

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

QUESTIONS ON NOTICE EIGHTH GENERAL MEETING WITH THE PIC INSPECTOR

Inspector of the Police Integrity Commission Annual Report 2006-07

QUESTION ONE:

1. *Have you been able to confirm whether the Legal Representation Office still has approval to provide legal advice and representation for persons whose testimony at a formal hearing may warrant legal representation (AR p 8 par 28)?*

INSPECTOR'S RESPONSE TO QUESTION ONE:

At this stage I am awaiting a response from the Attorney-General to my letter to him dated 9 October 2007.

QUESTION TWO:

2. *You comment at page 17 (C18-05) of your report that:
...the circumstances surrounding the overlooking of the complaint by the Commission highlighted the limitations placed by the legislation on the Commission's powers to oversight such Police investigations.*

Are you able to comment in general terms on how these legislative limitations can impact on an investigation?

INSPECTOR'S RESPONSE TO QUESTION TWO:

The statutory provision enabling the Commission to oversight other agencies is contained in Section 13 of the Police Integrity Commission Act 1996, which is in the following terms ---

- 1) *The principal functions of the Commission are as follows:*

- (a) to prevent police misconduct,
 - (b) to detect or investigate, or manage or oversee other agencies in the detection or investigation of, police misconduct,
 - (d) to receive and assess all matters not completed by the Police Royal Commission, to treat any investigations or assessments of the Police Royal Commission as its own, to initiate or continue the investigation of any such matters where appropriate, and otherwise to deal with those matters under this Act, and to deal with records of the Police Royal Commission as provided by this Act.
- (2) The Commission is, as far as practicable, required to turn its attention principally to serious police misconduct.
 - (3) The reference in this section to "managing" other agencies in the detection or investigation of police misconduct is a reference to the provision by the Commission of detailed guidance in the planning and execution of such detection or investigation.
 - (4) The reference in this section to "overseeing" other agencies in the detection or investigation of other police misconduct is a reference to the provision by the Commission of a lower level of such guidance, relying rather on a system of guidelines prepared by it and progress reports and final reports furnished to it.
 - (5) In managing or overseeing other agencies for the purposes of this section, the Commission does not have a power of control or direction, and any such management or oversight is to be achieved by agreement. However, it is the duty of members of the NSW Police Force to co-operate with the Commission in the exercise of its management and oversight functions and any other functions of the Commission.
 - (6) However, nothing in subsection (2), (3), (4) or (5):
 - (a) affects the capacity of the Commission to exercise any of the functions as referred to in subsection (1), or
 - (b) provides a ground for any appeal or other legal or administrative challenge to the exercise by the Commission of any of those functions.

In the context of the present question from the Committee, it may be of assistance if I set out portion of a letter dated 30 May 2007, written by myself to the Complainant in C18-05 -----

- 1) *In the letter to me of 23 May 2007, the Commission emphasises that once the Commission placed the further investigation of your complaint into the hands of NSW Police, as it did by letter dated 14 November 2005, the role of the PIC was thereafter limited to “oversighting” the Police investigation of your complaint.*
- 2) *However, it would appear to me that it is necessary and desirable to explore what “oversight” means in this context. That word would normally connote a power of supervision and control.*
- 3) *Section 13 of the Police Integrity Commission Act 1996 provides, so far as relevant, that the “principal functions” of the Commission include that of “...oversee[ing] other agencies in the detection or investigation of, other Police misconduct as it thinks fit.”*
- 4) *However the section then provides in sub-s (4) that such “overseeing” “is a reference to the provision by the Commission of a lower level of such guidance, relying rather on a system of guidelines prepared by it and progress reports and final reports furnished to it.”*
- 5) *Finally, sub-s (5) further provides that “in overseeing other agencies for the purposes of the section, the Commission does not have a power of control or direction, and any such oversight is to be achieved by agreement.....”*
- 6) *In the light of this statutory definition, it seems to me that “oversight” in this context (at least in the absence of a relevant agreement) means little more than that the Commission continues to have a watching brief, but without any power of control or direction in respect of the Police investigation. In effect, such overlooking seems to entail little more than waiting for the Police to decide upon how to investigate the complaint, how long to take in investigating the complaint, and to await the advice of the Police as to the fact of completion and the result of the investigation.*
- 7) *If this view of the statutory definition is correct, it would follow that from 14 November 2005 to date the Commission has had no power to control the direction of the Police investigation of your complaint in any way.*

The abovementioned statutory power reposed in the PIC to enable it to oversight relevant investigations, might be contrasted with the extensive powers given to the Ombudsman in this regard by Part 8A of the Police Act 1990. See for example Sections 140-143, and in particular Section 146 which gives the Ombudsman power to monitor the investigation.

Further express powers are given to the Ombudsman by Sections 151-155.

QUESTION THREE:

3. *You report at page 18 (C09-06) that adverse allegations had been made concerning the Commission. Were you satisfied that the allegations were without foundation?*

INSPECTOR'S RESPONSE TO QUESTION THREE:

It may be helpful if the whole of the relevant material appearing on Page 18 of my Annual Report for 2007, were set out. That material was in the following terms -----

C09-06: A file was opened in this matter as a result of the filing of a Statement of Claim in the Supreme Court of NSW in 2005. The Statement of Claim sought damages from the State of NSW. Although the Commission was not a party to those proceedings, adverse allegations were made therein concerning the Commission. Progress of the litigation was therefore monitored by me. However, in April 2007 the Plaintiff's claim was settled, whereupon the file was closed.

In answering the Committee's question, it is important to emphasise, first, that the PIC was not a party to the Supreme Court proceedings, and, second, that no complaint was ever received by my Office from the Plaintiff in the Supreme Court proceedings concerning the PIC. Thus I was never in a position where I was called upon, or had jurisdiction, to investigate the allegations concerning the PIC which were contained in the Plaintiff's Statement of Claim.

