NEW SOUTH WALES

A

Inspector of the Police Integrity Commission

Ref No. C07/02AH

REPORT

29 APRIL 2002

OPERATION FLORIDA

RE: LISTENING DEVICE WARRANT

REPORT BY INSPECTOR OF PRELIMINARY INVESTIGATION

Pursuant to Section 89(2) of the *Police Integrity Commission Act 1996* my functions as Inspector under the legislation may be exercised inter alia *"at the request of the Minister"*. On 15 April 2002 Mr Michael Costa, the Minister for Police, made such a request. He wrote as follows:

> *"You will no doubt be aware of media interest relating to a listening device warrant obtained in connection with an investigation that now forms part of the Police Integrity Commission's Operation Florida.*
>
> *I have met today with the Commissioner of the Crime Commission, Phillip Bradley and Police Commissioner Ryan to discuss the matter. Both gentlemen have assured me that the appropriate procedures have been followed.*
>
> *I have informed the Police and Crime Commission that I do not wish to be apprised of the details of persons named in the warrant or the terms of reference of the investigation. However, given the public interest I believe it would be appropriate if in accordance with Section 89 of the Police Integrity Commission Act, 1996 you provide me with a report of the matter. In particular, I would ask that you confirm:*
>
> > *The warrant was justifiably sought;*
> > *The seeking of the warrant complied with the relevant legislation; and*
> > *The material obtained by the warrant was used appropriately.*
>
> *I would appreciate your advice by the end of the month."*

The Minister has also appointed me to report on the matters referred to in the above letter *"under s217(1) of the Police Service Act 1990"*.

email: inspect@ipg.com.au
GPO BOX 5215, SYDNEY NSW 2001 TEL: (02) 9232 3350 FAX: (02) 9232 3983

The warrant in question has been identified as a warrant issued by Justice Virginia Bell of the Supreme Court of NSW under Section 16 of the *Listening Devices Act 1984* (the Act) on 14 September 2000.

Before dealing with that warrant, it is appropriate to make some preliminary observations.

Preliminary Observations

In February 1996, Justice James Wood published the first interim Report of the Royal Commission into the NSW Police Service. Chapter five (5) of that Report proposed a new system to deal with Police complaints and corruption investigations in NSW.

It took into account that within the NSW Police Service there was a pattern of corruption which must urgently be addressed so that public confidence could be restored.

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

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

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

After careful consideration it was resolved that a new *"purpose built agency"* (which came to be called the **Police Integrity Commission)** should be established. It was emphasised that it will:

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

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

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

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

For this reason the Commission decided that there be a *"watchdog"* 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. That *"watchdog"* was called the Inspector of the Police Integrity Commission.

In this Report I avoid including, to the extent that it can be avoided, the sensitive and confidential material which I have necessarily accessed for the purpose of this investigation.

I note that any challenge to the validity of a warrant granted by a Judge of the Supreme Court under the *Listening Devices Act 1984* can only be dealt with by the Supreme Court itself, and not by a statutory body such as the Inspector of the Police Integrity Commission. However, in making that observation, I also note that I have seen nothing in the material inspected by me which would cast any doubt upon the validity of the warrant granted by Justice Virginia Bell of the Supreme Court.

Some Historical Matters

Functions of the Police Integrity Commission are set out in Section 13 of the *Police Integrity Commission Act 1996*; whilst the functions of the NSW Crime Commission are set out in Section 6 of the *NSW Crime Commission Act 1985*.

In February 1999, the Management Committee of the NSW Crime Commission (NSWCC) granted a reference to investigate the allegations of an officer of the NSW Police *"SEA"* (now known as M5) and an arrangement was made with the Commissioner of Police that officers from the Special Crime Unit would form a Taskforce to assist in that investigation. The reference is Codenamed *"Mascot"*. The scope of the Mascot investigation has been defined by the highly secretive and long-term nature of the investigation. It was undertaken in that fashion to gain as much electronic and other corroborative evidence as was possible to support the allegations of M5 (*"SEA"*) so that criminal and managerial proceedings could be successfully pursued.

The Commissioner of the Police Integrity Commission (PIC) was informed of the matter at an early stage. Appropriate Memoranda of Understanding (MOU) were entered into between the Commissioners of the NSW Police Service, the PIC, and the NSWCC.

The matters discovered under the Mascot reference and distilled in a great number of Schedules of Debrief (SOD) are the subject of ongoing hearings codenamed *"Florida"* before the PIC. This Operation encompasses a wide range of misconduct and corrupt behaviour by a large number of serving and former police. On 30 March 2000 Assistant Commissioner Sage announced that the purpose of Operation Florida *"is to investigate:*

1. *whether current or former NSW Police associated with NSW Crime Commission Informant SEA (M5) are, or have been, involved in serious police misconduct.*

2. *Whether other current or former NSW Police, who came to notice as a result of the above investigation, are, or have been, involved in serious police misconduct.*

It is neither appropriate nor necessary for the purpose of this advice that I make any further comment about that important major ongoing investigation of the Police Integrity Commission, namely Operation Florida.

