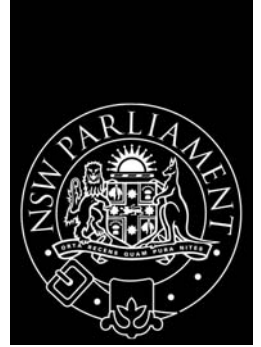


PARLIAMENT OF NEW SOUTH WALES



# Committee on the Office of the Ombudsman and the Police Integrity Commission

SEVENTH GENERAL MEETING WITH THE INSPECTOR  
OF THE POLICE INTEGRITY COMMISSION

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Together with Transcript of Proceedings

New South Wales Parliamentary Library cataloguing-in-publication data:

**New South Wales. Parliament. Committee on the Office of the Ombudsman and the Police Integrity Commission**

Seventh General Meeting with the Inspector of the Police Integrity Commission: together with transcript of proceedings / Parliament of New South Wales, Committee on the Office of the Ombudsman and the Police Integrity Commission. [Sydney, N.S.W.] :The Committee, 2005. – p. 49; cm. (Report ; no. 9/53, October 2005).

Chair: Paul Lynch

“October 2005”

ISBN 1921012129

1. Police corruption—New South Wales.
- I. Title
- II. Lynch, Paul.
- III. New South Wales. Police Integrity Commission.
- IV. Series: New South Wales. Parliament. Committee on the Office of the Ombudsman and the Police Integrity Commission. Report ; no. 53/9

353.46 (DDC)

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## Functions of the Committee

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

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

Section 31B(2) of the Ombudsman Act specifies that the Committee is not authorised:

- to investigate a matter relating to particular conduct; or
- to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint; or
- to exercise any function referred to in subsection (1) in relation to any report under section 27; or
- to reconsider the findings, recommendations, determinations or other decisions of the Ombudsman, or of any other person, in relation to a particular investigation or complaint or in relation to any particular conduct the subject of a report under section 27; or
- to exercise any function referred to in subsection (1) in relation to the Ombudsman's functions under the *Telecommunications (Interception) (New South Wales) Act 1987*.

The Committee also has the following functions under the *Police Integrity Commission Act 1996*:

- to monitor and review the exercise by the Commission and the Inspector of their functions;
- to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected

Functions of the Committee

- with the exercise of their functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;
- to examine each annual and other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing, or arising out of, any such report;
  - to examine trends and changes in police corruption, and practices and methods relating to police corruption, and report to both Houses of Parliament any changes which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector; and
  - to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

The Act further specifies that the Joint Committee is not authorised:

- to investigate a matter relating to particular conduct; or
- to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, a particular matter or particular conduct; or
- to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or a particular complaint.

The *Statutory Appointments (Parliamentary Veto) Amendment Act*, assented to on 19 May 1992, amended the Ombudsman Act by extending the Committee's powers to include the power to veto the proposed appointment of the Ombudsman and the Director of Public Prosecutions. This section was further amended by the *Police Legislation Amendment Act 1996* which provided the Committee with the same veto power in relation to proposed appointments to the positions of Commissioner for the PIC and Inspector of the PIC. Section 31BA of the Ombudsman Act provides:

- (1) The Minister is to refer a proposal to appoint a person as Ombudsman, Director of Public Prosecutions, Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission to the Joint Committee and the Committee is empowered to veto the proposed appointment as provided by this section. The Minister may withdraw a referral at any time.
- (2) The Joint Committee has 14 days after the proposed appointment is referred to it to veto the proposal and has a further 30 days (after the initial 14 days) to veto the proposal if it notifies the Minister within that 14 days that it requires more time to consider the matter.
- (3) The Joint Committee is to notify the Minister, within the time that it has to veto a proposed appointment, whether or not it vetoes it.
- (4) A referral or notification under this section is to be in writing.
- (5) In this section, a reference to the Minister is;
  - (a) in the context of an appointment of Ombudsman, a reference to the Minister administering section 6A of this Act;



(b) in the context of an appointment of Director of Public Prosecutions, a reference to the Minister administering section 4A of the *Director of Public Prosecutions Act 1986*; and

(c) in the context of an appointment of Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission, a reference to the Minister administering section 7 or 88 (as appropriate) of the Police Integrity Commission Act 1996.