The Plaintiff's Statement of Claim ran to 17 pages and made numerous allegations against various agencies of the Defendant, the State of New South Wales. So far as the PIC was mentioned in any allegations by the Plaintiff, such allegations were to the effect that the Plaintiff's husband, then a serving Police officer, had instituted complaints about NSW Police to the PIC, but that the Defendant, according to the Plaintiff's allegation, had failed to prevent the disclosure of the Plaintiff's husband as a person who had made complaints to the PIC. It was further alleged, for example, that the Defendant had failed to take any preventative steps to protect the Plaintiff's husband once the disclosure had been made that the latter had made a complaint to the PIC. These issues were not litigated in the Supreme Court because of the settlement of the matter between the parties in April 2007, and thus remain untested allegations.

QUESTION FOUR:

4. *Do you endorse the previous Committee's recommendation to extend the jurisdiction of the PIC Inspector to authorise investigation of alleged impropriety or misconduct by non-PIC officers engaged in joint or related operations with PIC officers?*

(Note: Question 5 of the separate series of questions from the Committee also raises this subject matter, and the response below is intended also to be in response to Question 5.)

INSPECTOR'S RESPONSE QUESTION FOUR:

I do endorse the previous Committee's relevant recommendation. In this regard, I noted in paragraphs (71) of my Annual Report for 2007, that -----

- (71) In effect that recommendation has been endorsed both by Mr Ireland, QC, and Mr Wood, AO, QC. It has also, in effect, been endorsed by the Hon. Gerald Cripps, QC, Commissioner, ICAC.

QUESTION FIVE:

5. *You report on a problem in interpreting s 16 of the Police Integrity Commission Act (page 25). Do you have any comment to make on s16?*

INSPECTOR'S RESPONSE TO QUESTION FIVE:

The difficulty of interpreting Section 16, in particular Section 16(3), was the subject of comment by a number of Judges involved in the case of PIC v Shaw (hereafter Shaw's case).

In my 2007 Report I attempted to summarise the position at paragraphs (88) and (90) which, so far as relevant, were in the following terms -----

- (88) *On 30 June 2006 the NSW Court of Appeal published its decision in the case of Police Integrity Commission v Shaw, [2006] NSWCA 165, an Appeal from a decision of Young CJ in Equity at first instance: [2005] NSWSC 782. The relevance of this decision, apart from what it actually decided between the parties, arises out of the Court's examination of certain provisions of the Police Integrity Act, which had given rise to difficulties of interpretation.*
- (90) *Notwithstanding the assistance rendered by this decision as to the construction of certain Sections of the legislation, difficulties of interpretation remain. This is particularly so in relation to Section 16 of the legislation. As to these difficulties see the comments of Young CJ in Equity at [46] where the Judge described Section 16(3) as apparently representing a "volte face" vis a vis the preceding portion of the Section; and those of Giles J at [22] where that Judge described Section 16 as "curiously worded".*

In paragraph (46) of the judgment of Young CJ in Equity, the following appears ----

*46 One then goes to s 16 which is headed "Provisions regarding Assessment, Opinions and Recommendations". As I have said earlier, this is the principal section relied on by the defendants. Sub-section 1 empowers the Commission to make assessments and form opinions as to whether police misconduct or other misconduct may have occurred. It then can make recommendations as to whether action other than recommendation of prosecution under the **Police Act** 1990 should take place, but it may not make a finding or form an opinion or make a recommendation that a specified person should be prosecuted for a criminal or disciplinary offence. However, there is then a volte-face in sub-section 3 that the PIC can form an opinion and presumably publish it, that a person is engaging in police misconduct or conduct that constitutes or involves or could constitute police misconduct. Again, Mr Walker says it is significant that this large exception to people's civil rights is limited to police misconduct.*

In paragraph (22) in the judgment of Giles J, appears in relation to Section 16 ----

22 Section 16 is perhaps curiously worded, permitting and forbidding making assessments, forming opinions, making findings and (less curiously) making recommendations. Unless intended as a form of thought-control, the explanation may be that, quite apart from inclusion in a report under s 96, stating permissible and forbidden assessments etcetera also affects what the Commission can do under other provisions of the Act, of which ss 15, 18 and 83 are the most material.

I remain of the opinion that it would be helpful if Section 16(3) could be clarified by way of an amendment if necessary, so that the intention of that subsection is made clear. However, if that were to occur, there are other Sections of the Act that could also be considered for amendment in the interests of clarity, in my opinion.

QUESTION SIX

6. *Following your review (page 26, par 94), were you satisfied with the terms of the Commission's memoranda of understanding?*

ANSWER TO QUESTION SIX:

It might be helpful to set out Paragraph (94) of my 2007 Annual Report, which was in the following terms -----

(94) However, in the light of the Committee's recommendation, I reviewed all relevant Memoranda made between the Commission and other relevant agencies, and wrote to the Commission in February 2007 setting out my observations and recommendations as a result of my having conducted that review.

The observations and recommendations that I made to the PIC in this regard, are those set out in my letter to the PIC dated 14 February 2007, which, leaving aside formal parts, were in the following terms ----

RE: MEMORANDA OF UNDERSTANDING

(1) As you are aware, the Committee on the Office of the Ombudsman and the Police Integrity Commission ("The Committee"), in their phase two report in respect of section 10(5) of the Police Integrity Commission Act, recommended that the PIC Inspector examine all Memoranda of Understanding ("MOU") between the PIC and their investigative partners, and the operation including the protocols and principals for information management and sharing, as part of his regular monitoring duties. That recommendation, as far as I am aware, has not yet been considered by Parliament.

(2) However in view of the Committee's observations concerning the relevant MOU, as expressed, particularly, in paragraphs 1.5.5.11 to 1.5.5.13 of the report, it would appear to be highly desirable that the Inspector commence to review the content of relevant MOU without further delay. To this end, you have recently kindly provided me with copies of ten such MOU.

