

REPORT OF PROCEEDINGS BEFORE

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

TENTH GENERAL MEETING WITH THE INSPECTOR

At Sydney on Monday 26 October 2009

The Committee met at 11.00 a.m.

PRESENT

Mr K. A. Hickey (Chair)

Legislative Council

Ms S. P. Hale
The Hon. C. J. S. Lynn
The Hon. L. J. Voltz

Legislative Assembly

Mr M. J. Kerr
Mr P. R. Pearce

CHAIR: Thank you for appearing before the Committee on the Office of the Ombudsman and the Police Integrity Commission for the Tenth General Meeting. The Committee will be pleased to hear your evidence. Please state your full name, professional address, occupation and in what capacity you appear before the Committee.

PETER JAMES MOSS, Inspector of the Police Integrity Commission, affirmed and examined:

Mr MOSS: Do you mind if I do not put the professional address on the record, Mr Chair?

CHAIR: No. The Committee has received your answers to questions on notice. Would you like to make an opening statement?

Mr MOSS: I do not think so, thank you, Mr Chair. I have appeared before this Committee previously, I think this is the third time, in my capacity as Inspector of the Police Integrity Commission. Unless there is anything that the Committee would want me to comment on by way of opening, I do not think an opening would add to the usefulness of the procedure.

The Hon. LYNDA VOLTZ: In reply to the questions on notice, in number one you set out specific circumstances in which the inspector's power might extend to consideration of particular conclusions reached by the Commission?

Mr MOSS: Yes.

The Hon. LYNDA VOLTZ: Is it a fair summary to say that whilst the Inspector may recommend that the Commission reconsider those particular conclusions, the Inspector would never seek to substitute his own conclusions for that of the Commission?

Mr MOSS: I hope I have made it plain that in my view I do not have any power to do that. It follows that I have never attempted to do it and that I have no intention of ever seeking to override the opinions of the Police Integrity Commission and having them substitute my opinions in place of their own.

CHAIR: Inspector, as you are aware the Minister for Police is considering a legislative amendment to clarify the PIC Inspector's powers to publish complaint reports. Is the Committee correct in assuming that the amendment to the legislation is still a very pressing matter for your office?

Mr MOSS: It is, because all those problems that I have raised in private correspondence with the Committee still remain extant. Of course, I was able to overcome those problems in respect of what I would call some major reports by the Inspector to date by including those in my special report to Parliament and by that means those particular reports became public. For example, the ones that I am working on at the moment I have mentioned in the current correspondence to the Committee. There are three draft reports with the Commission at the moment arising

out of the malfunctions in the Whistler report. Since I wrote the last of the correspondence to the Committee I have delivered a draft report on the Police Association complaint; I delivered a draft report to the parties. In respect of all those reports, the problem arises as to the status of the report when finalised. Apart from the letter that I mentioned from the then Minister I have not heard any more about the progress of the proposed amendment.

CHAIR: Would it be fair to say that there was no consultation with you in regard to those amendments?

Mr MOSS: Not since the then Minister wrote to me, and that would be a good six months ago. I understood that they were interested in what was going on in Western Australia, where they were proposing an amendment of a similar nature in respect of the Parliamentary Inspector. I have written to the Corruption and Crime Commission [CCC] of Western Australia about that matter, and although I have received a response I have not been notified that that amendment has been finalised. Really, the position remains much the same as it was when I last appeared before this Committee.

Mr PAUL PEARCE: I am interested in question number four. Previously there had been several differences of opinion between the Office of the Inspector and the Commission. How would you describe your current working relationship?

Mr MOSS: Mr Pearce, the working relationship has always been civil. I go up there once a week, typically, and I confer with the Commissioner and the Commission's solicitor. As I say, that has always taken place in a civilised manner. As you will have seen, perhaps from some of the correspondence, things do get a little heated sometimes in correspondence. I do not think that that is to be wondered at, because I do not think anyone likes to be criticised—and from time to time the Inspector has been critical of the Commission. I do not find their response untoward in any way. I think it is well within acceptable bounds. But to answer your question, as far as I am aware the relationship between the Inspector and the Commission is a good one.

Mr PAUL PEARCE: This would be based on the correspondence that the Committee has received, from both yourself and the Commission, and copies thereof and various opinions floating around. It has been an agreed-to-differ relationship?

Mr MOSS: I would say there are some strong differences of opinion, Mr Pearce.

Mr PAUL PEARCE: There certainly are. Do you feel that that in any way inhibits your capacity to carry out your role?

Mr MOSS: Only that it means that some of my recommendations are not carried out. It means also that if my views are correct, particularly as to points of law, and the Commission does not agree with them, to that extent I suppose the Inspector's role is perhaps not entirely effective. Obviously, they are entitled to disagree, and they do. I do not think it has caused a major problem to date because they have told me more than once that even though they disagree with me they have

taken my views into account. As I have said somewhere in this correspondence, I believe I have seen objective evidence that they have. From my perspective I have seen what I regard as a distinct improvement in some procedures of the Commission.

