspector “*may investigate and assess complaints about the Commission or officers of the Commission*”.

Section 91 of the Act provides that the Inspector may make or hold inquiries for the purposes of the Inspector’s functions.

Such inquiries generally involve seeking information and submissions in turn from the parties to the complaint until the gravamen of the complaint is clearly established and both parties have had every reasonable opportunity to present relevant material

¹³ s. 89(1)(b) of the Act

and arguments on the issues identified. They usually involve accessing by computer relevant electronic records of the Commission.

Other inquiries may require the holding of a formal hearing. Generally, a formal hearing exercising the powers of a Commissioner as conferred by Division 1 of Part 2 of the *Royal Commissions Act 1923* will only be held where it is necessary by that means to resolve a disputed issue of fact critical to the inquiry.

Such hearings may be small scale and appropriately held in the Inspector's office. For this purpose, the Ministry for Police has made arrangements for a court reporter from the Attorney General's Department to be available for such hearings.

It may, on the other hand, require a larger scale hearing. The circumstances may indicate that it should be public or that it should be private. If public, the facility of a Commission hearing room may be appropriate to be arranged pursuant to section 92(4)(a) of the Act. On the other hand, it may be more appropriate for a hearing room to be arranged through the Attorney General's Department, at a venue which is seen to be quite independent of the Commission.

ELECTRONIC RECORD KEEPING

The MATRIX system of electronic record keeping which replaced the DETRAK system previously in place has resulted in easier access to operational reports and to the minutes of the regular Operational Advisory Group meetings.

From time to time changes in the formatting and operational procedures continue to improve the easy access to the recorded information. From the Inspectorates perspective the MATRIX system is well managed and effective.

CONTROLLED OPERATIONS

Controlled operations are conducted by the Police Integrity Commission pursuant to the Law Enforcement (Controlled Operations) Act 1997. Controlled operations which are an important and productive weapon in the Commission's arsenal embrace operations which, absent statutory authority, would contravene the law.

The approval procedures for authority to conduct a controlled operation have been settled by the Commission's Solicitor and are set out in some detail. Although the application for a controlled operations authority is prepared by the relevant investigative officer with the assistance of the Team lawyer, as and when required the Commission Solicitor also provides advice upon the necessity or appropriateness of the application. Post-approval such operations are subject to the external audit, as far

as documentation is concerned, by the Ombudsman. As the Commission is the decision maker in such controlled operations the roles of the Operation Advisory Group (OAG), the Team Lawyer, and the Commission Solicitor are important.

In practice controlled operations undertaken by the Police Integrity Commission from time to time of necessity involve police officers in the exercise of investigative, surveillance or enforcement functions and accordingly fall within the purview of Section 142(1) of the Police Integrity Commission Act which provides:

“142 Exercise of functions by police

(1) A police officer may not exercise investigative, surveillance or enforcement functions under or for the purposes of this Act unless authorised to do so by the Commissioner. Such an authorisation may not be given without concurrence of the Minister.”

Accordingly as section 142 presently stands the concurrence of the Minister is a prerequisite to the exercise of police functions in a controlled operation. Whilst there could be no objection in principle to the concurrence of the Minister being obtained, practical considerations, in circumstances where last minute changes necessitating the deployment of alternate or additional police officers at times when, for good reason, the Minister is unavailable may seriously compromise a major operation.

During the reporting year nine controlled operations were conducted. Whilst on each occasion the statutory formalities were able to be fulfilled there were nevertheless occasions when it became obvious that the occurrence of unforeseen developments could readily put the whole operation at risk through the inability to obtain the section 142 prerequisite concurrence of the Minister.

To put the position in context it is only necessary to recognise that a controlled operation may be the climax of an investigation to which substantial resources would inevitably have been devoted. The risk of aborting a controlled operation in circumstances where the concurrence of the Minister is unable to be availed of is that at the very least, the gathering of important if not critical evidence would be jeopardised.

This statutory restraint calls for urgent review.

MEETINGS WITH PARLIAMENTARY COMMITTEES

The Committee on the Office of the Ombudsman and the Police Integrity Commission (the Parliamentary Joint Committee) is constituted under Part 4A of the

Ombudsman Act 1974. The functions of the Committee under the *Ombudsman Act 1974* are set out in section 31B.

Under the *Police Integrity Commission Act 1996*, the Parliamentary Joint Committee has the function of monitoring and reviewing *'the exercise by the Commission and the Inspector of their functions'*.¹⁴

The Report of the Parliamentary Joint Committee on the Fifth General Meeting with the Inspector of the Police Integrity Commission was published in September 2003 and is accessible on the Committee website at:

www.parliament.nsw.gov.au/prod/parlment/committee

During the course of the meeting Mr Malcolm Kerr, member for Cronulla, who is a member of the Parliamentary Joint Committee posed a question which was taken on notice and was in correspondence later defined as:

"Whether the operation of the Police Integrity Commission could be improved by the application of any of the principles enunciated by the Honourable Michael Helsham and considered in Chapter Five of the "Report of the Committee on the Independent Commission Against Corruption on Inquiry into Commission procedures and the Rights of Witnesses February 1991."

