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OF THE

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

ENTITLED

“SECOND GENERAL MEETING WITH THE
INSPECTOR OF THE
POLICE INTEGRITY COMMISSION”

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**SECOND GENERAL MEETING
WITH THE INSPECTOR
OF THE
POLICE INTEGRITY COMMISSION**

**Report of the Committee on the Office of the
Ombudsman & the Police Integrity Commission**

August 1998

**Secretariat
Room 813 Parliament House Macquarie St Sydney 2000
Telephone: 02 9230 2737 Facsimile: 02 9230 3309**

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COMMITTEE MEMBERSHIP

LEGISLATIVE ASSEMBLY

Mr B J Gaudry MP (Chairman)
Mr J Anderson MP
The Hon D Grusovin MP
Mr J S P Kinross MP
Mr P G Lynch MP
Mr A P Stewart MP
Mr J Small MP



LEGISLATIVE COUNCIL

The Hon M J Gallacher MLC
The Hon E B Nile MLC
The Hon A B Kelly MLC



SECRETARIAT

Ms H Minnican - Director
Ms T van den Bosch - Research Officer
Ms N O'Connor - Assistant Committee Officer



Committee on the Office of the Ombudsman and the Police Integrity Commission (left to right):
Bryce Gaudry MP (Chairman), James Anderson MP, The Hon Deirdre Grusovin MP, Jeremy Kinross
MP, Paul Lynch MP, Anthony Stewart MP, Jim Small MP, The Hon Michael Gallacher MLC, The Hon
Elaine Nile MLC, and The Hon Anthony Kelly MLC.

FUNCTIONS OF THE COMMITTEE

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

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

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

Section 31B (2) of the *Ombudsman Act 1974* 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 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.

This 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 1992*, assented to on 19 May 1992, amended the *Ombudsman Act 1974* 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 to provide 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 1974* provides:

- “(1) The Minister is to refer a proposal to appoint a person as Ombudsman, Director of Public Prosecutions, Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission to the Joint Committee and the Committee is empowered to veto the proposed appointment as provided by this section. The Minister may withdraw a referral at any time.

-
- (2) The Joint Committee has 14 days after the proposed appointment is referred to it to veto the proposal and has a further 30 days (after the initial 14 days) to veto the proposal if it notifies the Minister within that 14 days that it requires more time to consider the matter.
 - (3) The Joint Committee is to notify the Minister, within the time that it has to veto a proposed appointment, whether or not it vetoes it.
 - (4) A referral or notification under this section is to be in writing.
 - (5) In this section, a reference to the Minister is;
 - (a) in the context of an appointment of Ombudsman, a reference to the Minister administering section 6A of this Act;
 - (b) in the context of an appointment of Director of Public Prosecutions, a reference to the Minister administering section 4A of the Director of Public Prosecutions Act 1986; and
 - (c) in the context of an appointment of Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission, a reference to the Minister administering section 7 or 88 (as appropriate) of the Police Integrity Commission Act 1996."

CHAIRMAN'S FOREWORD

The Committee's second General Meeting with the Hon Mervyn Finlay QC, Inspector of the Police Integrity Commission, was held on 11 June 1998. The Inspector's role is to consider any complaints made relating to the legality and propriety of the PIC's actions. As with the First General Meeting, the Committee found the meeting to be a useful opportunity to discuss the Inspector's activities in monitoring the PIC's legality and propriety, and his procedures for investigating complaints.

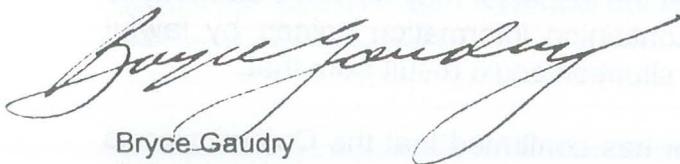
The Inspector's procedures are still to some extent evolving, and the level of complaints about the PIC to the Inspector remains small: only nine complaints had been received at the time of the hearing. It is pleasing to note that the Inspector has had no cause to recommend disciplinary action or criminal prosecution against PIC officers, and that there had been no evidence of illegality, abuse of power or impropriety by the PIC or its officers. A number of general issues, however, emerged in the course of the meeting.

A continuing problem identified by the Inspector is his inability to access legally obtained telecommunications intercept (TI) product held by the PIC. This has the potential to restrict the effectiveness of the Inspector, in particular where a complaint involves evidence obtained by telecommunications intercepts. An amendment to Commonwealth legislation is required to resolve this problem, and representations have been made about this by the Committee to the NSW Attorney General and the NSW Police Minister, who in turn have taken the matter up with the Commonwealth Attorney General. The problem is not yet resolved, and the Committee considers it to be a potentially serious restriction on the Inspector's fulfilment of the functions envisaged for him by the *Police Integrity Commission Act 1998*.

The meeting also revealed the conflict inherent when balancing the need for security of confidential information, and keeping records of the audits and spot checks undertaken by the Inspector. The Committee noted in its discussions with the Inspector that it would be desirable for some statistics to be collected relating to the use of the Inspector's powers, as this would assist the Committee in gaining an understanding of his activities. Since the hearing, the Committee has received a letter from the Inspector indicating that a new system has been put in place that will record information about all spot checks performed by the Inspector, and that will enable statistics to be collated, without risking the secrecy of operations or informants.

On a positive note, the Committee heard that an issue raised at the first General Meeting, the need for legislation to permit and provide some regulations and supervision of covert operations, has now been resolved. The *Law Enforcement (Controlled Operations) Act 1998* began operations on 1 March 1998, and allows law enforcement officers to conduct controlled operations without risking prosecution for having undertaken illegal activities in the course of those operations.

I wish to thank the Inspector for participating in the hearing, and for the cooperative way in which he dealt with the Committee's requests for information. I am grateful also to my colleagues on the Committee for their involvement, and to the Secretariat for its assistance in organising the hearing.



Bryce Gaudry
Chairman

INSPECTOR'S OPENING STATEMENT

Mr FINLAY: At our first joint meeting last November we discussed at some length the need for the New South Wales Parliament to enact legislation permitting covert operations, subject to proper supervision and control, that are designed solely for the purposes of legitimate law enforcement.

As you are aware, in response to Ridgway's case the New South Wales Parliament enacted the *Law Enforcement (Controlled Operations) Act 1997*. That Act permits certain prescribed New South Wales law enforcement agencies—namely, the New South Wales Police Service, the Independent Commission Against Corruption, the New South Wales Crime Commission and the Police Integrity Commission—to engage in conduct which, but for the Act, would be unlawful.

Evidence thereby obtained is not affected by the rule in Ridgway, although the courts continue to exercise their discretion to exclude evidence, the prejudicial effect of which is considered to outweigh its probative value. The controlled operations legislation requires that there be a code of conduct in force (by regulation) in relation to a law enforcement agency before an authority for a controlled operation could be granted. It further provides that such a regulation will not be able to be made, except on my recommendation as Inspector of the Police Integrity Commission.

All four agencies, after appropriate consultation, agreed upon a common code of conduct for such controlled operations. Such code, upon my recommendation, became a regulation in February 1998, *Law Enforcement (Controlled Operations) Regulation 1998*.

The Controlled Operations Act and Regulation came into effect on Sunday, 1 March 1998. For its general operations the Commission, after careful deliberation, has issued a code of conduct which sets out the standards of behaviour all Commission staff are to observe. Copies are being sent to the chairman of this parliamentary Committee for circulation to members. I assess it as a sound, commonsense document.

In my annual report for 1997 I drew attention to the need for the Commission to have telephone interception capacity. That was a need which could only be met by political action in the Federal sphere.

On 11 November 1997 the Governor-General gave the royal assent to a bill making appropriate amendments to the Federal legislation (*the Telecommunications (Interception) and Listening Devices Amendment Bill*).