## Chairman's Foreword

This report on the Committee's seventh General Meeting with the former Inspector of the Police Integrity Commission, the Hon. M. Ireland QC, centres on a recurrent theme of the General Meetings throughout Inspector Ireland's term in office, namely, the need to amend the Police Integrity Commission Act by extending the jurisdiction of the Inspector to include oversight of PIC's investigative partners.

The Committee has repeatedly called for an amendment to extend the Inspector's jurisdiction to include the conduct of non-PIC officers connected with the PIC, thereby, removing any gap in the accountability structure for PIC operations. Particular events during PIC's Operation Florida first prompted the Committee to make this proposal, and information obtained on a confidential basis through the Committee's oversight of the Office of the Ombudsman further highlights the inadequacies of the current accountability scheme. These are not hypothetical issues. Operation Florida provides concrete examples of specific incidents where the conduct of non-PIC officers, in this case officers of the NSW Crime Commission, were directly relevant to inquiries conducted by the Inspector.

In view of the extensive and coercive powers exercised by the PIC, it is critical that the highest level of accountability should apply to PIC's operations. It is completely unsatisfactory that the current gap in accountability has not been remedied. As stands, the legislation provides for an obviously impractical scheme of investigation coordination between the Inspector and ICAC to fill this gap. The Committee has yet to hear a satisfactory explanation as to why the amendment it has recommended has not been brought forward, particularly in view of the stakeholder support for the change.

The recent Supreme Court decision *Shaw v Police Integrity Commission* [2005] NSWSC 782, which reviewed matters relating to PIC's jurisdiction and its capacity to report on the conduct of Mr Shaw, prompted the Committee to commence an examination of the role and functions of Counsel Assisting the Police Integrity Commission. This will be a matter of ongoing inquiry with the Commissioner of the PIC.

I would like to extend the Committee's best wishes to Mr Ireland, who concluded his term of office on the day of the General Meeting, and thank him for his frank and courteous interactions with the Committee. I also thank the Committee Members for their participation in the General Meeting.

**Mr Paul Lynch MP**  
**Chairman**



## Chapter One - Commentary

On 31 August 2005, the Committee conducted the seventh General Meeting with the then Inspector of the Police Integrity Commission, the Hon. M. Ireland QC. Evidence was taken from the Inspector in relation to his recent Annual Report to Parliament for the year ending 30 June 2005. The Committee's examination also included questions about current issues relevant to the Inspector's oversight of the Commission. The public hearing took place on the last day of Inspector Ireland's term in office and presented an opportunity to reflect on the significant developments that had occurred since his appointment as Inspector. The commentary that follows focuses on a number of issues discussed with the Inspector at the General Meeting, in particular, the role of Counsel Assisting the Police Integrity Commission and the Committee's previous proposal to extend the jurisdiction of the Inspector.

### 1. EXTENDING THE JURISDICTION OF THE INSPECTOR

One of the continuing themes of the Committee's work relates to its proposal that the jurisdiction of the Inspector of the Police Integrity Commission should be extended to include alleged improprieties and misconduct by non-PIC officers connected with the activities of the PIC, e.g. when acting as part of a joint PIC task force.

#### 1.1 Oversight during Operation Florida

This recommendation arose from two incidents occurring during the joint PIC – NSW Crime Commission – NSW Police investigation known as Operation Florida (following on from the Crime Commission's Operation Mascot). The first of these incidents concerned the airing of material, obtained by listening device and telecommunications interception (TI), on the *Four Corners* program on 8 October 2001, before the material was tendered in evidence at the PIC hearing held earlier the same day. The second incident became known as the '114-name warrant'. Both of these incidents were investigated by the then PIC Inspector, the Hon. Mervyn Finlay QC,<sup>1</sup> who commenced an 'own motion' investigation into the broadcast of the surveillance material by *Four Corners* and, at the direction of the then Minister for Police, investigated the 114-name warrant. The outcomes of the Inspector's investigations reflect their different origins and the restrictions on his jurisdiction.