The *Listening Devices Act 1984*

The preamble to the Act reads:

> *"An Act to regulate the use of certain devices capable of being used for listening to private conversations; and to repeal the Listening Devices act 1969".*

I shall return later to deal with the particular warrant and before doing so I shall set out s16 of the Act in full.

It is helpful if I firstly set out a short overview of the Act provided by the Crown Solicitor containing some comments with which I agree.

3. The Act

3.1 Section 5(1) provides :

> *"5. **Prohibition on use of listening devices***
>
> *(1) A person shall not use, or cause to be used, a listening device :*
>
> *(a) to record or listen to a private conversation to which the person is not a party, or*
>
> *(b) to record a private conversation to which the person is a party."*

A "private conversation" is defined in s.3(1) as follows :

> *" **'private conversation'** means any words spoken by one person to another person or to other persons in circumstances that may reasonably be taken to indicate that any of those persons desires the words to be listened to only :*
>
> *(a) by themselves, or*
> *(b) by themselves and by some other person who has the consent, express or implied, of all of those persons to do so."*

It will be seen that a private conversation consists of any words which are spoken by one person to another person or persons in the specified circumstances.

3.2 *Sub s.(2) of s.5 provides sub s.(1) does not apply to the use of a listening device pursuant to a warrant granted under Part 4.*

3.3 *Section 16(1), in Part 4, provides :*

> *"16. **Warrants authorising use of listening devices***
>
> *(1) Upon application made by a person that the person suspects or believes :*
>
> *(a) that a prescribed offence has been, is about to be or is likely to be committed, and*
>
> *(b) that, for the purpose of an investigation into that offence or of enabling evidence to be obtained of the commission of the offence or the identity of the offender, the use of a listening device is necessary,*
>
> *an eligible Judge may, if satisfied that there are reasonable grounds for that suspicion or belief, authorise, by warrant, the use of the listening device."*

While the last paragraph requires the eligible Judge to be satisfied that there are reasonable grounds for "that" suspicion or belief, I assume, the eligible Judge must be satisfied in relation to the suspicion or belief as to the matter in para (a) and the appropriate matter(s) in para (b). I note that the form of warrant in Schedule 2 only requires the eligible Judge to state satisfaction as to the suspicion or belief as to the matter in para (a).

3.4 *In determining whether a warrant should be granted under s.16 the eligible Judge shall have regard to, inter alia, "the extent to which the privacy of any person is likely to be affected" (s.16(2)(b)). That is concerned not with whether the private conversations of only certain persons can be recorded or listened to but with whether the extent to which privacy of a person may be affected is such that the warrant should not be granted.*

3.5 *Section 16(4)(b), about which you seek my advice, provides that a warrant shall specify "where practicable, the name of any person whose private conversation may be recorded or listened to by the use of a listening device pursuant to the warrant."*

I think that the words "where practicable" require that the name of any person whose private conversation may be recorded or listened to by the listening device pursuant to the warrant must be specified if that is possible to be accomplished with known means or resources (Knight v Demolition & Construction Co (1953) 1 WLR 981) or is capable of being carried out in action or is feasible (Adsett v K.L. Steelfounders or Engineers Ltd (1953) 2 A11 ER 320). The word "practicable" has been said to impose a stricter standard than "reasonably practicable" (Adsett). Whether a person is a

person whose private conversation may be recorded or listened to by the listening device pursuant to the warrant will be determined by the matters and any conditions specified in the warrant pursuant to s.16(4) (as to which see my advice which follows). Section 16(4)(b) indicates that in some circumstances it will not be possible to specify the name of a person whose private conversation may be recorded or listened to by the listening device pursuant to the warrant. Where, however, the name of such a person can be ascertained by known means or resources then the name must be specified in the warrant.

3.6 *Section 16(6A) provides a warrant under s.16 may be in or to the effect of the form set out in Schedule 2. The form of warrant in Schedule 2 to the Act provides relevantly in para (2) :*

> *"(2) authorise the use by (names) and on his or her behalf (names or descriptions of persons) of a listening device by which to record or listen to the private conversation of (name) at (description of premises) subject to the condition(s) that :*
>
> *(a)*
> *(b)*
>
> *(set out condition(s))."*

The form appears to follow Form 89C in the Supreme Court Rules which applied when listening device warrants were granted by the Supreme Court. When the Act was amended in 1996 to provide for an eligible Judge to grant the warrant rather than the Court, s.16(6A) was inserted in Part 4 and the form of warrant was inserted in Schedule 2.