(3) *The first of these is between the PIC and the Director, Australian Transaction Reports and Analysis Centre (AUSTRAC). The principal purpose of this MOU is, clearly, to provide access on the part of the PIC to certain information under the Financial Transaction Reports Act 1988.*

(4) *The draft with which I have been provided of that MOU, is unsigned and is in fact described as “draft 17 February 1997.” I have therefore proceeded on the assumption that a later document was brought into existence similar to or the same as the draft and was duly signed by the Commissioner, on the one hand, and the Director on the other. Making that assumption I have noted the following matters for the consideration of the Commission.*

(5) *One difficulty about this exercise, is that I have no idea of the extent to which the parties to the MOU have acted in accordance with its terms since 1997 (assuming the agreement was signed in 1997). What seems abundantly clear, is that given the passage of time since the MOU was entered into, on that basis alone I would recommend that the Commission thoroughly review all aspects of the existing agreement, in the light of relevant statutory amendments to each relevant Act since the date of the agreement, and to reflect changes in the structural set up of each organisation and in the practice of each organisation, so far as relevant to the agreement. Subject to that general recommendation, I make the following comments.*

MOU: AUSTRAC/PIC, February 1997

(6) *In clause 4 there is a reference to section 27(1)(b) of the FTR Act; however, this section has since been omitted from the legislation.*

(7) *In clause 6 the Director retains the right to exclude access in respect of any particular application by the PIC. However there is no requirement that there must be a particular basis for so doing, for example that it is in the Director’s view necessary in the public interest.*

(8) *In clause 7 and the schedule referred to it would seem preferable to include the Commissioner as a nominated officer, and to identify the balance of the nominated officers by reference to their office, rather than the way the matter is dealt with in the existing agreement.*

(9) *As I have mentioned, I have no way of knowing, at this stage, whether clauses such as 8 and 9 have been regularly availed of, and, if so, complied with.*

(10) *There are a number of clauses dealing with the limited basis on which the relevant information may be divulged or communicated by PIC officers. On one view of it, these clauses, for example, clauses 13, 17 and 25 could be seen as inconsistent with the powers of the Inspector pursuant to section 90 of the Police Integrity Commission Act. I would therefore recommend that in all relevant MOU’s, an express provision be inserted making it clear that it is not intended to restrict the Inspectors powers under section 90.*

(11) *I would also recommend consideration be given by the Commission, as to*

whether the existence of these MOU's should be stated somewhere in the Commission's Annual Report. There is a general statement appearing on page 41 of the 2005-2006 Annual Report with regard to "the exchange of relevant information", but this is limited to the named organisations "and other Police agencies."

MOU: ICAC/PIC

(12) The copy of the relevant MOU between the PIC Commission and the ICAC, that I have been provided with is dated 11 September 1997. However clause 12.1 of the MOU provides that the MOU must be reviewed no later than 12 months from the date of the Memorandum. If that provision has been complied with and if such a provision has been included after each such review, it would follow that there must in existence documents arising out of each such review. On the other hand if that clause has not been complied with then it would follow that due to the lapse of time alone since the 1997 MOU was entered into, a review of that document is long overdue.

(13) Such a review should take into relevant amendments made to either statute and, in particular, the provisions which will come into effect when the Police Amendment (Miscellaneous) Act 2006 commences.

(14) This MOU has the appearance of a well thought out and adequate structure set forth in a logical manner. It would seem desirable for each MOU that the PIC enters into to follow as far as practicable, a similar format so that there is one general format to which all relevant MOU's conform. I would recommend that consideration be given to adopting, so far as practicable, the format of this MOU as the general format applicable to all relevant MOU's.

(15) At this stage I am not in a position to know whether the provisions of the MOU have been complied with, in particular clause 2.5, 2.6, 3.2, 5.2 and 7.1.

(16) In my opinion clause 9.2 is preferable to the comparable clause in the MOU with AUSTRAC.

(17) The provision in the ICAC/PIC MOU requiring an annual review, might be considered for inclusion in each relevant MOU, as a means of insuring that these documents do not get overlooked and become out of date and even irrelevant.

MOU: ICAC/PIC "OPERATION OSLO"

(18) This MOU was entered into in March 1999 and I assume has now run its course. However, it appears to be a carefully drafted document and may prove useful as a guide for future and similar operations. Clauses 4 and 5 of the document may give rise to the problem early adverted to, namely, that on one view of it the Inspector's jurisdiction might be called into question. Clause 8 required the giving of notice in certain circumstances. It might be relevant to ascertain whether that clause was ever complied with.

MOU: AFP/PIC, March 2001

(19) *The format of this MOU seems to have been carefully worked out, and, subject to further review which is clearly required having regard to the passage of time since it came into force, it may be that a similar format should be kept for this particular MOU.*

(20) *Once again I cannot know at this stage to what extent this MOU has been applied, and whether any problems have been detected in relation to it. I would suggest, however, that clause 14 in particular, be redrafted. It seems unlikely that the reference to “NSW State Government” could have any effect.*

(21) *There is provision for the settling of disputes, but once again I am not in a position to know whether that provision has ever been availed of.*

MOU: OMBUDSMAN/PIC, March 2001.

(22) *The principal purpose of this MOU, as stated in clause (m), is “to achieve access to data stored on the PODS by the Ombudsman.” If it is assessed as necessary to enter into a new MOU for the same purpose, then it would no doubt be prudent to await the coming into force of the Police Amendment Act 2006.*

(23) *Clause 2 requires the Ombudsman to give notice to the Commission in certain circumstances. It may be worthwhile to ascertain whether the relevant circumstances came to pass, and, if so, whether the relevant notice was given by the Ombudsman.*

MOU: POLICE SERVICE/PIC, “RELATING TO DATA TRANSFER”, October 2001

(24) *Obviously this will require considerable update and amendment, given the passage of time, and having regard to the changes to be effected when the Police Amendment Act 2006 comes into force.*

(25) *This is the first MOU where I have noticed a specific clause directed to ensuring that the jurisdiction of the Inspector is not inadvertently interfered with. See Clause 12. Unless there is an intention in respect of any MOU to attempt to exclude the Inspector from access to some information relevant to that MOU, I would suggest a Clause such as Clause 12 being inserted into each MOU.*

MOU: VICTORIA POLICE/PIC, June 2001.