**1.1.1 *Four Corners* broadcast** - With respect to the broadcast of TI surveillance material on *Four Corners* before it was introduced into evidence, the PIC's internal inquiries revealed that:

- The tape in question was communicated from the Crime Commission to the PIC, pursuant to s.68 of the TI Act, via a letter dated 9 October 2001.
- PIC's records indicate that the tape was not delivered to it until 15 October 2001 – one week after the commencement of the Operation Florida hearings and the *Four Corners* broadcast.
- PIC only received one copy of this tape (PIC stated that its records reflect the tapes it received more accurately than the Crime Commission's receipt, which was signed by a PIC officer and indicated that two copies of each audio tape was received).

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<sup>1</sup> See the Committee's *Report on the Fifth General Meeting with the Inspector of the Police Integrity Commission*, September 2003, pp. 8–12 for details of these incidents; also Inspector's Annual Report for the year ending 30 June 2001, pp.14-25.

Commentary

- The receipt of only one copy of the tape in question was consistent with the procedure adopted during Operation Florida, in which NSW Crime Commission officers who had access to one of PIC's operation rooms retained a second copy of each tape. Mr Masters had access to the particular operation room and the copy of the tape that was not barcoded was among the material in the room (suggesting it was not the PIC's copy of the tape).
- The tape in question is not specified in the receipts attached to the PIC's letters to Mr Masters, by which TI product was disseminated under s.67 of the TI Act.
- A PIC officer's notation on the *Four Corner's* draft script, that the tape was referred to in Counsel Assisting's opening address, was an error as PIC did not receive the tape in question until one week after the opening. Another PIC officer had recorded that the tape was not one of the items included in Counsel Assisting's opening and notations by counsel recorded the same.<sup>2</sup>

Consequently, the PIC concluded that it was likely that Mr Masters had obtained access to the tape from the custody of the NSW Crime Commission, perhaps while present with Crime Commission staff in PIC's operations room.<sup>3</sup> However, the PIC was not aware of the precise circumstances of such access. In view of this uncertainty, the PIC was of a mind to make further inquiries about the matter with *Four Corners* and the NSW Crime Commission. However, conscious that the Inspector might wish to make such inquiries himself, the PIC awaited the Inspector's advice.<sup>4</sup>

The Inspector commented that he was not satisfied that the PIC had been a party to a breach of the TI Act and that he did not consider that the statutory functions he is authorised to fulfil required him to pursue the matter with Mr Masters (*Four Corners*) or the Crime Commission. Nevertheless, he quite clearly placed responsibility with the PIC for the system failure that led to the publication of the surveillance material prior to it being tendered in evidence.<sup>5</sup> Significantly, the account given by the PIC to the Inspector about how the TI surveillance tape came to be in the possession of *Four Corners* was not verified and, as a consequence, there remains no complete public account of this particular matter.

In November 2004, the Committee became aware during the twelfth General Meeting with the NSW Ombudsman that the Ombudsman's Office had conducted an investigation into certain aspects of the incident, pursuant to the Ombudsman's audit role under the *Telecommunications (Interception)(New South Wales) Act 1987*.<sup>6</sup> The Ombudsman's report, entitled 'Release of lawfully obtained information by the NSW Crime Commission relating to Operation Mascot and by the Police Integrity Commission relating to Operation Florida', was provided to the Attorney General on 27 September 2002. Copies of the report also were provided to relevant heads of agencies. However, the Ombudsman had no authority to provide a copy of the report to the Inspector of the PIC.<sup>7</sup>

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<sup>2</sup> Inspector's report, dated 8 November 2001, 'Re: "Four Corners" Program: 8 October 2001, Report by Inspector of Preliminary Investigation' pp.15-16, reproduced in the Report of the Committee on the Office of the Ombudsman and the Police Integrity Commission, *Sixth General Meeting with the Commissioner for the Police Integrity Commission*, June 2002.