Paragraph (2) appears to combine the matters required to be specified by paras (b), (d) and (e) of s.16(4). It does not seem to make provision for the situation where it is not practicable to specify the names of persons whose private conversations may be recorded or listened to pursuant to the warrant and in that situation, presumably, the words "by which to record or listen to the private conversation of (name)" would be omitted.

3.7 *Section 17(1) requires a person seeking a warrant under s.16 to cause to be served on the Attorney General or a prescribed officer a notice of the particulars in paras (a) - (i) thereof. That in para (c) is "where practicable, the name of any person whose private conversation is intended to be recorded or listened to". That is of course a reference to the persons whose private conversation the applicant says it is intended to record or listen to.*

3.8 *Section 19(1) provides for a report to be furnished to an eligible Judge and to the Attorney General by a person to whom a warrant has been granted under Part 4, if a listening device was used pursuant to the warrant, "specifying the name, if known, of any person whose private conversation was recorded or listened to by the use of the device" (sub para (b)(i)).*

3.9 *Section 20 provides in sub ss.(1) and (2) :*

> *"20. **Requirement to inform subject of surveillance***
>
> *(1) Where, pursuant to a warrant granted under this Part, a listening device has been used to record or listen to the private conversation of a person, an eligible Judge may direct the person authorised to use the device to supply to that person, within a period specified by the eligible Judge, such information regarding the warrant and the use of the device as the eligible Judge may specify.*
>
> *(2) An eligible Judge shall not give a direction under subsection (1) unless the eligible Judge is satisfied that, having regard to the evidence or information obtained by the use of the listening device and to any other relevant matter, the use of the listening device was not justified and was an unnecessary interference with the privacy of the person concerned."*

3.10 *Section 22 provides :*

> *"22. **Destruction of irrelevant records made by the use of a listening device***
>
> *(1) This section applies to the use of a listening device :*
>
> *(a) pursuant to a warrant granted under Part 4, or*
>
> *(b) in the circumstances referred to in section 5(2)(c).*
>
> *(2) A person shall, as soon as practicable after it has been made, cause to be destroyed so much of any record, whether in writing or otherwise, of any evidence or information obtained by the person by the use of a listening device to which this section applies as does not relate directly or indirectly to the commission of a prescribed offence within the meaning of Part 4.*
>
> *Maximum penalty : 20 penalty units or imprisonment for a term of 12 months, or both."*

3.11 *Part 3 of the Act provides for the admissibility of evidence and s.14 provides :*

> *"14. **Admissibility of evidence of private conversation when obtained inadvertently pursuant to warrant***
>
> *(1) Where a private conversation has inadvertently or unexpectedly come to the knowledge of a person as a result, direct or indirect, of the use of a listening device pursuant to a warrant granted under Part 4 :*

(a) evidence of the conversation; or

(b) evidence obtained as a consequence of the conversation so coming to the knowledge of that person,

may be given by that person in any criminal proceedings (including proceedings for or in connection with the grant of bail) notwithstanding that the warrant was not granted for the purpose of allowing that evidence to be obtained.

(2) Subsection (1) does not render any evidence admissible if :

(a) the evidence relates to an offence in respect of which a warrant could not be granted under Part 4, or

(b) the application upon which the warrant was granted was not, in the opinion of the court, made in good faith."

3.12 The Listening Devices Regulation 1994 was repealed by staged repeal on 1 September 1999.

Part 4 deals with WARRANTS.

Section 16 provides for *"Warrants authorising use of listening devices"* as follows:

"(1) Upon application made by a person that the person suspects or believes:

(a) that a prescribed offence has been, is about to be or is likely to be committed, and

(b) that, for the purpose of an investigation into that offence or of enabling evidence to be obtained of the commission of the offence or the identity of the offender, the use of a listening device is necessary,

an eligible Judge may, if satisfied that there are reasonable grounds for that suspicion or belief, authorise, by warrant, the use of the listening device.

(2) In determining whether a warrant should be granted under this section, the eligible Judge shall have regard to:

(a) the nature of the prescribed offence in respect of which the warrant is sought;

(b) the extent to which the privacy of any person is likely to be affected.

(c) alternative means of obtaining the evidence or information sought to be obtained,

(d) the evidentiary value of any evidence sought to be obtained, and

(e) any previous warrant sought or granted under this Part in connection with the same prescribed offence.

(3) Where a warrant granted by an eligible Judge under this section authorises the installation of a listening device on any premises, the eligible Judge shall, by the warrant:

(a) authorise and require the retrieval of the listening device, and

(b) authorise entry onto those premises for the purpose of that installation and retrieval.