(26) *Obviously, if there is not one already in existence, it is desirable that the PIC communicate with the Office of Police Integrity, Victoria, with a view to producing a relevant MOU between the two bodies.*

MOU: NSWCC/PIC, CAR ACT, January 2002.

(27) *It may be of interest to explore to what extent this MOU has been applied in practice, and if it has, whether it meets the current intentions of the parties.*

MOU: NSWCC/PIC, June 2004

(28) *This appears to be drafted in a somewhat informal manner, and its sole purpose seems to be to provide for passage of relevant information from NSWCC to PIC, relevant information being concerning past or serving NSW Police.*

(29) *This is the document that contains the provision which became the subject of comment by the overseeing Committee. As the Committee pointed out, the Commissioner CC may place a caveat on the use of relevant information by the PIC and if that issue is unresolved, may be determined by Commissioner CC.*

MOU: CRIME AND MISCONDUCT COMMISSION (QLD)/PIC (NSW), February 2003

(30) *It would be of interest to know to what extent this MOU has applied in practice, and whether or not those occasions have been noted in the records.*

MOU: ODPP/PIC, September 2006

(31) *I am currently attempting to obtain a copy of the existing MOU between ICAC/DPP, on the basis that it might be useful to compare that MOU with the above. I will therefore cover this particular matter in a separate letter in due course.*

SUMMARY OF PRINCIPAL RECOMMENDATIONS FOR THE PIC COMMISSIONER'S CONSIDERATION:

(A) That urgent consideration be given to replacing each of the relevant Memoranda of Understanding referred to above, and that each be replaced with a document which takes into account, inter alia, changes in relevant legislation that have since taken place, and in organisational practices, as well as defects which have been noted in practice during the currency of any of the relevant memoranda of understanding. That in lieu of the MOU with Victoria Police a Memorandum of Understanding be entered into between PIC/Office of Police Integrity Victoria.

(B) That so far as practicable, a general format be adopted for all relevant Memoranda of Understanding.

(C) That a provision be included in each new MOU, to the effect that a 12 month review must take place to ensure that any practical difficulties are addressed in a timely manner, and that the document continues to be up to date. That the operation of the MOU in practice be monitored so that defects, e.g., in time frames, can be addressed promptly, including at each 12 month review.

(D) That a provision be inserted into each new MOU directed to making it clear that the Inspector is entitled to have full access to all aspects of the PIC's operations and records and that no provision in the MOU is intended to restrict the Inspector's oversight functions.

(E) That the existence of all such Memoranda be expressly referred to in the Commission's Annual Report.

As far as I am aware, the only relevant MOU not covered in my letter of 14 February 2007 (although referred to in paragraph (31), was the MOU between the PIC and the Director of Public Prosecutions (NSW) dated 26 September 2006.

However on 27 August 2007 I conferred with the DPP at his Office, concerning various matters of mutual interest, including the operation of the MOU between the DPP and the PIC. The DPP reported, in effect, that the content of the MOU seemed to be satisfactory, and he did not suggest the need for any review or amendment at that stage. I intend to make further contact with the DPP prior to my next Annual Report for the purpose of seeking an update as to the operation of this MOU. In my weekly conference with the PIC Commissioner following my meeting with the DPP, I conveyed the effect of my discussion with the DPP to the Commissioner.

By letter dated 12 October 2007, the Commission responded to my observations and recommendations by letter in the following terms (formal parts aside) ----

Re PIC Memoranda of Understanding – Your letter of 14 February 2007

Thankyou for your letter of 9 October 2007 regarding the above.

Following receipt of your letter dated 14 February 2007 contact was made with the various agencies who are parties to MOUs with the Commission. Those agencies were informed, by way of background, of the interest taken by the PJC and yourself in the Commission's MOUs and invited to consider the appropriateness and relevance of their respective MOUs in the context of the review being conducted by the Commission. The response from the different agencies has been varied. In some cases, new MOUs have been drawn up or are in the process of being drawn up.

For your information, I have set out hereunder the present status of the various MOUs and the Commission's dialogue with the respective agencies, adopting the same order used in your letter of 14 February.

1. Australian Transaction Reports and Analysis Centre (AUSTRAC)

A letter was sent on 27 February 2007: see Matrix 1212/294 (copy attached at "A"). AUSTRAC has advised that it is developing a new pro forma MOU to be used for all of its client agencies. It is first attending to putting MOUs in place with newly designated agencies and will then be reviewing existing MOUs. AUSTRAC has indicated that as soon as it is able a draft will be sent to PIC, incorporating the requests made in PIC's letter of 27 February. I will ensure that all the points made in your letter are taken into consideration For the most recent contact see the emails attached to Matrix 1212/310. A signed copy of the existing MOU can be found at Matrix 1212/27.

2. Independent Commission Against Corruption

As far as I am aware there has been no review since the MOU of 11 September 1997 was signed. A letter was sent to the ICAC Commissioner on 4 May 2007: see Matrix 15290 (copy attached at "B"). A reply was received on 9 July agreeing to a review of the existing MOU and undertaking to progress the issue but there has been no further contact since that time: see Matrix 16793/12 (copy attached at "C"). The Operation Oslo MOU referred to at

paragraph 18 of your letter has, as you surmised, run its course, Operation Oslo having concluded some time ago.

Further contact will be made with ICAC about updating the general MOU. As you observe in your letter, the revised document will need to reflect the recent amendments to the Police Act 1990.