However, as I subsequently advised this joint Committee, the Federal Act was capable of being interpreted in a way as to suggest that the Inspector may not have authority to access Police Integrity Commission files containing information gained by lawful telephone intercepts. An obviously ludicrous situation could result from that.

Independent advice from the Crown Solicitor has confirmed that the Commission is precluded by the Federal Act from communicating to the Inspector information lawfully obtained by telephone intercepts, even though the Inspector requires access to that material in order to fulfil his function under the *Police Integrity Commission Act*. This,

as I have noted, requires amendment to the Federal legislation, a requirement which has been drawn to the attention of the Attorney General of New South Wales and the Minister for Police. The Attorney General, the Honourable J. W. Shaw, QC, MLC, with the support of the Minister for Police, the Honourable Paul Whelan, MP, has taken this matter up with the Federal Attorney-General requesting that the Commonwealth give priority to the introduction of appropriate amendments to the *Telecommunications (Interception) Act*.

In last year's annual report I also noted that the amendments then prepared for the Federal legislation did not enable lawfully obtained telephone intercept material to be used in contempt proceedings. This has been the subject of further discussion by the Commissioner, Judge Urquhart and myself with this joint Committee.

I note in summary that the need for amendment at the Federal level to the *Telecommunications (Interception) Act 1979 (CTH)* is twofold: (1) to enable the Police Integrity Commission to communicate lawfully obtained telephone intercept material to the Inspector of the Police Integrity Commission for him to fulfil his functions under section 89 of the Police Integrity Commission Act 1996; and (2) to enable lawfully obtained telephone intercept material to be used in proceedings alleging contempt of the Police Integrity Commission.

I repeat what I have said before, that the role of the Inspector is limited to the role provided by the legislation. One function is to deal with complaints. Another function is to audit operations, but only "for the purpose of monitoring compliance with the law of the State". A third function is to assess the effectiveness and appropriateness of the Commission's procedures "relating to the legality or propriety of its activities".

It is not for the Inspector to assess whether or not in any given case a decision should or should not be made to carry out an operation. Such consideration is exclusively one for the Commissioner. It would only be within the legislative function of the Inspector's office to review such a decision in the most extreme case, such as where no competent decision maker in that position could have taken that action.

This being a public meeting, it is relevant that I underline the need for secrecy of operations and confidentiality of informants and witnesses. Justice Wood observed when recommending, as Royal Commissioner, that there be an Inspector of the Commission:

It is important that there be a "watchdog" which is 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.

Where my investigations of the complaints have involved an inquiry resulting in a report, I have generally restricted the circulation of that report to the complainant and to the Commission.

It is necessary that the integrity of the investigative methodologies of the Commission be preserved to avoid compromising other investigations. Some of the material I received from the Commission when carrying out such investigations, and some I have

seen in accessing the records of the Commission, fall into that category. I have avoided disseminating that material in the reports.

Section 56 of the Act expressly prohibits a person to whom that section applies—which includes the Inspector—from divulging or communicating to any person any information acquired by that person by reason of, or in the course of, the exercise of that person's functions under the Act. Such information is to be divulged only in accordance with a direction of the Commissioner or Inspector if the Commissioner or Inspector certifies that it is necessary to do so in the public interest.

It would hardly ever be necessary in the public interest to divulge information which puts at risk the secrecy of operations or the confidentiality of informants and witnesses. Generally, complainants are entitled to anonymity. I have respected this entitlement when giving examples of the types of matters raised in complaints, in answer to question 19 of the questions on notice.

Overall, I assessed 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.

In the hope that it may be of some assistance, I have copies of the opening remarks I have just made and if I may, I will table them for such use as members may wish to make of them.

QUESTIONS ON NOTICE

Activities

- 1. How many inquiries have you conducted under s91 of the PIC Act? Have these inquiries been conducted on a small or large scale?**

The term "inquiry" in s91 of the Police Integrity Commission Act 1996 (*"the Act"*) includes every investigation undertaken by the Office of the Inspector to deal with a complaint of alleged abuse of power, impropriety or other forms of misconduct on the part of the Commission or officers of the Commission.

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 and arguments on the issues identified.

The inquiries usually involve me, as Inspector, accessing by computer relevant electronic records of the Commission. One complaint required me to read lengthy transcripts of evidence and records of interview, also to listen to a tape of interview.

Nine such inquiries have been conducted. A number of them have, in turn, involved several distinct issues or complaints. These individual complaints are required to be addressed separately within the inquiry.

Some of these inquiries have involved consideration of detailed submissions of law. These, in turn, have required reference to relevant legal authorities. In some cases, complaints by individual complainants raise similar issues. But they are still required to be addressed separately. I shall give some examples of the types of matters raised in answer to Question 19 below.

If, however, the description "large scale" is confined to those inquiries which required the holding of a formal hearing, none fell into this category.

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. Small private hearings can be conducted in the office of the Inspectorate. 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. For a larger hearing, the Boardroom of the Ministry is available.

- 2. How many times have you referred matters regarding the PIC or PIC officers under section 90(1)(f) to other agencies?**

None.

-
3. **Have you had cause to recommend disciplinary action or criminal prosecution against PIC officers and, if so, in what circumstances - s90(1)(g)?**

No.

Statistics

4. **How many times have you used the following powers and in relation to what types of matters:**
- a) **accessing PIC records and taking or making copies of records - s90(1)(b);**
 - b) **requiring the PIC to supply information or produce documents and other things about any matter, or any class or kind of matters relating to PIC operations or any conduct of PIC officers - s90(1)(c); and**
 - c) **requiring PIC officers to answer questions or produce documents or other things relating to PIC operations or any conduct of PIC officers - s90(1)(d)?**

Re a) Irregularly. Sometimes once, sometimes twice a week.

As I have previously noted, I have unrestricted access to the records of the Commission (with the exception of TI material). It is important to understand that the Commission's register of its records is an electronic one. In this regard, I repeat my answer to the 3rd Question on Notice in the First General Meeting of the Inspector with the Committee on the Office of the Ombudsman and the Police Integrity Commission ("*the Committee*"):

"I have a secure designated room at the Commission where I have unrestricted access to relevant computer records. A printer is attached to that computer. With some small exceptions, the Commission's records are imaged and can be printed out. In those cases where a large document, for example, an Annual Report by another agency, is identified in the computer records, there is a bar code reference to facilitate obtaining a copy of such report from the Registry."

The one exception to which I earlier referred is TI material obtained by the Commission pursuant to its recent powers. Such material is not available to me and is the subject of a restricted notice on the computer. This is because the Telecommunications (Interception) Act 1979 (Cth) does not permit the Commission to communicate intercepted material to the Inspector. To date, this has not presented a problem in accessing the Commission's records. But in the future, it shall present a problem on occasions. See my answer to Question 5 of the Questions on Notice at the First General Meeting.

I also note that this problem of TI material can only be overcome by amending legislation in the Commonwealth Parliament. I further note that the State Attorney

General, with the support of the Minister for Police, has made appropriate representation in this regard.

b&c) About twice a week. See the observations following.

Formal requirements to supply information or documents or other things about any matter has generally been restricted to inquiries into complaints. In such cases, the requirements have always been in writing, as has the response.

Formal requirements have, otherwise, been unnecessary, the reason being the Commissioner has made himself available by phone or in person, to discuss any matter or provide any information I may wish. He has further given me direct access to any of the officers of the Commission with whom I may wish to speak, without prior reference to him. I have access to the electronic records of the Commission to which I referred above.

I have also had discussions about matters relevant to the Commission's operations and procedures, about once a fortnight, with the Commission's Solicitor, Mr Andrew Naylor. I further have discussions, far less frequently, with the Director, Operations - Special Services, Mr Andy Nattress; the Chief Investigator, Mr Bob Mitchell; the Information Manager, Mr Denis Lenihan and the Director of Corporate & Information Services, Mr Dave Rawson, as the case may be.