(4) A warrant granted by an eligible Judge under this section shall specify:

(a) the prescribed offence in respect of which the warrant is granted,

(b) where practicable, the name of any person whose private conversation may be recorded or listened to by the use of a listening device pursuant to the warrant,

(c) the period (being a period not exceeding 21 days) during which the warrant is in force,

(d) the name of any person who may use a listening device pursuant to the warrant and the persons who may use the device on behalf of that person,

(e) where practicable, the premises on which a listening device is to be installed, or the place at which a listening device is to be used, pursuant to the warrant,

(f) any conditions subject to which premises may be entered, or a listening device may be used, pursuant to the warrant, and

(g) the time within which the person authorised to use a listening device pursuant to the warrant is required to report pursuant to section 19 to an eligible Judge and the Attorney-General.

(5) A warrant granted under this section may be revoked by an eligible Judge at any time before the expiration of the period specified in the warrant pursuant to subsection (4)(c).

(6) Subsection (4)(c) shall not be construed as preventing the grant of a further warrant under this section in respect of a prescribed offence in respect of which a warrant has, or warrants have, previously been granted.

(6A) A warrant under this section may be in or to the effect of the form set out in Schedule 2.

(7) The regulations may provide that, in such circumstances as are prescribed, the functions of an eligible Judge under this section may be exercised by an eligible judicial officer. For that purpose a reference in sections 16, 17, 19, and 20A to an eligible Judge is to be read and construed as a reference to an eligible judicial officer."

Of critical importance to the matter under consideration is the provision subsection (4):

"A warrant granted by an eligible Judge under this section shall specify:

(a) the prescribed offence in respect of which the warrant is granted,

*(b) **where practicable, the name of any person whose private conversation may be recorded or listened to by the use of a listening device pursuant to the warrant*** (emphasis added)".

Before dealing with the warrant in question, two preliminary observations may be made.

First. In noting the value of electronic surveillance, Justice James Wood said in volume two of his final report of the Royal Commission into the New South Wales Police Service :

"7.82 The Royal Commission found that its use of electronic surveillance was the single most important factor in achieving a breakthrough in its investigations. In this regard, it mirrors the experience of conventional law enforcement agencies faced with a proliferation of the drug trade, and an increase in the sophistication of the methods employed by those engaged in organised crime. Although the advantages of this form of surveillance are so obvious that they barely need statement, they include :

- *the obtaining of evidence that provides a compelling, incontrovertible and contemporaneous record of criminal activity;*
- *the removal of the incentive to engage in process corruption;*
- *the opportunity to effect an arrest while a crime is in the planning stage, thereby lessening the risk to lives and property;*
- *the provision of greater security for money in the possession of undercover operatives;*
- *the reduction of the possibility of harm to police, and undercover operatives and informants, arising out of the opportunity this form of surveillance provides to obtain a forewarning of any planned reprisals, and to know in advance the planned movements and activities of the targets;*
- *the reduction in the need for close personal contact with criminals;*
- *overall efficiencies in the investigation of corruption offences and other forms of criminality that are covert, sophisticated, and difficult to detect by conventional methods, particularly where those involved are aware of policing methods, are conscious of visual surveillance and employ counter-surveillance techniques;*
- *a higher plea rate in cases which, by reason of unequivocal surveillance product, are indefensible, and do not depend on disputed evidence or civilian eyewitnesses who are untrained as observers and historians of fact; and*

- *the provision of a record to establish or rebut complaints against police.*

7.83 The effective use by the ICAC of this form of surveillance during the past 18 months and its regular and exceedingly productive use by the AFP in major drug importation cases provides further testimony to its value. In the judgement of this Commission, it is essential that the Police Service (and similar law enforcement agencies), the Crime Commission, the PIC and the ICAC be equipped with adequate resources and electronic surveillance capacity, to fulfil their charters to best advantage and to keep ahead of the increasing sophistication of criminals. Those resources and powers need to extend to listening devices, intercepts of telephone and other forms of telecommunications, tracking devices, and video surveillance."

Second. The Listening Devices Act 1984 (The Act) vests the jurisdiction to grant warrants in the Supreme Court of the State. The fact that the Supreme Court is the chosen court was an acknowledgement by the Government of the important public interest in controlling the use of listening devices.