In relation to paragraph 15 of your letter, as far as I am aware the provisions in clauses 2.5 and 2.6 of the current MOU have never really assumed significance as there has only been a small number of referrals from the ICAC of matters involving suspected police misconduct. A similar situation exists in respect of clauses 3.2, 5.2 and 7.1. Nevertheless, cooperation and assistance between the two agencies in other respects continues to take place in a most satisfactory manner.

3. Australian Federal Police

In 2006 the AFP presented an updated MOU to the PIC to replace the MOU which was entered into in 1998. Following a lengthy period of negotiation, a new version was agreed upon in August this year: see Matrix 3231/31 (copy attached at “D”) however the AFP has indicated that it wishes to defer signature until the [Crimes Legislation Amendment \(National Investigative Powers and Witness Protection\) Bill 2007](#) is passed: see Matrix 3231/32.

4. NSW Ombudsman

The MOU with the NSW Ombudsman dated March 2001 is one of three foundational documents which governed:

- The provision of, and access to, data during and subsequent to the development of the Police Oversight Data Store (PODS); and*
- The subsequent development of the Tri-Agency Agreement for PODS (a more detailed document concerning processes for managing access to data, system enhancements and customer support: see Matrix 12418/79).*

The other two MOUs in the suite are the PCCM related MOU between the PIC and NSWPF, discussed below, and another between the Ombudsman and NSWPF.

The broad principles for access to data described in this MOU remain current. The management processes described in the Tri-Agency Agreement also remain current, and have been updated by a number of minor amendments.

Discussions between the PIC, NSWPF and the Ombudsman are underway with a view to agreeing the future direction for PODS. The form of a revised MOU between PIC and the Ombudsman will be dependent on the outcome of those discussions. It would not be appropriate to review it at this time. The broader MOU being developed by NSWPF concerning systems data exchange

and user access, discussed below, will also have a significant impact on future agreements.

5. NSW Police Service

This MOU is the foundational document that requires the NSWPF to provide the Commission with data for PODS: paragraph 8. The MOU stipulates at paragraph 16 that “Any further memoranda of understanding concerning access by the Ombudsman or the Police Service to the PODS will be subject to this MOU”.

The Commission has been negotiating with the NSWPF since 2006 on a broader MOU regarding systems data exchange and user access between NSWPF and PIC generally. This is part of a project being undertaken by the Police Mainframe Replacement Program whereby all agencies dealing with NSWPF systems data are being asked to sign new MOUs. Because of the special position of the Commission vis a vis NSWPF, negotiations are continuing in relation to the special clauses to be included in the new MOU to be signed by the Commission.

6. Victoria Police

The Ethical Standards Department of Victoria Police advised on 9 July 2007 that the MOU signed on 22 June 2001 is working very well and requires no change from their point of view. In relation to the Office of Police Integrity, the Commission will enter into a MOU with that agency if and when the need arises.

7. NSW Crime Commission

In relation to the CAR Act MOU with the NSWCC dated January 2002, so far as the Commission is aware the terms of the MOU have been applied in practice. The Commission has commenced a number of proceedings under the CAR Act against serving and former NSW police officers. Further details of those matters can be provided if desired. They are reported upon each year in the Commission’s Annual Report.

In relation to the more general MOU dated June 2004, the Commission wrote to the NSWCC on 8 June 2007: see Matrix 3731/21 (copy attached at “E”). Particular attention was drawn to the comments in the PJC’s Report about the MOU effectively making the PIC a “junior partner” to the Crime Commission. A reply was received from the Crime Commission on 28 August 2007: see 3731/23 (copy attached at “F”). A number of joint investigations between our two agencies were cited by the Commissioner in rejecting the suggestion that PIC is not treated like an equal partner by the NSWCC. Further consideration is being given to the MOU in light of this response.

8. QLD Crime and Misconduct Commission

The Commission discussed the MOU with a representative from the CMC in August this year and agreed that the relationship was working satisfactorily and no changes to the MOU were required: see Matrix 2533/98.

You have commented in your letter that “it would be of interest to know to what extent this MOU has applied in practice, and whether or not those occasions have been noted in the records”. I am not sure exactly what information you are seeking by that comment but I can advise that the Commission does enjoy a high level of support and cooperation from the CMC and all dealings between the agencies are recorded on Matrix, in keeping with the Commission’s normal practices

9. NSW Office of the Director of Public Prosecutions

No correspondence has been entered into with the DPP as it is only 12 months since the current MOU was settled and signed and the Commission is satisfied that no revision is required at this point.

SUMMARY OF PRINCIPAL RECOMMENDATIONS

A. *In relation to your recommendation that urgent consideration be given to replacing each of the Memoranda referred to above, I am satisfied that those Memoranda which are not presently undergoing renewal, are not in urgent need of replacement on account of changes in legislation, organisational practices or defects in practice.*

B. *In relation to adopting a general format for all Memoranda, you will have observed that some agencies create their own pro formas for signature by their client agencies. The Commission has found that those agencies are generally most amenable to the inclusion of variations to reflect the Commission’s particular requirements and it is considered preferable to follow that approach in those cases rather than endeavouring to get all agencies signed up to a PIC pro forma.*

C. *I agree that it would be useful to include in each new MOU a provision that a review take place every 12 months to ensure that any practical difficulties are addressed in a timely manner.*

D. *I agree that it would be useful to include in each new MOU a provision noting the position of the Inspector of the Police Integrity Commission and his access to and oversight of all aspects of the PIC’s operations and records, including its dealings with other agencies.*

E. *I do not consider it necessary that the existence of all such MOUs be expressly referred to in the Commission’s Annual Report.*

I trust this information is of assistance. I am happy to discuss any aspect of it with you during our weekly meetings, or provide further documentation if it would assist you.

QUESTION SEVEN:

7. *Do you have any comments to make on sections 96 and 97 of the Police Integrity Commission Act (page 27, par 96)?*

INSPECTOR'S RESPONSE TO QUESTION SEVEN:

Paragraphs (95) and (96) of my Annual Report were in the following terms ----

(95) As well, and particularly having regard to the fact that it was in effect the last significant document of the Commission under the previous Commissioner, I also reviewed the content of the Commission's 2005-06 Annual Report, and forwarded a written analysis arising out of that review to the Commission in June 2007.