I have continued to have regular weekly conferences with the Commissioner (sometimes the Assistant Commissioner also attends). There, operations can be discussed in the strictest confidence and complete security. By mutual arrangement, I am also provided with the following:

1) relevant particulars relating to listening device warrants obtained (s50), including computer reference enabling me to access all associated material on the electronic register. It has become recent practice that I am also provided with hard copy of affidavits supporting any new LD application. All such documents, for security reasons, I read, when next convenient, in my room at the Commission and then have the documents shredded. This avoids unnecessarily taking any sensitive material back to the Inspector's office.

2) I am further provided with appropriate information relating to s25 & s26 Notices which have issued, including in each case the reference enabling me to access the electronic register. Section 25 Notices are those served by the Commission for the purposes of an investigation on a public authority or public official (which includes a police officer) requiring such person to produce a statement of information. Section 26 Notices are those served by the Commission for the purposes of an investigation on a person, whether or not a public authority or official, requiring the person to attend and produce specific documents or things.

3) I am further provided with appropriate information relating to authorities under s29 and applications under s45 (search warrants). To date, the Commission has not applied for a search warrant.

Reports from the PIC

5. **In your First General Meeting with the Committee you indicated that you receive reports relating to the handling of Category One complaints and delays experienced in following the Commission's procedures (Report p.13).**

How many of these reports have you received and what procedural issues, if any, have they raised?

The Commission's procedures relating to the handling of Category One complaints changed early in the year. A short summary of the procedures now operating are as follows:

- 1) Pursuant to section 67(a) of the Police Integrity Commission Act 1996, an agreement between the Commissioner for the PIC and the Ombudsman redefined the class or kind of complaint which should be referred to the Commission. Generally, this focussed more on serious police misconduct.
- 2) Complaints made on or after 1 February 1998 are dealt with by the Screening Committee in accordance with the detailed definition under (1) above.
- 3) That a 5 person Screening Committee (which includes the Assistant Commissioner and the Director, Operations and Special Services) meets on a weekly basis to consider complaints received by the Commission. These may be referred (by the Police Service or the Ombudsman) or non-referred (directly from an individual or another agency).
- 4) The Screening Committee has a role ranging from receiving every initial complaint sent to the PIC (referred or non-referred) to consider whether it is a Category One complaint to making recommendations to the Commissioner/Assistant Commissioner as to the action to be taken by the Commission on Category One complaints pursuant to Part 4 of the Act and on reports received from the Police Service.
- 5) In respect of all Category One complaints made on or after 1 February 1998, the Commission not only makes an initial decision but also takes continuing action. Recommendations are of specific kinds: For example, the PIC conducting a full investigation, ie, taking over the investigation from the Commissioner of Police (s70); or the PIC conducting a preliminary investigation to decide whether to make the conduct complained of, the subject of a more complete investigation etc (s24); or to oversee the investigation conducted by the Police Service (s13); or to monitor the investigation conducted by the Police Service (s14(b)).

In every case the complaint is given a code name and number. In the new computer system a tab automatically recalls a complaint, after a limited period, for review.

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- 6) The Operations Advisory Group (OAG) consisting of four members including the Assistant Commissioner and the Director, Operations and Special Services, has the role of overseeing PIC investigations including preliminary investigations and of advising the Commissioner/Assistant Commissioner on all stages of the investigations.
 - 7) The OAG normally meets every two weeks, unless there is a need to call a special meeting. Minutes of the OAG are kept and recorded in the computer system. These include reports by team leaders. The procedures expressly require decisions to be noted in the Minutes of the meeting and action points to be included.

These procedures, from my observation, are operating satisfactorily. Any further discussion is more appropriate for a Closed Session.

6. Do you continue to receive weekly reports on applications for listening device warrants and s19 reports made under the Listening Devices Act?

Yes.

7. Have you received reports from the PIC on the following and, if so, how frequently:

- a) notices to obtain information (s25);
- b) notices to obtain documents or other things (s26);
- c) authority to enter public premises (s29);
- d) applications for and execution of search warrants (s45); and
- e) applications for and execution of listening device warrants (s50) and TI warrants?

Weekly. See answer to Question 4(b&c) above.

8. What information do these reports contain? Are they purely statistical or do they deal with procedural matters?

See answer to Question 4(b&c) above. I can amplify in a Closed Session.

9. Do you use these reports to:

- a) determine if the PIC's registers are up-to-date and complete, and that all required documentation is on the file and correctly noted in the register, and that the requisite authorisation for the exercise of the power has been obtained;
- b) ensure PIC procedures and policies have been complied with; and
- c) ensure the use of PIC powers is legal and appropriate?

Re a) The Commission's register is electronic. No document leaves the Commission, is used by the Commission or passes between officers, without being placed on the register. The register, I have found, is comprehensive.

b&c) It is not the Inspector's function to so "ensure". However, the answer is yes, if (b) is meant to ask, if I use such reports to assist in auditing the operations of the Commission, for the purpose of monitoring compliance with the law of the State. It is also yes, if (c) is meant to ask whether I use such reports to assist in assessing the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.

Audit

10. How many audits have you conducted and how extensive were they?

I regard the Inspector's function of auditing the operations for the purpose of s89(1)(a) as an ongoing role. Understanding the term "audit" as meaning, for this purpose, looking closely in a systematic way at the records and activities of an operation, I do that irregularly. Sometimes once, sometimes twice a week. I repeat the following portion of my answer to Question 4d in the First General Meeting:

"In my opening remarks to the Committee at its meeting on 23 July, 1997 I mentioned the Federal "Inspector-General of Intelligence and Security Act 1996" I noted that the (then) current Inspector-General, Mr Ron McLeod, has the same requirement to audit that I have. I there said "In our roles that requires looking closely at the operations in a systematic way. That is best done by spot checks".

The auditing of the operations of the Commission by the Inspector is for the specific purpose of "monitoring compliance with the law of the State". Again, the role of Inspector in assessing the effectiveness and appropriateness of the procedures of the Commission has the express statutory limitation, namely "relating to the legality or propriety of its activities".

It is clear to me that the Inspector's auditing role is not unlimited. Were it unlimited, extensive and expensive staffing arrangements would be required."

11. When conducting audits do you have access to all PIC internal registers and accompanying documentation?

Yes (excluding TI material).

12. To what extent have you reviewed current operational material when conducting audits of PIC records?

To the extent I find necessary to fulfil the Inspector's functions under s89. I endeavour to avoid indulging in idle curiosity and wasting time by reading operational material which is not necessarily read for the purpose of my statutory functions.

Several general principles must be borne in mind when considering the question asked especially the use of notices, authorities or applications issued under sections 25, 26, 29, 45 and 50 of the Act. These include:

- a) Whilst the Commission is an administrative inquiry, it is to be conducted in accordance with the principle of natural justice and procedural fairness. The rules guided by such principle vary according to the nature of the inquiry.

While the administrative decision by the Commission to issue notices under the Act must be bona fide and for the purposes of an investigation described in s13(1) of the Act:

*"... it does not depend on the existence of probative material justifying the issue of such process. To take such a view would be to stultify the Commission and to defeat the purpose of the Act"*¹.

Other general propositions stated by Justice Wood in Mannah's case² are:

"Identical considerations apply to so much of the requirement of the summons as relates to the production of documents. The power to call for documents must similarly be exercised for the purposes for which it is given and not otherwise, that is, to assist the Commission in an investigation of a matter referred to it: Riley McKay Pty Ltd v Bannerman (1977) 13 FLR 129 at 134. Upon its face each summons was validly issued for the purpose. Any challenge to production upon the basis that the request was not made bona fide and that the document could not on any conceivable basis assist the investigation, would properly be the subject of review by the Court under s19, following upon the production to the Commission or to the Court in the manner required by s19(5)

.....