On the 17 May 1984, Hansard records Mr Landa, the Attorney General, moving that the Listening Devices Bill be read a second time with the opening words :

> *"These proposals are an important statement of principle. The bill will establish safeguards against the unjustified invasion of privacy that can be occasioned by the use of electronic surveillance. In so doing, it seeks to protect one of the most important aspects of individual freedom - the right of people to enjoy their private lives free from interference by the State or by others. The protection of individual privacy is clearly established as a legitimate matter for the concern of government. As laws were made many years ago to protect individuals from the unsavoury and unwarranted activity of eavesdropping, the passage of time and the rapid development of technology in this field have rendered those laws utterly inadequate to cope with the threat which is posed to individual privacy by the use of listening devices. Mr Justice Douglas of the Supreme Court of the United States of America has observed :*
>
> > *What the ancients knew as "eavesdropping" we now call "electronic surveillance"; but to equate the two is to treat man's first gunpowder on the same level as the nuclear bomb. Electronic surveillance is the greatest leveller of human privacy ever known.*
>
> *Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscriminate and more obnoxious to a truly free society."*

He further said (at page 1095 of Hansard) :

> *"Clause 15 will authorize the Supreme Court to grant a warrant for the use of a listening device in connection with a prescribed offence. The clause specifies the matters to which a court must have regard in considering an application for a warrant and provides for a warrant to be issued in specific terms. The need for particulars, and information that establishes the reasonable justification for the use of listening devices, derives from the fact that the intrusions upon privacy that would be sanctioned by their indiscriminate use would be broad in their scope. The observance*

of strict precautions in the authorization of their use will minimize the extent of unjustified and unnecessary interference with the private lives of individuals. Clause 17 will provide that the Attorney General is to be notified of the particulars of an application of a warrant under clause 16 and is to be given an opportunity to be heard in relation to the application. This provision is included to ensure effective representation of the public interest in requiring responsibility in the use of listening devices."

The Warrant

As at September 2000 a large number of Listening Device Warrant applications had been successfully made to the Supreme Court in respect of M5's activities. M5 remained in the field wearing a listening device for a very long period in an undercover role gathering evidence of his initial allegations and of current crime and corruption. A series of rollover warrants was granted under the Act for this purpose, including the subject warrant.

On 14 September 2000 an application was made by a Detective Sergeant with the assistance of the Special Crime Unit and the NSWCC. Such application was accompanied by a copy of the usual notice under Section 17 of the Act to the Attorney-General or his delegate and by a comprehensive, very lengthy Affidavit.

It is clear that this was an exceptional investigation. I accept that "*the contact which SEA was likely to have with other police, and former police was extensive, and there were likely to be conversations which were relevant to the investigation of the nominated offences with many such persons. Investigators tended to include all persons likely to speak in the presence of the device*". I also accept that "*the documents were prepared by, or under the supervision of, an experienced lawyer* (to whom I have spoken), *on the instructions of the applicant, and submitted by the lawyer to the Justice in chambers. The terms of the affidavit and draft warrant were approved by an Assistant Director of the (Crime) Commission*".

A warrant was issued by Justice Virginia Bell under Section 16 of the *Listening Devices Act 1984* on 14 September 2000. Such warrant commenced:

> *"I, Virginia Margaret Bell, being an eligible Judge within the meaning of the Listening Devices Act 1984, having been satisfied that there are reasonable grounds for the suspicion of Glenn William Trayhurn ('the applicant') that the prescribed offences specified in paragraph (1) have been, are about to be or are likely to be committed:*
>
> *(1) specify as the prescribed offences in respect of which this warrant is granted, the following:*
>
> - *money laundering, contrary to section 73 of the Confiscation of Proceeds of Crime Act 1989 (NSW)*
> - *corruption, contrary to section 200 of the Police Service Act 1990 (NSW)*
> - *corruptly receive a benefit, contrary to section 249B of the Crimes Act 1900 (NSW)*

- *conspiracy to pervert the course of justice, contrary to section 319 of the Crimes Act 1900 (NSW)*
- *conspiring to pervert the course of justice, contrary to common law*
- *tampering with evidence, contrary to section 317(a) of the Crimes Act 1900 (NSW);*

(2) *authorise the use by the applicant and on the applicant's behalf by the persons named in the annexed Schedule of a listening device to be worn or carried by the applicant or by one of the persons named in the annexed Schedule on the applicant's behalf by which to record or listen to the private conversations of* ... [the names of 114 serving police, former police, and civilians] ...".

The warrant concluded by fixing a period of 21 days, during which it would be in force with the usual requirement for a Report pursuant to Section 19 of the *Listening Devices Act 1984* to be made to an eligible Judge and to the Attorney-General. The warrant is in the form set out in Schedule 2 of the Act.

It is understandable that the applicant would seek to include in the warrant all names of those whom it was reasonably suspected M5 (*"SEA"*) may engage in recorded conversations in order to corroborate his allegations, gain evidence about their corruption, gain information about their knowledge of the allegations/corruption, and/or may reasonably be expected to be present when M5 was going to record conversations.

Some may think that for any person to be named in the warrant there must be reasonable grounds to suspect that such person was involved in a prescribed offence or at least had some information about it. That thought is erroneous.