(96) I included in that written analysis, a reference to Part 8 of the Police Integrity Commission Act, which deals with Reports to Parliament, with particular reference to considerations as to the proper construction of Sections 96 and 97 of the Police Integrity Commission Act. I regard this as a matter of some importance, in particular, having regard to the definition of "affected person" in Section 96(3).

There appears to be a difference of opinion between myself, on the one hand, and the PIC, on the other, as to the proper interpretation of Section 97. I attempted to set out my opinion in this regard (which implicitly also identified the contrary interpretation) in a letter addressed to the Commissioner and dated 5 October 2007, which, leaving aside formal parts, is in the following terms -----

RE: RESPONSE TO COMMISSIONER'S LETTER DATED 13 SEPTEMBER 2007 TO THE INSPECTOR

- (1) By letter dated 19 September 2007 I acknowledged receipt of your letter dated 13 September 2007. Since then I have had the opportunity to consider in detail the content of that letter, and accordingly respond as follows.*
- (2) Apart from my further comments on what I regard as the proper construction of Section 97, I shall attempt to be brief. I note, in particular, that a number of the matters to which I referred in the Commission's 2006 Annual Report will be taken into account, or have been taken into account, in the preparation of the Commission's 2007 Annual Report.*
- (3) My reference, in paragraph (12) of the Critique, to the possible inclusion of material directed at deterring the making of false complaints against the Police, was prompted by the fact that such material is included in the Ombudsman's Annual Report 2006, at page 47.*

- (4) *However, my principal purpose in writing this letter to you is to attempt to state, perhaps more succinctly, the basis on which I contend that Section 97 should be given the construction as indicated in my document dated 7 June 2007. The difference flowing from the competing interpretations, the one apparently adopted by the Commission, as appears from your letter, and that preferred by myself, could not be said to be insignificant. Therefore, I feel bound to ensure that I have put the basis for my interpretation clearly and with appropriate references to relevant material. This, then, is the purpose of what follows herein.*
- (5) *Before persons can be identified by the Commission as “affected persons”, they must be capable of coming within the definition of that expression which definition is to be found in Section 97(3). Thus, per Giles J. at paragraph 28 of Shaw’s Case (emphasis added) ----*

. the definition of an “affected” person in s 97(3) is whether in the Commission’s opinion substantial allegations have been made against the person in the course of or in connection with the investigation.

- (6) *In my opinion, a distinction is to be drawn between two timepoints relevant to Section 97, the first being the timepoint relevant to the making of the substantial allegations referred to in Section 97(3), namely, “in the course of or in connexion with the investigation concerned.” As to the significance seen by Basten J. in relation to this, see paragraph 83 (emphasis added) of his judgment in Shaw’s case (a passage to which I also referred to in paragraph (25) of my document referred to above).*

83 Two points may be made in respect of the language of [s 97](#) Secondly, the scope of the mandatory obligation in sub-s 97(2) is identified by reference to affected persons, being persons against whom substantial allegations have been made “in the course or in connection with” the investigation of the matter or matters. This last point has two consequences of potential significance in the present case. First, it provides support for the argument that an allegation of giving false or misleading evidence, which would not presumably be the matter being investigated at the commencement of an investigation, but might become the subject of a substantial allegation “in the course of” the investigation and is therefore within the scope of the opinions required to be included in the report under sub-s (2). Further, there is some awkwardness in thinking that a substantial allegation will necessarily fall away at some point in the inquiry, especially if the reason is not that the person is “exonerated” by the evidence, but rather that he is inculpated, but the police are exonerated.

Thus the implication appears to be that a substantial allegation may “fall away at some point in the inquiry” if the reason is “that the person is exonerated by the evidence.”

- (7) *The second timepoint relevant to Section 97, is the time at which the Commission is required to consider whether it is open to the Commission to identify a person as an “affected person.” In order to identify a person as an “affected person” the Commission is required to form the opinion that substantial allegations (i.e., allegations which in the opinion of the Commission are of substance, and not fanciful or unsupported by credible evidence) have been made in the course of or*

in connexion with the investigation concerned. But at what point in time must the Commission form the opinion as to whether such allegations are allegations which in the Commission's opinion have substance?

- (8) *As to when this opinion must be formed, see Basten J. at paragraph 99 (emphasis added) of his judgment in Shaw's case (also referred to in paragraph (25) of my document referred to above) ---*

99 Because a hearing had been held, as a result of a decision which was not challenged, the Commission was required to prepare a report in relation to the matters as to which it had conducted the hearing, and furnish the report to Parliament: [s 96](#)(2) and (3). The contents of its report would depend upon, relevantly for present purposes, whether or not the Commission had then formed an opinion as to whether the Respondent was an affected person. If it had formed such an opinion (and a challenge to its ability to form such an opinion in relation to the Respondent was dismissed by the primary judge and not reagitated separately on appeal) then it would have been required to include in its report a statement that consideration should be given to his prosecution for a specified criminal offence, if it were of that opinion.