<sup>3</sup> *ibid*, p.16.

<sup>4</sup> *ibid*, p.17.

<sup>5</sup> *ibid*, p.18 and also Inspector of the Police Integrity Commission, *Annual Report for the year ended 30 June 2002*, pp. 14 – 26.

<sup>6</sup> Committee's report entitled, *Twelfth General Meeting with the NSW Ombudsman*, March 2005, p.41.

<sup>7</sup> *ibid*.

Of particular concern to the Committee, is the perspective provided by the Ombudsman's investigation into the record-keeping systems pertinent to the sequence of events that led to *Four Corners* obtaining TI surveillance tape information before it was introduced into evidence<sup>8</sup>. Far from verifying the account offered to the Inspector by the PIC, the Ombudsman's investigation identified a number of recording anomalies associated with the dissemination of TI product to *Four Corners*. The Committee cannot make the details of the Ombudsman's investigation public due to the confidentiality provisions that apply to the performance of this inspection function, and the Ombudsman's consequent request to the Committee for confidentiality. However, the Ombudsman's examination of record-keeping practices within the PIC and Crime Commission has led the Committee to form the view that, on this occasion, full accountability for PIC's operations was not best served by relying on the Inspector's report alone, limited as it is by the restrictions on his jurisdiction. Indeed, the Ombudsman's investigation points to a very different conclusion about the actions of PIC's investigative partner, the NSW Crime Commission, than that drawn from the PIC's suggested interpretation of events.

In order that the Inspector was aware of all the information available from the Ombudsman concerning the release of the material to *Four Corners*, the Committee resolved to ensure that the PIC should forward a copy of the Ombudsman's report to the Inspector. The PIC notified the Committee that it was apparent from its records that this had not occurred. Consequently, the PIC forwarded a copy to the Inspector on 11 January 2005: over two years after the Ombudsman's report had been prepared.<sup>9</sup>

It is a matter of some concern to the Committee that had it not questioned the Ombudsman about the TI oversight role performed by his Office, it would not have become aware of the existence of the Ombudsman's report.<sup>10</sup> Nor would the Committee have been in a position to ensure that the Inspector received a copy of the report. Moreover, the Committee remains concerned about the extent of the oversight that occurred in respect of the *Four Corners* incident. The Ombudsman's TI inspection function did not extend to a broader examination of the conduct and decision-making of the PIC and Crime Commission on the dissemination of TI product in connection with Operation Florida. As a result, the Inspector's inability to examine the conduct of non-PIC officers connected with the activities of the PIC detracts significantly from the level of accountability for PIC's operations which, on this occasion, appears to fall considerably short of that expected by the Committee.

**1.1.2 Listening device warrant** - In the case of the 114-name warrant, the Inspector was directed to investigate the issue by the Minister for Police<sup>11</sup>. Given the existing legislation, this was an appropriate solution to an issue generated by PIC's task force partner, the NSW Crime Commission, which also falls within the portfolio responsibilities of the Minister for Police. It is relevant to note that the PIC was not responsible for compiling the affidavits in

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<sup>8</sup> *ibid.* Part of the Ombudsman's Answer to Question on Notice 8(i) was treated confidentially in accordance with s.31H(1) of the *Ombudsman Act 1974*.

<sup>9</sup> *ibid.*, p.5; letter from the Commissioner, dated 18 January 2005, providing responses to questions taken on notice during the eighth General Meeting with the Commissioner of the PIC.