The way in which the form of the warrant in Schedule 2 to the Act has been drafted may lead to an incorrect impression that a warrant may only authorise the private conversation of persons named in the warrant to be recorded or listened to by a listening device and that, in relying on the warrant, only the private conversations of those persons can be recorded and listened to. The Crown Solicitor has observed that the last above is *"an incorrect impression because of my construction of s.16 and I do not think that para 2 of the form in Schedule 2 would be taken to have amended s.16."*

I take this up by recommending that consideration be given to amending paragraph 2(2) of the form of warrant in Schedule 2 to the Act to avoid such impression. *The matters in paragraphs (a), (d) and (e) of s.16(4) might be separately specified in the form of the warrant and guidance provided to delete the specification of names where it is not practicable to specify names.*

I agree that is, of course, ultimately a matter for Parliamentary Counsel to advise upon. Consideration could also be given to amending s.16(1) to clarify that the suspicion or belief in respect of which the eligible Judge must be satisfied there are reasonable grounds is that in para (a) and the relevant part(s) of para (b) and to whether the eligible Judge's satisfaction in relation to the suspicion or belief concerning the relevant part(s) of para (b) should also be recorded at the beginning of the form of warrant in Schedule 2.

Section 16(4) of the Act provides:

> *"A warrant granted by an eligible Judge under this Section shall specify:*
>
> *(a) the prescribed offence in respect of which the warrant is granted,*
>
> *(b) **where practicable, the name of any person whose private conversation may be recorded or listened to by the use of a Listening Device pursuant to the warrant*** (emphasis added)"

The Crown Solicitor has given me his advice confirming my view that Section 16(4)(b) of the Act requires the warrant to specify *"where practicable, the name of any person whose private conversation may be recorded or listened to by the use of a Listening Device pursuant to the warrant"* **whether or not such person is reasonably suspected of having information relating to *"the prescribed offence"*** (emphasis added).

I agree with the Crown Solicitor's advice :

> *"4.2 What an eligible Judge authorises by a warrant pursuant to s.16(1) is "the use of the listening device", in the context of satisfaction that there are reasonable grounds for a suspicion or belief of the applicant that for the purpose of an investigation into a prescribed offence or of enabling evidence to be obtained of the commission of the offence or the identity of the offender, the use of a listening device is necessary. While I think that the listening device may only be used pursuant to the warrant for the relevant purpose(s) in s.16(1)(b), s.16(1) contains no other express or implied restriction as to how the listening device is to be used for that purpose or purposes, and in particular, no restriction as to the persons whose private conversations may be recorded or listened to. That is not surprising as, presumably, information which assists the investigation of a prescribed offence or assists in enabling evidence to be obtained can come from the recording of the private conversation of any person who happens to be in premises or at a place where for some reason it is thought that a listening device should be installed or used. The person may have absolutely no connection with the prescribed offence or be in possession of any relevant evidence but their private conversation, because of the circumstances in which it is made in the premises or the place, may assist the relevant purpose(s) in s.16(1)(b).*
>
> *Presumably, in practice, information available to an applicant will give rise to a belief that the use of a listening device in relation to premises or a place is necessary for one or more of the purposes specified in s.16(1)(b). Information will indicate why those premises or the place might be one where the use of a listening device would assist the relevant purpose(s) in s.16(1)(b). At the time of the application for a warrant the applicant may not be able to name otherwise identifiable persons whose conversations are intended to be listened to at the premises or the place. It may also be that the private conversations at those premises or that place of persons unknown to the applicant will, because of the circumstances in which they occur, assist in some way to achieve the relevant purpose(s) in s.16(1)(b). For example, an entirely unconnected person may come into conversation at the premises or place with a person connected in some way with the prescribed offence and the words the former says may have some relevance to words the latter may say which have significance for*

the purpose(s) in s.16(1)(b). It is not just the private conversation of persons who are reasonably suspected of having information relating to the prescribed offence or persons who are reasonably suspected of being involved, directly or indirectly, in the prescribed offence which if recorded or listened to would provide information which would assist the investigation of the prescribed offence or assist in enabling evidence to be obtained of the offence or of the identity of the offender.

The Act recognises that private conversation not connected with the prescribed offence will be recorded or listened to by a listening device pursuant to a warrant and makes appropriate provision to deal with the information recorded.

4.3 In determining whether a warrant should be granted, the eligible Judge must have regard to the matters listed in paras (a) - (e) of s.16(2). ***The eligible Judge is not required by those paragraphs to have regard to whether private conversation of persons not reasonably suspected of having information relating to the prescribed offence or of being involved, directly or indirectly, in the prescribed offence, would be recorded or listened to*** (emphasis added). [See para 3.4 at page 5.]