- (9) *The above passage appears to me to support the view that the relevant time when the relevant opinion is to be formed is the time when the Report is to be furnished to Parliament, that is to say, "as soon as possible after the Commission has concluded its involvement in the matter." Unless at that point in time the Commission is of the opinion that there exist substantial allegations against a person made in the course of or in connection with the investigation concerned, there would be no person capable coming within the statutory definition.*
- (10) *As well, there are aspects of several of the S96 Reports produced by the Commission during the period of the inaugural Commissioner which seem to me to suggest that the Commission had adopted the construction of S. 97 for which I contend. See Operation Belfast Report, pp. 190-191, 193 (persons against whom allegations of criminal conduct made found at date of report not to be "affected persons": see in particular 8.18 "Plant is not, in the Commission's opinion, an 'affected person'....": 8.19 no 'affected persons': 8.21 no 'affected persons': 8.29 no 'affected persons'; whereas other persons identified are found to be 'affected persons'); Saigon Report at pp. 88 ("are or were affected persons"); 108-109 (18 witnesses called re allegations of corruption or misconduct, but at date of Report none came within definition of "affected persons", although the Commission was of the opinion that it had identified "systemic failures and omissions" (6.90) but nevertheless the Commission found there were no persons who could be characterised as 'affected persons' in that portion of the investigation (6.97); Pelican Report pp. 88 ("are or were").*
- (11) *It seems to me, with respect, that the contrary view as to the proper construction of Section 97, in particular, as to the time when the opinion must be held that there are or are not persons who may be identified as "affected persons", give rise to the following difficulties: first, persons can be (and were in Banff, and notwithstanding, in the case of the relevant Police officers, that Counsel Assisting had formulated his questions so as to obtain a denial of relevant conduct, but also to state that no allegation in those terms was being made: see Basten J at para. 84) identified as "affected persons" despite the fact that at the date of the*

Commission's report the Commission does not hold the opinion that the allegations against those persons have any substance, or that there is any credible evidence to support such allegations. To be identified in a public Report as a person against whom in the opinion of the Commission substantial allegations, say, of murder, had been made is, in itself, a serious matter.

(12) *Thus in that situation persons are identified as "affected persons", so that a Section 97(2) statement is mandatory, despite the fact that at the date of its Report the Commission does not hold the opinion that such persons are the subject of allegations of substance made in the course of or in connexion with the investigation concerned. Such persons, in my opinion, should be ipso facto excluded from the "whether or not" requirement of the Section 97(2) mandatory statement, because they are not capable of being the subjects for relevant consideration. That is to say, there is no question available to which the "whether or not" requirement could be applied, because such persons could not be the subject of a "whether to" statement.*

(13) *I do not suggest that the position is as clear as one might wish. There are passages in Shaw's case which might be considered equivocal on the issue. Ultimately, it seems to me to come down to this: if it is not unreasonable to read Section 97 in the way I have suggested above, then such a reading is to be preferred for the reasons assigned above.*

At this stage, I have not received the Commission's response to the above.

SECOND SET OF QUESTIONS ON NOTICE EIGHTH GENERAL MEETING WITH THE PIC INSPECTOR

Inspector of the Police Integrity Commission Annual Report 2005-06

[NOTE: The 2005-06 Annual Report is the report of the previous Inspector, the Hon James Wood QC]

QUESTION ONE:

1. *On page 5 of the report the Hon James Wood wrote:*

An equally important step in the reform process was to ensure the retention of the jurisdiction of the Office of the NSW Ombudsman to oversight the NSW Police particularly in relation to the management of complaints and compliance with the law. This has been achieved through the formalisation of an agreement between the Commission and the Ombudsman pursuant to s67(a) of the Police Integrity Commission Act concerning the classification of complaints and the establishment of a comprehensive regime for their investigation and management.

What is your view of the current role of the Ombudsman in the oversight of complaints about police?

INSPECTOR'S RESPONSE TO QUESTION ONE:

Important changes in relation to investigation of complaints against the Police, were effected by the Police Amendment (Miscellaneous) Act 2006, which, so far as relevant, came into effect on 1 June 2007. Those changes, in effect, removed the distinction between categories of Police complaints. Nevertheless, the jurisdiction of the Office of the NSW Ombudsman to oversight the NSW Police particularly in relation to the management of complaints has been retained in the legislation.

In N.S.W, complaints by members of the public concerning police complaints may be made to the Ombudsman, the Police Integrity Commission or directly to the Police. In practical terms the Ombudsman deals with the vast majority of police complaints, usually by overseeing investigation of such complaints by the police themselves. Thus the vast majority of police complaints are investigated by the police, but such investigations are oversighted by the Ombudsman.

By way of contrast, the Police Integrity Commission's role is confined to investigating a small number of serious police complaints (perhaps less than twenty per annum) and to overseeing an even smaller number of complaints investigated by the Police at the request of the Commission.

The overall position may be demonstrated by reference, first, to the 2005-2006 Annual Report of the Ombudsman.

During that year, 2131 police complaints were investigated by police at the request of the Ombudsman, such investigations being oversighted by the Ombudsman. In a small number of

cases, the Ombudsman directly investigates police complaints.

Reference to the 2005-2006 Annual Report of the Police Integrity Commission, reveals that during the same period only 17 serious complaints out of a total number of 666 police complaints assessed by the Commission as serious police complaints were investigated by the Commission, the balance being referred to the Ombudsman for investigation by police under oversighting by the Ombudsman. The investigation of a further 9 serious police complaints were referred to the police for investigation but oversighted by the Commission.

From the above statistics it will be seen that it is the Ombudsman who has the principal role in relation to the oversighting of the investigation of police complaints; and that it is the Police who have the primary role for investigating police complaints, in most cases under being oversighted by the Ombudsman. The role of the Police Integrity Commission, on the other hand, is in effect confined to investigating a small number of serious police complaints each year.

Part 8A of the Police Act confer a number of specific powers on the Ombudsman in relation to the investigation by the Ombudsman of complaints against NSW Police.

See, for example, Section 142 (Power to request further information from a complainant), 143 (Ombudsman may request further information from other persons), 145 (Investigating Police must have regard to any matters specified by the Ombudsman), 146 (Ombudsman may monitor the investigation), 150 (After investigation of a complaint has been concluded the Ombudsman must be provided a copy of the final Report), 151 (If required by the Ombudsman to do so, the Commissioner must provide the Ombudsman with details of the investigation), 152 (If the Ombudsman is dissatisfied with the investigation of a complaint the Commissioner must provide the Ombudsman with relevant information if sought), 153 (If Ombudsman is dissatisfied with the investigation, the latter may request the Commissioner to cause a further investigation to be conducted), 154 (Ombudsman may request review of Commissioner's decision in respect of the complaint).