..... There is a danger of a body such as the defendant adapting standard summonses or notices for the production of documents, without regard to the individual case in respect of which the demand is issued. Equally there is a danger of the request being cast too widely in its terms, that is with insufficient precision as to the person or property to which the relevant item related or the period encompassed to permit the recipient to know with certainty what is required

..... I do, however, observe that is an important matter for the Commission to bear in mind given the penal consequences which attach to a failure to respond to a summons or notice to produce documents .."

- b) Authority supports the following propositions:

1. The power given to the Commission, (like all statutory powers), to issue section 25

¹ per Wood J in Mannah's case, above (1987) 13 NSWLR 28 at 39. These remarks, made in reference to the State Drug Crime Commission of New South Wales, also apply to the Police Integrity Commission.

² Mannah v the State Drug Crime Commission (1987) 13 NSWLR 28 at 40-41

and section 26 notices, must be used bona fide for the purposes for which it was conferred and that involves that its exercise be not excessive in the circumstances of the case. Thus when such notices are issued, the Commission must issue them bona fide for the purposes of an investigation described in section 13(1) of the Act.

2. The power of giving these notices must be exercised for the purposes for which it is given and not otherwise; that is, to assist the Commission in the exercise of its functions of investigating serious police misconduct or other police misconduct.
3. The Commission should not issue a notice which would impose upon a person a burden completely disproportionate to the value to the Commission of the information sought.
4. It is not a good ground of objection to a notice that it is burdensome or oppressive. The answering of a notice may involve the recipient in considerable work and expense but the legislation assumes that the public interest necessitates this.
5. If the Commission acts beyond power when issuing a notice, it is no answer for the Commission to say that it was acting bona fide for the purpose of conducting an investigation.
6. What is relevant to an investigation carried out by the Commission (and thus might properly be made the subject of a notice issued under section 25 or 26 of the Act) is not to be determined by the notion of relevance which is applied to determine admissibility of evidence in adversary litigation. A much broader concept of relevance applies to an investigation of the type which the Commission carries out.
7. If there is material before the Commission which induces in it a bona fide belief that documents may exist which may cast light on matters the subject of an investigation, then the Commission is entitled to issue the notice. It is not necessary that the Commission should believe that the documents will in fact have such a result. The Commission can do no more than pursue lines of inquiry that appear promising. These lines may or may not in the end prove productive. If the Commission's decision to issue a notice is challenged, a Court should not set aside that decision unless it is such as no reasonable Commission, correctly directing itself in law, could properly arrive at. In other words, a Court should not restrain the Commission unless it is satisfied that it is going off on a frolic of its own.
8. The evaluation of probabilities concerning the usefulness of the information sought in the notices, is, within limits, for the Commission, and certainly not for the persons from whom disclosure is sought.

Where a decision is within power and legal, it is often a discretionary decision. Assuming that it is the decision of the Commissioner, Judge Urquhart, then it could only be considered tainted with impropriety if no District Court Judge of ordinary ability acting in good faith in the public office of Police Integrity Commissioner would have made that decision.

It is certainly not for the Inspector to question the propriety of a discretionary decision, simply because the Inspector may consider he or she would have decided differently.

- 13. In auditing the PIC's registers do you examine the justification and appropriateness of the use of coercive powers?**

As in the answer to Question 12 above.

- 14. Have you audited operational files of investigations which received significant media coverage, were sensitive or resulted in criminal or disciplinary charges?**

Generally, I have endeavoured to do so.

- 15. How often do you have conferences with the Commissioner, Assistant Commissioner and other senior officers of the PIC, and how frequently do you use computer facilities at the Commission to follow PIC operations?**

See answer to Question 4 above.

- 16. The Ombudsman is responsible for ensuring the PIC complies with its record-keeping responsibilities regarding TI. To what extent do you examine issues of legality and propriety in relation to the use of TI by the Commission?**

I am unable to do so for the reasons mentioned in the answer to Question 4 above.

- 17. Has the Crown Solicitor's advice concerning your ability to view TI product held by the Commission restricted your access to PIC files for the purpose of carrying out your functions under the Act?**

Not to date, but see answer to Question 4 above.

Complaints

- 18. How many complaints have you investigated concerning the PIC or the conduct of its officers?**

Nine.

- 19. What types of matters have been raised in complaints to the Inspector?**

The following are three examples:

A) One complaint, which required resolution, related to an item seized by officers of the Royal Commission in the execution of a search warrant in March 1996. The item had been retained, first by the Royal Commission, and then by the Commission in anticipation that it would be required as an exhibit in the event of prosecution of the

person claiming entitlement to possession of it.

The Royal Commission (and thereafter the Commission) sought the advice of the Director of Public Prosecutions as to whether a prosecution should be laid.

The Complainant, through his solicitor, sought return of the item. When it was not returned, complaint was made to the Inspector. The gravamen of the complaint was the inordinate period of time during which the item had been retained by the Commission without any relevant prosecution being laid.

I considered that the entitlement of the Commission to retain the item was limited to a period no longer than is reasonably necessary in the circumstances. Further, that this stage may be reached even though no decision, whether to prosecute or not, had been made by the Director to whom the question had been referred.

I considered that the onus lay upon the Commission to justify the continued retention of the item at the time of the complaint.

I was of the view that an inordinate period of time had elapsed during which the item had been retained without any relevant prosecution being laid. Accordingly I recommend that the Commission return the item to the Complainant at the expiry of a limited period unless a charge of larceny by the Complainant involving the item had, by then, been initiated.

The Commission returned the item.

That complaint also required consideration of the validity of the relevant search warrant issued by the Police Royal Commission.

B) Another complaint concerns a former police officer who was granted an indemnity from prosecution under the terms of an Amnesty from the Royal Commission.

Pursuant to the terms of the Amnesty, the officer had been permitted to resign from the Service on making a statement by statutory declaration admitting the complainant's criminal activity in the Police Service.

Subsequently, the complainant applied for a position as Investigator with another government authority. That authority was concerned that some of the applicants, who included the complainant, may have had issues relating to their integrity raised at the Police Royal Commission. The authority sought information from the Commission which may assist it in determining whether the applicants (which included the complainant) "*may be fit to hold a position such as that of Investigator with*" the authority.

The Commissioner considered it was necessary to divulge certain information to the authority in the public interest (see the Secrecy Provisions, s56 of the Act). Accordingly, limited information was made available to the authority confirming that the applicant was granted an indemnity from prosecution after making application for Amnesty and making certain admissions. The Commission suggested that if the authority required

further information on that issue, it should approach the complainant directly.

The Commission further noted that the information was disseminated to the authority *"in the public interest pursuant to s56(4)(c) of the Police Integrity Commission 1996. In accordance with the Secrecy Provisions under s56(5) of the Act, you are prohibited from further divulging or communicating the information to persons beyond (the law enforcement unit of the authority) without prior consent of the Commissioner of the PIC"*.

The gravamen of the complaint against the Commission was that it allegedly acted with impropriety in disclosing to a potential employer such material.

I was of the opinion that it made good sense for the Commissioner to certify that it was necessary to disclose the information it did in the public interest. It did so in order to respond to information expressly requested by the authority. Further, the particular agency seeking the information was an "investigative agency" within s18 of the Act. I concluded my report:

"It is, in my view, correct to say that the Commission has a role as a disseminator of information to ensure (in particular the Law Enforcement Agencies of) the public sector operates to the highest standard of probity.

This means that in appropriate circumstances, the Commission has a duty to disclose information which may be relevant to the conduct of public functions, in particular functions relating to law enforcement.