Mr Kerr also referred to *"The six cardinal principles"* enunciated in the 1966 Report of the Royal Commission on Tribunals of Inquiry conducted under the Chairmanship of The Right Honourable Lord Justice Salmon.

I appreciate Mr Kerr's question which is not without interest. Although the question relates to views which were expressed many years ago, the procedural aspects have currency and the response set out below may hold interest for members of the Committee.

"The submission dated 24 October, 1990 made by Mr Helsham to the Parliamentary Committee on the ICAC, whilst informative, is directed towards answering certain complaints, of provenance apparently unknown, but which are articulated and answered seriatim. They are not quite on point for present purposes except to note that in the ultimate paragraph on page twelve Mr Helsham says:

"The point is that I do not think we have yet explored all the appropriate procedures for conducting an investigation, but rather assumed that an investigation will basically mean a hearing, in public, using the

¹⁴ S.95(1)(a) of the Act

adversary system, with the tender of documents and so on. Of course each investigation will probably need a different procedure, but this is something that the Commission must look at; at the moment there is no requirement for legislative changes. I have suggested that the Commission might usefully find out how the inquisitorial system works and to what extent its procedures might be adopted.” (emphasis added)

In the addendum to his submission dated 5 December 1990 Mr Helsham at page 4 having observed that a hearing may be an adjunct to an inquiry and that a general scope and purpose document does not have to relate to the whole of an inquiry and may relate to the scope and purpose of that particular hearing, said this:

“This enables separate topics, events or what have you to be hived off from the inquiry and explored in separate hearings, if it is appropriate to proceed in this way.

This leads me to a suggestion that investigations be conducted by a Commissioner using the powers and procedures conferred and envisaged by Part 4 Division 2 of the Act, having recourse to hearings only when, for example, a particular matter cannot be taken any further without one, or for some other sufficient reason. In particular I see this process used to enable the mass of material or information collected or volunteered be refined down to what appear to be the real matters of corruption, or issues if you like, and to be restricted to the persons who appear to be in the hot seat. These can then be brought into open hearings.

The idea is that this enables the ambit of the open hearing to be confined, to allow tests of relevance of evidence to be applied, to avoid surprise in the evidence and other disadvantages associated with the extraction of material by means of open hearings. It will probably reduce the number of hearings involved and hence shorten and simplify proceedings; the adversarial approach would be reduced to a minimum.”

Importantly at p5 Mr Helsham having identified the possible disadvantage flowing from this approach as being “...the lack of possible relevant information coming to the Commission as the result of publicity”, goes on to state:

“I am aware that the approach outlined herein will not be applicable to all inquiries. Nor will any other approach. It is not advanced in order to alleviate disadvantages said to have accompanied other inquiries. It is advanced in an attempt to devise techniques for the conduct of inquiries as distinct from treating them as quasi-curial proceedings to which the adversary approach is appropriate. I have earlier suggested that study be made of the inquisitorial system of criminal justice as practiced in Europe and elsewhere. It maybe that our knowledge of how quasi-criminal investigations might be better handled could benefit from such a study.” (emphasis added)

Mr Helsham accordingly makes plain in both his submission and the addendum that the procedures he suggests have not been the result of exhaustive exploration; have been premissed on the assumption of a hearing, in public, using the adversary system and will not be appropriate to all hearings.

The “*three-tiered approach*” identified in chapter five of the Report of the Committee on the Independent Commission Against Corruption (the Committee) dated February 1991 is as follows:

1. assessment of the problem;
2. investigation of the matter and refining down the material; and
3. conduct of hearing.

There is no new ground being broken here. In fact one wonders, as a matter of logic, how any inquiry could contemplate proceeding in any other way, whether structured in the adversarial or inquisitorial mode or in some amalgamated form.

The question on which you seek my opinion i.e. “*whether the operation of the Police Integrity Commission could be improved by the application of any of these principles*”, is, you may agree, rather one of to what extent can the “*three-tiered approach*” be adhered to in the conduct of Commission inquiries.

Not surprisingly, Mr Zervos, general counsel appearing on behalf of the ICAC before the Committee is noted in the report as having “...*indicated that he felt the ICAC already pursued matters in accordance with Mr Helsham’s proposed three-tiered process*”.