None of these powers are conferred by Part 8A of the Police Act on the Police Integrity Commission.

QUESTION TWO AND FOUR

2. *On page 11, Mr Wood comments that his monitoring of the records of PIC operations which require legislative sanction (eg controlled operations) "to some extent... involves a duplication of the monitoring carried out by the Ombudsman".*

Do you consider that there is any unnecessary duplication and in what way does the Inspector's oversight differ from or add value to the Ombudsman's?

- (4) *Has the amendment to section 142 of the PIC Act (the provision for notifying the Inspector of an authorisation of a police officer to exercise investigative, surveillance or enforcement functions under or for the purposes of the PIC Act) been working satisfactorily?*

INSPECTOR'S RESPONSE TO QUESTIONS TWO AND FOUR:

I have combined these two questions and the answers thereto, because the subject matter in each case has to do with the provisions of the Law Enforcement (Controlled Operations) Act 1997.

It might be helpful in answering these questions if I were to set out paragraphs (72) and (73) of my Annual Report which dealt with this subject matter and were in the following terms -----

(72) 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.”

(1A) As soon as practicable after giving such an authorisation, the Commissioner must notify the Inspector of that fact.

(73) Although by virtue of the definition of “police officer” in Section 4 of the Police Integrity Act, the reference to “police officer” in subsection (1) must be read as referring to NSW police officers only, I am in a position to inform myself of all Controlled Operation authorisations by the Commissioner by reason of my access to the Commission’s internal records, and I also intend to further inform myself in this regard by reference to the Ombudsman’s Annual Report dealing with compliance with the relevant provisions of the Law Enforcement (Controlled Operations) Act. During the reporting period the Commissioner authorised two Controlled Operations neither of which, due to subsequent circumstances, was carried into execution.

In my opinion the Inspector’s functions in relation to this subject matter do not involve any unnecessary duplication on the relevant statutory functions of the Ombudsman. In fact, since my appointment the Commissioner has not authorised any controlled operations which were actually put into effect.

As to whether, in my opinion, Section 142 of the PIC Act has been working satisfactorily, as already mentioned, no controlled operations authorised by the PIC Commissioner have in fact taken place since the time of my appointment. However, as mentioned in paragraph (73) of my Report, despite the limited definition of “Police officer” in Section 142, I am in a position to inform myself of all controlled operation authorisations by the Commissioner by reason of my access to the Commission’s internal records. By way of contrast, Part 4 (Sections 21-24) of the Law Enforcement (Controlled Operations) Act requires that the Ombudsman act as an independent monitoring and inspection agency. The Act further requires that the Ombudsman be notified of all grants with an authority, and variations to an authority. The Ombudsman must also be notified of all occasions on which the Chief Executive Officer receives a report on

a controlled operation. Notices must be provided to the Ombudsman within 21 days of the event to which the Notice relates. Although the Ombudsman must conduct inspections of the internal records of the relevant agencies to assess compliance with the requirements of the Act, that need be carried out only once every twelve months, although the Ombudsman may inspect such records at any time. Accordingly, although there is an overlap in the Inspector's functions, on the one hand, and the Ombudsman's, on the other, in relation to the PIC in this regard, I do not see that as constituting unnecessary duplication.

QUESTION THREE:

3. *On page 13 Mr Wood reports that six complaints concerning matters which the Commission had declined to investigate (see point (c)) were referred by him back to the PIC and NSW Police for further investigation. In a speech given at the 2nd National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies Mr Wood said that his management of a complaint did "not constitute an appeal or administrative law review, in the strict sense", however he considered that, if it satisfied the Wednesbury test of unreasonableness, a complaint against the PIC for declining to investigate a matter could be sustained, although he had no power to compel the PIC to take further action or "make orders that might undo some form of misconduct".¹*

Would you consider that his comments and referral of matters back to the Commission is in conflict with his observation on page 14 of his Report that the Office of the Inspector of the Police Integrity Commission does not exercise "...an appellate role in relation to decisions of the Commission whether to conduct investigations into complaints or to refer them to the NSW Police Service".

INSPECTOR'S RESPONSE TO QUESTION THREE:

From the relevant passage on page 13 of the Inspector's 2006 Annual Report, I note that the Complainants sought that the PIC investigate complaints against the Police in relation to the Complainants' own criminal convictions. This unusual feature may have caused the Inspector to take the view that he should conduct a preliminary investigation arising out of each such complaint. In the speech given by Mr Wood, referred to in the question, there can be no doubt, in my opinion, that the statement that the Inspector's jurisdiction does not constitute the Inspector as a general appellate entity to which every decision of the PIC can be appealed, is correct. The reference to the "Wednesbury Test", is a shorthand reference to the case of *Associate Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 233. The Wednesbury reasonableness test is sometimes stated in terms that where the unreasonableness of the decision of a public body has been challenged the test is whether the decision was so irrational that it cannot be supported or that no sensible person who had applied his or her mind to the question to be decided could have arrived at that decision. The PIC has a discretion whether or not itself to investigate a relevant complaint, or alternatively pass the complaint on to the Ombudsman for investigation, or on to NSW Police to be investigated. That is a discretion vested in the Commission and not in the Inspector. However, if the particular circumstances led to a conclusion that the Commission had failed to exercise the discretion in a reasonable manner, that would appear to be a matter falling within the Inspector's jurisdiction.

¹ Committee on the Independent Commission Against Corruption, NSW Parliament, *Report on the 2nd National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies*, p 141

If such a case did arise, all the Inspector could do as a matter of practicality, would be to draw the Inspector's concerns to the attention of the PIC. Thus I am not of the opinion that there is any conflict between the material that appears on page 13, on the one hand, and Mr Wood's speech on the other.

Inspector, Police Integrity Commission

17 October 2007