In the present case, the Commission has responded to a particular request from a law enforcement agency and has done so in an appropriate way and subject to limitations on further publication.

On the facts of this case, I dismiss any allegation of impropriety against the Commission in disclosing such information in the manner in which it did."

C) Some other complaints questioned, among other things, whether notices issued pursuant to s25 & 26 of the Act in a particular operation were issued bona fide and for proper purposes of a Police Integrity Commission investigation.

The Commission is constituted by, and its functions are defined by, the Act. Section 3 states the principal objects of the Act to be:

(a) to establish a body whose principal function is to detect, investigate and prevent police corruption and other serious police misconduct, and

(b) to provide special mechanisms for the detection, investigation and prevention of serious police misconduct and other police misconduct, and

(c) to protect the public interest by preventing and dealing with police misconduct.

The first three principal *functions* of the Commission as provided in s13(1) of the Act are:

- (a) *to prevent serious police misconduct and other police misconduct,*
- (b) *to detect or investigate, or manage other agencies in the detection or investigation of, serious police misconduct,*
- (c) *to detect or investigate, or oversee other agencies in the detection or investigation of, other police misconduct, as it thinks fit.*

For the purposes of an investigation, the Commission may:

- (i) *issue notices for service on a public official (which includes a member of the Police Service) to obtain information (s25 of the Act),*
- (ii) *issue notices for services on a person to obtain documents or other things (s26 of the Act).*
- (iii) *hold hearings.*

Many other Federal and State statutes have, for a long time, contained sections similar to s25 and s26 of the Act³.

I note the relevant 8 propositions set out in the answer to Question 12 above. These shall provide guiding principles when determining such complaints in the light of the specific facts relied upon.

Generally, when dealing with such complaints (where I do so by report), I restrict circulation of that report to the parties directly involved.

Justice Wood in recommending that the Commission be set up with the principal function of detecting and investigating serious police corruption, noted:

“5.36 There is always a risk that an agency which is heavily committed to covert investigations, reliant on informants, and possesses powers which are both coercive and of a kind which might involve substantial infringements of rights of privacy, may overstep the mark. For this reason it is important that there be a ‘watchdog’ which is 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.”⁴ (emphasis added)

Section 56 of the Act prohibits divulging or communicating to any person any

³ see s264 of the Income Tax Assessment Act 1936; sections 19 & 30-33 of the Australian Securities Commission Act 1989; s155 of the Trade Practices Act 1974; sections 28 & 29 of the National Crime Authority Act 1984; sections 16 & 17 of the NSW Crime Commission Act 1985; sections 21 & 22 of the Independent Commission Against Corruption Act 1988 and sections 6 & 7 of the Royal Commission (Police Service) Act 1996.

⁴ Page 95 of the Interim Report of the Royal Commission into the NSW Police Service, February 1996

information “*acquired by the person by reason of, or in the course of, the exercise of the person’s functions under this Act*”. The exception to that Secrecy Provision is where the information may be divulged in accordance with a direction of the Commissioner or Inspector “*if the Commissioner or Inspector certifies that it is necessary to do so in the public interest*” [Section 56(4)(c)].

In some cases, where another law enforcement agency, for example, the NSW Crime Commission, has been involved in the determination of the Commission upon a particular investigation, I may direct that the contents of the report may be divulged to such law enforcement agency and may certify that it is necessary to do so in the public interest pursuant to section 56(4)(c) of the Police Integrity Commission Act. I may give a similar direction and make a similar certification where the complainant is a serving officer of the NSW Police Service whose complaint is mirrored by some other police officers, making my report a matter of likely interest to the complainant’s police union to whom the information in the report may then be divulged.

20. What were the outcomes of your complaint investigations?

In Complaint 1 (Example A in answer to Question 19 above) I upheld the complaint and made the recommendation noted.

In Complaint 2, I did not consider an inquiry was warranted (the complaint had previously been investigated by the Ombudsman).

In Complaint 3 (Example B in answer to Question 19 above) I dismissed the complaint.

Complaints 4-9 (related complaints) are awaiting final reports. They shall be referred to in the Annual Report. It is appropriate that all reports in these related matters be handed down at the same time. In one case I am still awaiting final submissions in reply.

21. On average, how long does it take you to investigate a complaint?

The times between receipt of complaint and finalisation by report have varied between five weeks and twelve weeks. Some of those investigations had been lengthened by parties involved applying for extension of time within which to furnish supplementary submissions or reference to authority. Such applications for extension, I have readily granted.

22. Have you received any complaints or other matters from other agencies by referral in accordance with section 89(2)?

No.

23. Has there been any evidence of illegality, abuse of power or impropriety by the PIC or PIC officers?

No, other than for the impropriety involved in Example A of the answer to Question 19 above, but I am still to conclude my reports in the 6 related matters (referred to in answer 20 above).

24. Have the recommendations contained in your reports on complaint investigations been fully implemented?

Yes.

25. Are there any systemic or procedural implications for the operations of the PIC arising from your complaint investigations? In particular, what are the implications of the C's complaint report for the operations of the PIC?

The complainant is entitled to an anonymity. I have substituted the letter C for his name in Question 25 above. Because of the nature of the matters raised, I considered that it was necessary in the public interest that a copy of such report be made available to the Committee through its Chairman. I did not mean the facts divulged in the report to be circulated further.

I answer the first general part of this question, no, but I am still to conclude my reports in 6 related matters. As to the second particular part, I would prefer to respond to it in the Closed Session of the Committee.

26. Section 101 of the PIC Act provides for the Inspector to make discretionary reports to Parliament. What do you consider would be the determining factors which would lead you to decide to exercise this discretion?

The determining factor is whether it is considered in the public interest for such report to be made. It is not helpful to speculate on the determining factors of a particular case outside this broad proposition. I provided an example in my answer to Question 6a in the First General Meeting with the Committee as follows:

“Generally where it is in the public interest to so do. For example, a complaint of abuse of power or impropriety or other form of misconduct on the part of the Commission may have been widely ventilated in the media. If this complaint on investigation is found to be without substance, it is likely that such finding should be available to the public by a report dealing with the complaint.

Another complaint may not have had any publicity, it may be of a trivial nature and on inquiry be found to be without substance. It is unlikely that making a report dealing with such complaints would be considered in the public interest. It would of course be dealt with in a statistical way in the next Annual Report.

On the other hand, a complaint may be made which has not been aired publicly. On inquiry it may be found to be sustained and perhaps to be serious. It is likely in such an event that it would be considered in the public interest for a report to be made. The public being entitled to be made aware of such a finding through a Special Report to Parliament (s101 of the Act).”

As I have said earlier, I do not consider that it is in the public interest that the reports of any of the nine inquiries to date be the subject of a Special Report under s101 of the Act. I propose to give examples of such inquiries in my Annual Report.

Procedural Reviews

27. To what extent have you reviewed the PIC's investigation procedures?

I have assessed the procedures of the Commission in a manner mentioned in answer to Question 4. I have also had occasional discussions on the procedures with the Commission's Solicitor, Mr Andrew Naylor, who has a special role in this regard to which I refer in my next answer.

In February 1998, certain warrants for the use of Listening Devices granted at the request of the Royal Commission into the NSW Police Service were declared to be void by the Supreme Court⁵. However, the defects in the warrants so declared void, are not present in the Listening Device Warrants granted on the application of the Commission.

The Commission has satisfactory procedures describing the steps to be taken in preparing, settling and moving upon an application for a warrant pursuant to s16 of the *Listening Devices Act 1984*. Such procedures come into effect after the Commissioner has approved a recommendation by the Operations Advisory Group that a listening device warrant should be sought.