The analysis propounded by Mr Zervos is as follows: (the emphasis is added)

*“The Commission follows certain procedures when it looks at a particular matter that has been brought before it. We carry out extensive and detailed preliminary inquiries in relation to a matter. It goes through a fairly vigorous process of assessment. It is then the subject of a detailed report which will ultimately go to the Commissioner. It is the Commissioner who decides, on the information that is provided, whether or not a formal investigation should be approved. Further extensive inquiries take place after investigation has been approved. Of course, in some instances, that will depend on the nature of the subject-matter, and the extent to which we do carry out those inquiries varies from case to case. Depending on the circumstances under investigation statements are taken by officers of the Commission. **In some instances people do refuse to make statements to the Commission, and there are occasions when it is thought that the matter should proceed to a hearing without a statement from somebody who is principally involved in the matter. This is done to prevent prior knowledge of the areas under investigation being obtained by potential witnesses and used against the interests of getting to the truth.** In many instances private examination of people has taken place before a matter goes to a public hearing...*

It is the Commission’s view that a hearing is part of the investigation process. Clearly the Act provides that and states it in clear terms. It is therefore important to recognise that the hearing, in being part of the investigative phase, is there for that purpose. It is there to seek evidence, to collect that evidence, and to conduct a genuine search for truth. There will be many instances, depending on the matter in question, in which prior investigation, using traditional and conventional methods, has taken place before a public hearing. I should add that there have been various occasions when private hearings have been utilised in the initial stages of an investigation and prior to going into public hearing. The fact that they have been in private is a reason why people do not know about them. We have also utilised suppression orders during the course of an inquiry. Because there have been suppression orders, people again do not know about them. But they have been utilised in the course of inquiries for the benefit of suppressing information that, for whatever reasons that may have applied at the time, should not be in the public domain. Having said that, I say further that the Commission does carry out a considerable amount of field work in certain circumstances to

ensure that the ground work has been laid for matters to be raised in hearings. Mr Helsham submitted to you a three-tier basis on which the Commission should conduct investigations. The fact is that the Commission does operate on that basis. As I have stated, this approach varies depending on the subject-matter under investigation.”

I respectfully concur in Mr Zervos' analysis of the events which, in general terms, impact upon investigative agencies such as the ICAC and the Police Integrity Commission (PIC) and dictate the way in which the three essential phases of assessment, investigation and hearing may not necessarily occur in what would ordinarily be the most logical and desirable sequence.

You will, I am sure, appreciate that the power vested in the PIC to conduct a public hearing is a valuable and productive tool which has the capacity to generate very helpful public assistance. This was exemplified in the Wood Royal Commission as well as in a number of PIC investigations including for example Operation Florida.

The need for flexibility of approach to PIC operations is best demonstrated when a witness who has, for example, given certain sworn testimony is confronted with irrefutable evidence to the contrary, generally in the form of telephone intercept; listening device and/or surveillance video evidence.

The change of position (“roll-over”) which not infrequently results may (and frequently does) result in new lines of inquiry; the broadening of the scope and purpose of the inquiry and the deferral of one or other phase of the inquiry to accommodate the new developments.

One suspects that the recognition of the likelihood of such developments were not lost upon Mr Helsham and may have induced the qualifications he was at pains to make plain in introducing his submissions and in concluding his addendum.

Recognition must be given to the development which has taken place in investigation technique and indeed technology in the conduct of investigations in the thirteen years plus since February 1991 as well as in the practices and procedures employed by law enforcement and oversight agencies such as the PIC.

Similarly, with regard to the six cardinal rules identified by The Right Honourable Lord Justice Salmon in his report to Parliament following the Royal Commission on Tribunals of Inquiry, as the following:

1. Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.
2. Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.
3. (a) He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.
(b) His legal expenses should normally be met out of public funds.
4. He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.
5. Any material witnesses he wishes called at the inquiry should, if reasonably practicable, be heard.
6. He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.

I believe it fair to say we have come a long way since 1966.

That is not to say that the six cardinal principles enunciated in the report have not enjoyed approbation by juristic adherents to the Common Law for many decades. The point is, however, that their “*strict observance*”, as propounded in the preamble to their recitation in the Salmon report, imposes a duty indistinguishable from that borne by the Crown in a criminal prosecution.

Some of the distinguishing features between a criminal trial and a corruption inquiry are identified by Mr Helsham in his addendum of 5 December 1990. However, most importantly for present purposes is the need to recognise that the investigative role and functions imposed by statute upon the PIC engender practices and procedures which are best discharged by an inquisitorial approach in conjunction with the need to observe procedural fairness and natural justice.

It goes without saying that to have merely contemplated the infusion of the concept of inquisitorial justice, (long established across the English Channel), in the presence of His Learned Lordship would have been perceived as an anathema. Not so by Mr Helsham.

In conclusion in my opinion the three-tiered approach is a description of an appropriate method of investigation which is used by investigative agencies such as the PIC, recognising, however, that experience mandates the exercise of a high degree of flexibility to accommodate changes in direction and

emphasis as investigations, including public and private hearings proceed and needs dictate.

The six cardinal principles adverted to by Lord Salmon, like the “*Curate’s Egg*” remain good in parts, however, that such principles be “*strictly observed*” as promulgated in the report is not concomitant with those aspects of the purpose and function of the Police Integrity Commission which are of necessity inquisitorial.

This Inspectorate holds itself available and would welcome enquiries and discussion on any matter of concern to members of the Parliamentary Joint Committee at any time.