Mr PAUL PEARCE: Based on that, because a lot of this is centred around your interpretation and your views in relation to issues of natural justice and procedural fairness as opposed to the views of the Commission, do you feel that what you have put before the Commission has effected the changes and therefore you would not suggest there needs to be a legislative change, or do you still feel there needs to be some clarification in a legislative sense?

Mr MOSS: The only legislative change that I would put up for consideration, and I have of course, is to clarify the status of the Inspector's reports. Apart from that, I think I am right in saying that I have never suggested any legislation.

Mr PAUL PEARCE: I am not suggesting you have suggested that; I am suggesting it is a response—

Mr MOSS: I certainly do not see the need for it, Mr Pearce.

Mr PAUL PEARCE: So you believe basically that the procedures—this dynamic, if you like, between you and the Commission, has led to some modification of procedures, which is addressing some of the concerns you have identified in your correspondence?

Mr MOSS: Yes. I think one has to bear in mind that personalities will always make a difference, to some extent. With a different Inspector and a different Commissioner there maybe would not be any difference of opinion, but given the present personalities there is a difference of opinion.

Mr PAUL PEARCE: From this Committee's perspective, the issue of procedural fairness and natural justice is very significant, so whether it is personalities or not it is a significant issue, both in terms of the principles involved and also, potentially, and this is a fear I have expressed previously, it may well be that procedures that deny natural justice or procedural fairness may well lead to people who should be in strife getting off. I am just concerned about that aspect of it, but if you believe there is an improvement in the processes within the Commission, then I think you have certainly achieved something by raising this matter.

Mr MOSS: I do, Mr Pearce, and as I have said in this current correspondence, I do not believe that any of the procedural fairness problems that have arisen and which I have highlighted in my reports upholding complaints would occur now. I think they are really alert to it. Even when they do not agree with me I think none of those situations would arise again.

Ms SYLVIA HALE: I have seen the relationship between the two offices referred to as "liveable differences", and from what you have just said it would suggest that by dint of your representations to the Commission they have modified their practices. But it is a concern that such a critical issue as procedural fairness

should be so dependent upon the personalities of the major protagonists, as it were. Is there any process that should or could be put in place to ensure that after your departure or Mr Pritchard's departure we do not get a return to the previous situation?

Mr MOSS: I do not think so, Ms Hale. Even in the courts the issue of procedural fairness is not always clear by any means. I do not think there is any way around it. As I have pointed out in this correspondence, there have never been any factual disputes or disputes as to credit—this is the curious thing—in these issues, and notwithstanding that there is no factual dispute in relation to these complaints, there nevertheless is this issue where I see, I must say, a clear breach of procedural fairness in the cases I have nominated in the reports, and the Commission with equal strength has said, "No, we don't agree. We think you're quite wrong. We don't think that we have denied procedural fairness."

CHAIR: But even though they have said that, they have modified their practices to address procedural fairness.

Mr MOSS: They have, to the extent that I do not believe those situations would occur again.

CHAIR: Would it be fair to say that the Committee should be the overseeing body to ensure that where procedural fairness is questioned we continue to make sure we get an outcome that everyone can live with?

Mr MOSS: I suppose if a case arose where the Committee thought the difference was serious enough you could get your own legal advice.

Ms SYLVIA HALE: Do you think it is the case that issues of procedural fairness are relatively new considerations by the courts and that as time progresses there will be an even greater body of precedent that will make it easier to resolve matters?

Mr MOSS: Yes to both those questions. I think this body of jurisprudence has really developed in the last 20 years, particularly with the High Court leading the way. I think also the advent of administrative law, which really was not around when I was practising as a barrister, is where the procedural fairness rules really flourish. You are quite right that it is comparatively recent and it will probably become better laid down in terms of precedent with the passage of time.

Mr MALCOLM KERR: Can I take you to the schedule in your annual report dealing with complaints? The complaint I wanted to look at was the summary of the report dated 16 December 2008, dismissing complaint C17/08.

Mr MOSS: That was a number of former senior police officers.

Mr MALCOLM KERR: It was a number of senior police officers, and it was the subject of quite protracted correspondence between you and the complainants.

Mr MOSS: The complainant is a very articulate gentleman, formidably articulate.

Mr MALCOLM KERR: That is complimentary, though.

Mr MOSS: Indeed, a worthy opponent.

Mr MALCOLM KERR: When you say opponent, I take it you do not have an adversarial relationship with the complainant!

Mr MOSS: If you want a good intellectual joust you could do worse than joust with that gentleman.

Mr MALCOLM KERR: In terms of the chronology that you have provided in that report, it was in 1996 and related to an incident—a burglary— that occurred originally in 1984.

Mr MOSS: It goes back a long way.