28. What is your evaluation of the PIC's internal audit procedures?

The Commission's Solicitor, Mr Andrew Naylor, who is independent of any particular operation, has been given the task within the Commission of conducting an ongoing internal audit of the Commission's procedures. This is achieved by him acting as a filter, in that all authorities, applications and supporting documents under sections 29, 45 and 50, are seen by him for approval relating to their legality and propriety before they are finally given effect to pursuant to the decision of the Commissioner. He also oversees the relevant documentation for controlled operations, which operations are subject to the Code of Conduct approved by me.

I evaluate such internal audit procedures by the Commission as sound.

⁵ Grove J in *Bayeh v Taylor and others*. Judgement delivered 4 February 1998.

QUESTIONS WITHOUT NOTICE

MERVYN DAVID FINLAY, Inspector of the Police Integrity Commission, on former oath:

CHAIRMAN: I understand that you received a summons issued under my hand to appear before the Committee today.

Mr FINLAY: I did.

CHAIRMAN: You have responded to the Committee's questions on notice. Do you wish to table your answers?

Mr FINLAY: If I may, I formally table my answers to the questions on notice from the Committee. I trust all members of the Committee have copies of those.

CHAIRMAN: Would you care to make an opening statement to the Committee in relation to those questions or on any other aspect of your jurisdiction?

[The Inspector's opening statement appears at page 6]

...

CHAIRMAN: Your submission eloquently puts together the need for confidentiality in your role as inspector, and that is something we do respect. According to our responsibility and accountability to Parliament, we have a responsibility to access as much information as is possible for the public good, without compromising those issues of confidentiality. I thank you particularly for the cases you have handed up in your report to give an idea of the types of issues coming before you. It is very important that we get both those case examples as well as some statistical basis on which to understand the number of times issues come before you, the gravity of those issues and obviously the type of procedural issues that are arising between complainants and the commission in the carrying out of its functions. I make that comment because there is, I suppose, a natural tension between our level of accountability and the need for confidentiality of your operations. I might go to those examples that you used for us on section 19. You say you have made nine such inquiries in relation to complaints brought before you. I take it that these would be typical examples of the types of complaint?

Mr FINLAY: It is hard to know as yet what is typical. I am bound to find ones that come before me that continue to not be ones that you would expect, but once you see them you can understand how they come before you. Perhaps I can give an example of that in closed session later.

CHAIRMAN: Certainly. In closed session I would be interested to go step by step through the process you undertake to follow up on those complaints.

Mr FINLAY: Yes.

CHAIRMAN: I am not moving in any order through your report, but in relation to question 4, do you have details of the number of times you have used those powers?

Mr FINLAY: No, I do not. For the reasons I mentioned, if I may just put in a summary way. Generally speaking, I think the exercise of power is when you are exercising it in a way which shows you are formally relying on that power. Generally, one would do this by having it in writing and having a record of it. However, when you have established a far more helpful informality, you can merely ring the commissioner or any of the senior members of the commission, and have immediate responses to questions you may raise, which I would phrase in such a way as, "There's a matter I am concerned with, can you help me on this?" I would not put it in the way of 91(1)(c), "I am formally making a request that you do so-and-so and I will confirm this in writing or by fax." I do not think that is the way for my role to be effectively and helpfully performed.

That means that a lot of my communication would, technically, come within the definition of "request" but would not be thought of as a formal request. Whenever I speak to the commissioner or the assistant commissioner or one of the senior officers, I am requesting information of some sort or another about the operations of the commission. But I do not frame it as a formal request under a particular subsection of my powers. Those people are well aware of the inspector's powers but they are also, I am able to report, unreservedly co-operative. That has been my experience, and it has been a very helpful co-operation.

CHAIRMAN: You would only invoke those powers if they were not as co-operative, I take it?

Mr FINLAY: I think that is so. That has not arisen. When a complaint comes in I always communicate with the commission formally in writing. I never speak informally to them about a complaint. I feel that would not be procedurally fair to the other party, who is not present. Therefore, I deliberately avoid any informal conversation about the complaint and I deliberately require that my request to the commission be a written one and that their response be a written one.

CHAIRMAN: So, in effect, you have communicated nine times with the commission, am I right, in a formal sense?

Mr FINLAY: Yes, but many times within each of those nine investigations there would be a backwards and forwards of correspondence, often to identify the gravamen of the real issues at stake, to obtain the parties' agreement that these are the real issues, and to ensure they have had ample opportunity to put the argument and material they may wish to and, if it is any new argument or material, to ensure that the other party has the opportunity to make a response to that.

Sometimes if I, by independent research, think that some line of authority may have a bearing on a submission made or on the investigation, I would nominate to the parties some cases I have looked at and invite any observation they may wish to make on those cases. That, I hope, gives them the best opportunity I can give them to feel they have had a fair hearing on both sides of the complaint.

CHAIRMAN: In your opening statement you mentioned the issue of telecommunications intercept. Has that problem arisen to date in your dealings with the commission?

Mr FINLAY: No, it has not been a problem to date. But now that the telecommunications intercept powers are being used in the commission, undoubtedly it will arise at some stage in one investigation or some auditing of mine. That material that is already there, which otherwise will have everything in the register disclosed on it, will come up on my computer screen as a closed area.

CHAIRMAN: Normally, you could go to the commission utilising the computer that you have and that would virtually give you hands-off access, if I could put it that way, is that right?

Mr FINLAY: I could look at anything there. If I so wished, I could go back to original documents behind what had perhaps been looked at by the operations advisory group. I should try to give a balance to this, Mr Chairman. There is an enormous amount of material there, and there is an enormous amount of information gathering all the time. As I think I said, I try to avoid idly looking through material. I could spend day after day just reading all the types of material that is received in regard to one operation, but that is not helpful for me to fulfil my function. I try to avoid idle curiosity about those factual types of matters. There is usually a good factual summary that is quite sufficient for me.

CHAIRMAN: You have your room with your computer, and you can access all the material. I take it that, on call, you could call up any of the operational units or individuals within the PIC to effect a cross-examination of them, if necessary, on any of that information?

Mr FINLAY: I can do two things from where I sit in front of the computer. First, I can print out any document that may particularly interest me which I would wish to have in hard copy. Second, I can put my hand on the telephone and get the direct line of any of the senior operators involved to whom I wish to speak. I try to avoid taking any hard copy out of that room back to my office or putting it in my briefcase or walking out of the place with it. A lot of the material is enormously sensitive. It would be unsafe to other people for it to be at risk of being lost and found by others. So I usually have that material shredded and try to avoid carrying away any hard copy.

Mr KINROSS: Does the operations advisory group summary of material, as opposed to the material itself, include the reference to the special branch files, which I believe Commissioner Urquart has previously commented on?

CHAIRMAN: Before answering any of these questions, you may contemplate that some of them would be better dealt with in camera.

Mr FINLAY: Certainly. I understand that the commission will have a report on special branch files very shortly. I would not like to say anything publicly about that at all; I think it would be inappropriate for me to do so.

Mr KINROSS: But you are aware of that material?

Mr FINLAY: May I put it this way: I am aware of the whereabouts of that material, but I do not think it would be appropriate for me to answer further.

The Hon. M. J. GALLACHER: I refer to the way in which you conduct the investigation. Am I correct in thinking that you have one staff member?

Mr FINLAY: I do.

The Hon. M. J. GALLACHER: Do you interview witnesses and complainants and go through the full gamut of a normal investigation?

Mr FINLAY: No. To date I have not found it necessary to have a hearing, which would be the way I would interview. I cite one matter by way of example in which I thought this was going to be necessary because there was a dispute on fact as to what was said between the complainant and two former members of the royal commission. I thought the only way that that factual dispute—which was relevant to the resolution of the investigation—could be resolved was to have a hearing. I thought it would be satisfactory to have that hearing in my office. I arranged with the Ministry for Police for a reporter from the Attorney General's Department to be available for that purpose, and I arranged for the legal representation office to represent the complainant at such a hearing. However, that was resolved in another way, which meant that not only was hard copy available of exactly what was said but there were tapes of what turned out to be the four relevant conversations. I sent this hard copy—which was fairly voluminous—to the complainant, who was a former police officer, and invited that police officer to attend my office to hear the tape that I had heard if the officer wished to. I said to the police officer, "Unless you advise to the contrary, I assume that you would accept the accuracy, as this represents the best evidence I could rely upon as to what was in fact said." That resolved the matter, as you can imagine it would.