4.4 The warrant granted must specify the matters in paras (a) - (g) of s.16(4). What para (b) requires is that if it is possible to specify the name of a person whose private conversations may be recorded or listened to by the use of a listening device pursuant to the warrant then that name must be specified in the warrant. I assume that this requirement was a measure intended to try to protect the privacy of citizens and is relevant to the obligations in ss.19 and 20. The specification in the warrant of names pursuant to the requirement in s.16(4)(b) is not intended by the Act to limit the warrant to authorising the recording or listening to of the private conversation of named persons. Clearly, s.16(4)(b) itself and s.19(1)(b)(i) recognise that the private conversations of unnamed persons may be recorded or listened to pursuant to a warrant. Any limitation as to the persons whose private conversations may be recorded for the purpose(s) in s.16(1)(b) must be found elsewhere. Such limitation will arise as a consequence of the specification of the premises or place where the listening device may be used. The more precise the specification of the premises or the place, the smaller the number of persons whose private conversations may be recorded or listened to. Conditions specified in the warrant may further confine the persons whose private conversation may be recorded or listened to."

I also agree with the following observation of the Crown Solicitor :

"What is relevant to whether a name must be specified, where practicable, is not whether the person is reasonably suspected of having information relating to the prescribed offence or of having been involved, directly or indirectly, in the prescribed offence but whether the person is a person whose private conversation may be recorded or listened to by the use of a listening device pursuant to the warrant (emphasis added)."

I consider that it is clearly in the public interest that electronic material was sought and obtained corroborating M5's allegations of crime and corruption. I am advised that already 160 charges have been laid against 6 police and 40 civilians and *"there are more to come"*.

I return to the subject Listening Device Warrant, No. 266/2000. The notice of the application for such warrant was duly served upon the Attorney-General or his delegate in compliance with Section 17 of the Act. Such notice also includes all but two of the 114 names which were in the warrant itself.

More than one of the persons named in the subject warrant have since been charged with serious criminal offences. As is now required in such cases, the prosecution provided a comprehensive brief relating to the charges. Necessarily, one item in such briefs is the subject warrant of the 14 September 2000.

In former days it may have been expected that such warrant would, before tender, have had deleted from it those names whose conversations were not relevant to the particular charges. During the lengthy civil hearing of Marsden v Amalgamated Television Services Pty Ltd before Justice Levine a warrant, under the Act, from which many deletions had been made, was rejected by the trial Judge. This ruling by Levine J was presumably known to the legal advisors of the NSW CC. It is likely to have resulted in the warrant without any names deleted being included in the documents in the Crown Briefs tendered in the above cases.

I note however that the Court of Appeal in a judgment in Marsden v Amalgamated Television Services delivered on 13 July 2000 said in paragraph 31:

> *"At the commencement of the hearing in this court, one of the claimant's proposed grounds of appeal was that his Honour should have admitted the Elomari tapes and transcripts, but this was abandoned in the course of argument. Accordingly, the next question arising is whether error has been demonstrated in relation to his Honour's refusal to admit the copy warrants as evidence of compliance, in the circumstances, with s.5(2)(a) of the Act. The warrants in question had been provided by the Police Integrity Commission ("the Commission") with a number of deletions which had been made pursuant to statutory powers, the exercise of which has not been the subject of challenge. They had been provided in substitution for earlier copies of the warrants in which many more deletions had been made. His Honour had rejected the tender of these earlier copies on the basis that, having regard to the deletions, they could not answer the description of warrants. He rejected the documents in question on the same basis. They were not warrants contemplated by s.16 of the Act. We would agree that the earlier copies, having regard to their mutilated state, were properly rejected. We have, however, with respect, come to the view that the copy warrants, the subject of this application, should not have been rejected."*

It was after the delivery of the brief (which included the subject warrant) in such criminal proceedings, that copies of the warrant have been provided by person or persons unknown to journalists in the media.

Questions Asked

The first matter which I am asked to confirm in my Report is:

1. **Was the warrant justifiably sought?**

ANSWER : This was an exceptional investigation encompassing a wide range of serious misconduct and corrupt behaviour by a large number of serving and former police. It was, in my view, completely appropriate that a warrant "authorising the use of listening devices" (and subsequent rollover warrants) be sought for the purpose of the investigation into those offences and of enabling evidence to be obtained of their commission and the identity of the offenders.

As I have noted above, any challenge to the validity of a warrant granted by a Judge of the Supreme Court under the *Listening Devices Act 1984* can only be dealt with by the Supreme Court itself, and not by a statutory body such as the Inspector of the Police Integrity Commission. However, in making that observation, I also note that I have seen nothing in the material inspected by me which would cast any doubt upon the validity of the warrant granted by Justice Virginia Bell of the Supreme Court on 14 September 2000.