Mr MALCOLM KERR: Yes, 1984, and in 1996 three complainants appeared before the Wood Royal Commission in relation to the incident that became known as the Kareela cat burglar segment of the Royal Commission. It was not until 1999 that they were summonsed for assault and other charges relating to that. When you first appeared we spoke about unacceptable delays that were occurring. That appears to be a significant delay in dealing with the matter.

Mr MOSS: Very. I think it was 14 years from the date of the incident when the magistrate heard the proceedings. Of course, the witnesses' memories were grossly affected. It was most unsatisfactory.

Mr MALCOLM KERR: It was most unsatisfactory.

Mr MOSS: Most.

Mr MALCOLM KERR: It was not until 30 March 2001 that all charges were dismissed by the magistrate at the conclusion of the committal proceedings. You mentioned, "It should be noted that the complainants did not themselves give evidence at those proceedings and were not therefore subject to cross-examination." I take it you were not seeking to draw any negative inference at all?

Mr MOSS: Forensically, of course, it was a good move. You would have to take that advice if you were given it. But it was only that they did not seem to appreciate that it made a difference when one came to assess the significance of the proceedings. In other words, they did not seem to appreciate, no matter how many times I tried to put it to them in correspondence, that had it been the case that they had entered the witness box, had been thoroughly cross-examined and the magistrate had said, "I prefer the evidence of the defendants", that would have been one thing. But they wisely took the advice that was proffered to them, did not give evidence, so they were never cross-examined.

Mr MALCOLM KERR: I take it no criticism can be made of people who take a wise course of action?

Mr MOSS: No, not at all, Mr Kerr.

The Hon. CHARLIE LYNN: Inspector, have you read Tim Priest's book, *Enemies of the State*?

Mr MOSS: No, Mr Lynn, I have not—not because of any particular reason, not because of any adverse reason at all. The complainants did write to me. They were most unhappy when I did not uphold their complaint—as they were entitled to be, of course. They said there was going to be a book published in August, which is now past, of course, and this will be given an airing. When I saw that book had been published, I thought that it is probably the book they are referring to. But, no, I have not read that book.

The Hon. CHARLIE LYNN: There are fairly serious allegations in the book about the conduct of the Wood Royal Commission in relation to the investigation of police corruption.

Mr MOSS: These are the complaints that they made to me, of course.

The Hon. CHARLIE LYNN: If you have not read the book, I cannot pursue it.

Mr MOSS: I take it you mean they are complaints concerning the two Commission investigators who they claim were corrupt?

The Hon. CHARLIE LYNN: It is about the judicial part of the Wood Royal Commission running a covert operation to entrap police in relation to drug dealing, which led to the deaths of up to 14 people. They are serious allegations.

Mr MOSS: Yes.

The Hon. CHARLIE LYNN: You have not read the book and Mr Pritchard said that he had not read the book either. Has it been brought to your attention before?

Mr MOSS: When it first came out I thought, "This will be reviewed sooner or later and I will have a look at the review." I must confess, I have never seen a review of it. Maybe I do not read the right newspapers.

CHAIR: Inspector, let me say that Charlie is trying very hard to promote this book. I think he is on a commission.

Mr MOSS: I am obviously a great disappointment to Mr Lynn in that regard.

The Hon. CHARLIE LYNN: We will pursue it in another forum because the allegations are very serious and should be investigated.

Mr MOSS: I have no comment to make on that, Mr Lynn.

The Hon. LYNDA VOLTZ: Other than he has already looked at it.

Mr MOSS: I have looked at one issue, not the issue that Mr Lynn is talking about.

Mr MALCOLM KERR: What issue is Mr Lynn talking about?

The Hon. CHARLIE LYNN: Operation Bax.

Mr MALCOLM KERR: Does the Inspector have any knowledge of Operation Bax?

Mr MOSS: I have, but if we are going to have a confidential session, Mr Kerr—

CHAIR: Perhaps we could leave it till then.

Mr MOSS: Yes, certainly. It is not much but what I have to say would probably be better said in confidential session.

Mr MALCOLM KERR: Returning to the complaint, you noted in November 2005 there was a civil action by the complainants against the New South Wales Government that was settled on confidential terms.

Mr MOSS: That is what they told me, Mr Kerr, and I have no reason to doubt them.

Mr MALCOLM KERR: If the complainants had no objection to the terms of settlement being disclosed, it may be in the public interest.

Mr MOSS: Of course, it is right outside my jurisdiction. It is up to the parties.

Mr MALCOLM KERR: It is a significant matter and given that taxpayers' money was used I would have thought that the terms of settlement would be of interest to the general public.

Mr MOSS: Without having any idea what the terms were, of course, Mr Kerr, they may be. I think you would probably find fairly tight resistance to making them public.

CHAIR: Thank you, Mr Moss.

(The witness withdrew)

(The Committee adjourned at 11.25 a.m.)