The Hon. M. J. GALLACHER: Where do you see investigations leading in the future, as regards the potential for interviewing witnesses in the traditional complaints investigative procedure?

Mr FINLAY: There may be conflict—maybe two quite different accounts—as to what was said out in the field or actions done in the field. The resolution of that conflict may be critical to the resolution of the complaint. Therefore, that would just have to be done by way of evidence, and I would then take that evidence under section 91 of the Police Integrity Commission Act, with all the powers there. I would hear the evidence, in effect, as a judge, give opportunities for questions to be asked of the opposing witnesses, and then make a determination, as a judge would in any conflict.

The Hon. M. J. GALLACHER: Who would you then use as your investigators to gain statements from witnesses, complainants, and so on?

Mr FINLAY: I would probably have all that initially in writing as part of the complaint, and statutory declarations that had been forwarded to me in support of a complaint or in opposition to it. However, I have made contact with—and I do not wish to mention any names—one whom I judge was a very senior officer, not from the New South Wales police force, who was of assistance in the royal commission. I interviewed him, and he was willing to take a role, if I have one, that requires someone to make investigations.

The Hon. M. J. GALLACHER: Of each of the nine investigations to date, and however many occur in the future, is a hard copy kept of every inquiry that you conduct? Who would have authority to check your findings and the result of each inquiry?

Mr FINLAY: Firstly, I make a report. Six of these investigations have been going on for some time—for almost three months. A lot of them were overlapping. In one of them—which I think I observed in one of the answers—there was still an outstanding submission about an aspect that was unique to that particular complainant. But because of the overlapping nature of these complaints it was not appropriate for me to hand down one or even five of the reports when I still had a final submission to come in on the sixth one. The submission concluding that material came in only at the end of last week. I then, early this week, concluded my reports in all six matters. They were delivered this morning to the parties—that is, to the legal representation office—through two different solicitors representing the six complainants, and to the commission. Some of them are different in length; a lot of them deal with the same material. Each one is between 20 and 30 pages long. I hope that they, as fairly and as balanced as I can, set out the gravamen of the complaints, what the response was, how I have come to a resolution, and why I have done so.

I have a file for each such complaint, containing every piece of material that has come in on that complaint. Who could check that? Anyone who had authority to do so. Who had authority to do so? There was one complaint that I did not find necessary to deal with by way of report—for a reason I would rather not say publicly but it was obviously not a complaint appropriate to a matter of investigation to waste the State's money on. Such was the nature of the complainant's problem that he sent a series of communications to me. I responded by letter to him setting out why I cannot, in full, and regretting that there is nothing further I can do. But it comes to a stage when there are allegations being made in letters that now people of the highest level—politicians, in conspiracy with police commissioners—are arranging to murder him, that you cannot keep the correspondence going. You are only feeding a fire that is sadly out of control. So I stopped. Then you get another letter saying, "Why haven't I heard from you?", at which stage I can only write back, as I did, saying that there is a provision in the Act that any complaint about my conduct may be made to the Independent Commission Against Corruption, that this is the address, and if he wishes to make a complaint and would like the return of any documents for that purpose, to let me know.

The Hon. M. J. GALLACHER: If they are not satisfied with your actions, the last course would be ICAC?

Mr FINLAY: That is correct.

The Hon. M. J. GALLACHER: You are obviously well aware of the way in which the Ombudsman conducts an inquiry and that the inquiry's report is sent out to the complainant with statements and all other relevant information used to answer the allegations raised in the complaint. Do you take a similar course in responding to complainants? Do you send out copies of statements from investigators, and so on, or do you simply send a copy of your findings?

Mr FINLAY: About halfway in between. Some of the material that I access in the commission is absolutely security-confidential material, and it would be quite inappropriate to send it out. But I endeavour, as well as I can, to deal with and to make available all those matters that I feel are proper and appropriate and not irresponsible with regard to public interest. There comes a time when private interests and public interest in these areas can be in some tension, so I have to have regard to that.

CHAIRMAN: In your reply to question 4 you mention a recent practice of affidavits supporting listening device applications being provided to you. Is there any statistical data on that? For example, are there details about how many applications have been made and whether you have been happy with the material in all cases?

Mr FINLAY: I shall provide the Committee with an example. In my weekly meeting I now receive among other things, by mutual arrangement between the commission and myself, if there have been any listening device applications, a sheet that records the listening device number; the number on Detrak, which is the computer program for the whole register; the target name or names; the nature of the listening device, whether it be a body listening device or a premises listening device; details of whose body and what premises; the date of application; the name of the Supreme Court judge; and the date from which the listening device starts operating. Simply by going to the number in D Trak, I can see on the computer—and if necessary print out immediately on hard copy—the application for the listening device; the notice to the Solicitor General about the listening device; the affidavit in support, which is usually a long document because it has to be such that will satisfy the Supreme Court judge; the warrant issued under the Listening Devices Act; the period of the warrant; and the period within which a section 19 report is to be given about the operation.

It was a matter of convenience to me that the first time a listening device application was made—recognising that some applications are of a roll-over nature—I was given a hard copy of the affidavit that supported the application, which the Supreme Court judge would have gone through and acted upon. As I have mentioned, I make a practice of not taking that away, because it contains the most confidential of material. I take it to my room and if it is too late to read it on the evening of receipt I come back a day or two later and read it. On being satisfied, I have the affidavit shredded. I do not take it away. I make a tick in respect of my initial view about that application.

CHAIRMAN: I take it that to date you have been satisfied with the procedures.

Mr FINLAY: Yes. I have. I could give an example of an allied matter that may be of help. The area of search warrants was a problem area with the Royal Commission into the New South Wales Police Service, as Committee members may recollect. There was a case in which Acting Justice Temby held a particular search warrant to be invalid, Warner's case. The Court of Appeal upheld that decision, striking down the validity of the search warrant. These preliminary type of applications are fairly new. Normally it is in a trial itself that the validity of a search warrant will be challenged, but that did not mean in Warner's case that the Crown could not try to use that search warrant. It did mean that a finding had been made with regard to the validity.

What happened when Warner's trial came on was that finally—although not so long after, because it was only in November last that the Court of Appeal upheld the decision—there was a voir dire, which is a trial within a trial, with a jury out, to decide the legality of the evidence. In Warner's case the trial judge, following the Court of Appeal decision, found that the warrant was invalid, that the invalidity arose out of a technical breach—it was not a deliberate flouting of the law—and that as a matter of discretion it was in the public interest that the material found in the search be allowed. The trial judge allowed that material. Once that decision was made the defendant pleaded guilty to the charge.

For warrants that have a question mark over them there are likely to be voir dieres, delays and expense to the community. The commission, being mindful of that, was concerned to try to ensure that search warrants used by the commission would be as free of any fault as they possibly could be. The commission had opinions sought and given by, among other people, the acting Solicitor General of the time, J. Spigelman. There is now a form of search warrant and a whole procedure relating to search warrants that is as likely as can be to stand up to any tests in any courts. I consider that to have been a wise course of action.

So that there be no misunderstanding, I shall give an example of two extreme situations as to how this evidence may be allowed, although technically illegal. Let me assume the same factual situation: that police officers go to a premises, make a forced entry and find heroin under the pillow of the defendant, who is the only occupier of the premises, and he is charged with possession of the heroin. The only real issue will be as to whether the evidence of that find of heroin was admissible in the circumstances.