I confirm that the warrant was justifiably sought.

2. Did the seeking of the warrant comply with the relevant legislation?

ANSWER : Yes, subject to one minor irregularity noted below.

The warrant contained the names of 114 serving police, former police and civilians, whose private conversations may be recorded or listened to by the subject listening device. This huge number of persons is explicable by the magnitude of this exceptional investigation and by the correction of a common misunderstanding.

The misunderstanding to which I refer is that some may think that for any person to be named in a warrant there must be reasonable grounds to suspect that such person was involved in a prescribed offence or at least had some information about it. That thought is erroneous. The Crown Solicitor has given me his advice confirming my view that Section 16(4)(b) of the Act requires the warrant to specify *"where practicable, the name of any person whose private conversation may be recorded or listened to by the use of a Listening Device pursuant to the warrant"* **whether or not such person is reasonably suspected of having information relating to "the prescribed offence"** (emphasis added).

I specifically agree with the advice of the Crown Solicitor that :

> ***"What is relevant to whether a name must be specified, where practicable, is not whether the person is reasonably suspected of having information relating to the prescribed offence or of having been involved, directly or indirectly, in the prescribed offence but whether the person is a person whose private conversation may be recorded or listened to by the use of a listening device pursuant to the warrant"*** (emphasis added).

It is understandable that the applicant would seek to include in the warrant all names of those whom it was reasonably suspected M5 (*"SEA"*) may engage in recorded conversations in order to corroborate his allegations, gain evidence about their corruption, gain information about their knowledge of the allegations/corruption, and/or may reasonably be expected to be present when M5 was going to record conversations.

As noted above I accept in this regard that :

> *"The contact which SEA was likely to have with other police, and former police was extensive, and there were likely to be conversations which were relevant to the investigation of the nominated offences with many such persons. Investigators tended to include all persons likely to speak in the presence of the device."*

The minor irregularity to which I refer is that the application and the affidavit in support of the application omitted to include the names of two (2) of the hundred and fourteen (114) persons whose names are specified in the warrant. Neither of such persons is the subject of criminal nor disciplinary proceedings.

The minor irregularity of the omission of those two names was clearly inadvertent and is, in my view, of no substantial consequence.

I note that I have recommended, in the body of this advice, that consideration be given by Parliamentary Counsel to the statutory amendments to which I there refer (no doubt the views of relevant agencies would be sought). Those recommendations do not affect the questions nor the answers in this report.

3. Was the material obtained by the warrant used appropriately?

ANSWER : I have no reason not to accept the advice of the Crime Commission that :

> *"The material was downloaded from the device worn by SEA and most of it transcribed in draft. Relevant portions were reviewed and certified as correct. It was securely held and used only for the purpose of preparing for PIC hearings, criminal prosecution briefs, and in furtherance of this investigation. We are not aware of any information obtained pursuant to this warrant being used or disseminated for any other purposes."*

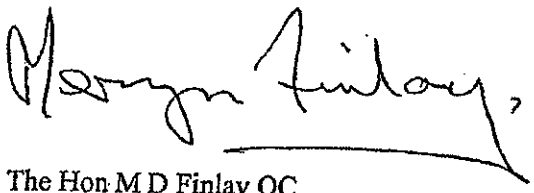
I have seen documents recording instances of appropriate dissemination *"to the Police Integrity Commission, and to defendants in criminal prosecutions and the D.P.P."*

For the purpose of the Police Integrity Commission hearings material obtained pursuant to the warrant was disseminated to lawyers instructed by the Police Service. So far as the Police Integrity Commission is concerned, portions of the audio tapes and transcripts have been admitted into evidence as four separate exhibits in the Operation Florida hearing. Apart from that and general research, intelligence and hearing room preparation, I am satisfied the material has not been used for any other purposes, nor has the Commission disseminated the material to any other agency.

I confirm, on the above, that the material obtained by the warrant was used appropriately.

When practicable the destruction of so much of any record obtained by the use of the listening device *"as does not relate directly or indirectly to the commission of a prescribed offence"* shall be required pursuant to s22 of the Act.

I certify, pursuant to s56(4)(c) of the Police Integrity Commission Act 1996, that it is necessary in the public interest for the information in this report to be divulged to Mr Michael Costa the Minister for Police, Mr Les Tree the Director General of the Ministry for Police, Mr Phillip Bradley the Commissioner of the NSW Crime Commission, Mr Terrence Griffin the Commissioner of the Police Integrity Commission, and to Mr Ken Moroney the Acting Commissioner of Police, and I so direct. I do not divulge my report to the Media.



The Hon M D Finlay QC
Inspector of the Police Integrity Commission