On the one hand, acting perhaps upon surveillance information of known drug takers visiting the premises regularly, the police may have obtained a search warrant but the search warrant may, through a typist's oversight, have not included a line that technically should have been included in order to comply with the Act. Because of that the search warrant may be invalid. In that case it is highly likely that any trial judge would say that that was not a deliberate breach of the law and that it is in the public interest that he exercise his discretion and allow the finding of the heroin. In another case, however, if the police do not even bother to try to obtain a search warrant but enter the premises forcibly then the same trial judge is most likely to say that the police cannot benefit from their illegality, particularly when it was deliberate and reckless, and disallow the whole of the evidence.

CHAIRMAN: In your answer you said that the Police Integrity Commission has yet to seek a search warrant.

Mr FINLAY: That is correct.

CHAIRMAN: But I take it that you would have examined the procedures pertaining to that.

Mr FINLAY: I have examined the procedures, and to me they seem to be quite sound. I have discussed that with Andrew Naylor, the solicitor of the commissioner, as well.

Mr KINROSS: Are you aware that the law was amended late last year and concern was expressed in the Senate of the Federal Parliament that search warrants could be obtained not from justices, as the case had been, but, for example, from members of the Administrative Appeals Tribunal?

Mr FINLAY: I do not remember that; I remember that being the case as regards telephone intercept warrants. Federal Court judges declined to continue to grant applications, and thereafter non-judicial members of the commission have been granting them. I am not aware of any problems that have arisen since that happened. No longer are telephone intercept warrants granted by judges.

Mr KINROSS: Is that also the case with search warrants?

Mr FINLAY: No.

Mr KINROSS: Although this may not be completely relevant to this Committee, would you mind saying why the judiciary indicated that it no longer wanted the power to grant telephone intercept warrants?

Mr FINLAY: I am not in a position to answer that. I am sure that the Federal Court judges would have had what they perceived to be good reason for that. They may have considered that it was really an administrative act and was not appropriate for them for that very reason.

The Hon. M. J. GALLACHER: Changes have been made to the search warrant procedures with respect to New South Wales police. A certain number of officers need to be present, there must be a video camera in operation while the search is taking place and, to my knowledge, there is a requirement for a member of the public to be present. Are the same requirements placed upon the Police Integrity Commission with regard to the execution of search warrants?

Mr FINLAY: The same requirements would apply. I do not wish to disclose too much, but the Committee may be well assured that the Police Integrity Commission would take every possible course reasonable to ensure that what it does is not only valid but is fair and is the best proof that one could seek of just what was found and where it was found. Often the best procedure is to have a video camera going behind the scenes.

CHAIRMAN: Your replies to questions 10 and 12 state that your audit role requires "looking closely at the operations in a systematic way" and that it is best done by spot checks. Do you keep a record of all spot checks?

Mr FINLAY: No, I do not. Perhaps I should think about that. I have my own personal note of matters that I do, but I do not have a file relating to that. There are certain operations on which I am more likely to do that, for reasons that are valid. Perhaps I may not develop that at the moment.

CHAIRMAN: Perhaps you might do so in a confidential session. The issue for me and, I think, for other members of the Committee, is that eventually we may need to draw a picture in our minds of the numbers and the amount of times involved and the

structures under which audits take place. A lot of these things we take on trust, and that is obviously part of the process. Over time it may be useful to have some idea of times and the outcomes of audits, as a historical record as well as to give us some idea of the actual operations of the inspectorate.

Mr FINLAY: Yes.

Mr KINROSS: I have a question that flows from audit matters. Mr Finlay, on a previous occasion when you appeared before the Committee we asked you how many hours per week were being spent with the work you undertake as inspector. To my recollection, you said that the role was certainly a part-time one.

Mr FINLAY: If I remember correctly, I said on the last occasion that I endeavour to not overservice my role. I do not do any other work. I exclusively do work in this role of inspector. I am paid for those days on which I see fit to work and find it necessary to work to perform my duty. I feel very strongly that this should not be a role that is overserved at the community's expense. On the previous occasion I said that in the preceding month I had found it necessary to work for only 7.5 days in total. That gave rise to an extract in one of the morning papers that read: the inspector revealed he had worked only 7½ days last month, suggesting that he had been paid for the full month, but lazily he had worked only 7½ days.

I am paid only for the days I work and I work only on those days that I feel are reasonably necessary to properly fulfil my function, but not to overservice it. It varies. Last month these investigations and, no doubt, giving some thought to these questions on notice may have added to it, occupied, I think it was, 10½ days. It varies, but between those figures.

CHAIRMAN: Have you taken any interest in the developments of the Criminal Justice Commission in Queensland and the setting up of a parliamentary commissioner in a role somewhat similar to yours?

Mr FINLAY: I have taken an interest in that I am provided with, and I read, media coverage of all material throughout Australia that may bear upon a body such as the Police Integrity Commission. I usually read this at home at night or on the weekends, and that is not time I charge for. I have not seen fit to have any direct communication with such bodies. I have had direct communication with the inspector-general, who has a somewhat similar role to me in respect of Federal agencies, and I have found that helpful. I would certainly communicate with any that I thought may be of assistance to me in fulfilling my functions. But I have not considered that the Queensland situation may be helpful. I have certainly followed it with interest.

(Evidence continued in camera)

(The witness withdrew)

(The Committee adjourned at 3.39 pm)

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APPENDIX



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

**Proceedings of the
Committee on the Office of the Ombudsman
& the Police Integrity Commission**

Thursday, 11 June, 1998
at 10.00am in the Jubilee Room, Parliament House

MEMBERS PRESENT

LEGISLATIVE ASSEMBLY

Mr B Gaudry MP (Chairman)
Mr J Anderson MP
Mrs D Grusovin MP
Mr J Kinross MP
Mr P Lynch MP
Mr A Stewart MP

LEGISLATIVE COUNCIL

The Hon M Gallacher MLC
The Hon E Nile MLC

APOLOGIES

The Hon A Kelly MLC and Mr J Small MP

IN ATTENDANCE

Ms Helen Minnican (Director), Ms Tanya Bosch (Research Officer) and Ms Natasha O'Connor (Assistant Committee Officer).

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7TH GENERAL MEETING WITH THE OMBUDSMAN

The Chairman opened the public hearing at 10.29am and welcomed the Ombudsman, Ms Irene Moss, Deputy Ombudsman, Mr Chris Wheeler, and Assistant Ombudsmen, Mr Greg Andrews (General) and Mr Steve Kinmond, (Police).

The witnesses, all on former oath, acknowledged receipt of summons.

The Ombudsman tabled her answers to the questions on notice and confirmed that the Guidelines for Redress was a draft document which had a limited circulation and had been made available to the Committee for consideration and comment. The Committee agreed that the Guidelines would not be distributed outside the Committee pending the production of final guidelines.

The Ombudsman addressed the Committee, then the Chairman questioned Ms Moss, followed by other Members of the Committee.

The public hearing concluded and the Members of the Committee continued to examine the witnesses in private.

Questioning concluded, the Chairman thanked the witnesses for attending.

The Committee adjourned at 1.00pm and resumed at 2.10pm.

2ND GENERAL MEETING WITH THE PIC INSPECTOR

The Chairman opened the public hearing and welcomed the witness.

The Hon M D Finlay QC, PIC Inspector, on former oath, acknowledged receipt of summons.

The Inspector tabled his answers to the Committee's questions on notice and addressed the Committee. The Chairman commenced questioning inspector Finlay , followed by other Members of the Committee.

The public hearing concluded and the Members of the Committee continued to examine the witness in private.

Questioning concluded, the Chairman thanked the witness for attending.

The hearing closed and the Committee adjourned at 3.40pm sine die.