<sup>10</sup> It is not open to the Committee to review the Ombudsman's reports in this area as s.31B(2) of the *Ombudsman Act 1974* specifically precludes the Committee from exercising any of its functions in relation to the Ombudsman's functions under the *Telecommunications (Interception) (New South Wales) Act 1987*.

<sup>11</sup> Inspector of the Police Integrity Commission, *Annual Report for the Year Ended 30 June 2002*, p. 18.

support of issuing the warrant or its execution.<sup>12</sup> The Inspector found that the warrant was justifiably sought, that the seeking of the warrant complied with the relevant legislation, and that the material obtained by the warrant was used appropriately.<sup>13</sup> He also reported that the huge number of names contained in the warrant could be explained by the magnitude of the investigation. It was the opinion of both the Inspector and the Crown Solicitor that the relevant question as to whether a name should have been included in the warrant is not whether there is reasonable ground to suspect that the person had committed an offence, or had information about the offence, but rather whether the person's private conversation may be recorded or listened to by the use of the listening device pursuant to the warrant.<sup>14</sup>

## 1.2 The need for legislative amendments

The Committee originally considered the extent of the Inspector's jurisdiction during the fifth General Meeting with the PIC Inspector, noting in its report that the lack of external accountability with respect to the conduct of officers from the NSW Crime Commission and other agencies engaged in joint operations with the PIC has significant implications for the activities of the PIC. As the Inspector stated:

Where an allegation is made which essentially involves conduct by NSWCC officers, but which touches in some way upon the activities of the Police Integrity Commission, there is potential for a diminution of public confidence in the Police Integrity Commission if the matter cannot receive a full investigation.<sup>15</sup>

The Committee further noted that it is unreasonable for there to be adverse criticism made of the PIC arising from concerns about the conduct of its partners in joint operations. The Inspector gave evidence that:

As things presently stand, one cannot say that all possible future circumstances involving disputed facts would permit a full and proper inquiry by the Office of the Inspector.<sup>16</sup>

Consequently, the Committee recommended that the *Police Integrity Commission Act 1996* be amended to overcome this gap in the accountability framework for the PIC by providing the Inspector with jurisdiction to investigate alleged improprieties by non-PIC officers, in circumstances where:

- the conduct of a PIC officer also is involved; or
- there is a connection between the alleged misconduct and the activities of the PIC; or
- the legality or propriety of the PIC's activities is called into question;

and the conduct is conduct of a type that would normally fall within the Inspector's jurisdiction.<sup>17</sup>

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<sup>12</sup> Evidence from the Commissioner of the PIC, *Report of the Sixth General Meeting with the Commissioner for the Police Integrity Commission*, June 2002, p. 59.

<sup>13</sup> Inspector of the Police Integrity Commission, *Annual Report for the year ended 30 June 2002*, p.18.

<sup>14</sup> *ibid*, pp.19-20.

<sup>15</sup> Committee on the Office of the Ombudsman and the Police Integrity Commission, September 2003, *Report on Fifth General Meeting with the Inspector of the Police Integrity Commission*, Inspector's response to Questions on Notice, Question No. 3, p.14.

<sup>16</sup> *ibid*.



On 25 February 2004, the Chair of the Committee wrote to the Minister for Police seeking his advice as to whether or not the Committee's proposal would be included in the forthcoming legislative amendments arising from the review of the Police Integrity Commission Act (conducted by the Ministry for Police in 2002). The Minister's response, dated 26 May, indicated that an opinion had been sought from the Crown Solicitor on the manner in which the Inspector and the ICAC may deal with matters connected with joint operations involving PIC officers. The advice was under consideration and the Minister undertook to keep the Committee informed of the matter. The Committee awaited further advice<sup>18</sup>.

The Minister later advised the Inspector by letter of 11 August 2004 that:

The Ministry for Police has sought Crown Solicitor's advice on the circumstances in which the "improprieties" of Crime Commission and other officers may be investigated, which I enclose for your consideration. The advice would suggest that ICAC has jurisdiction to investigate the "improprieties" of Crime Commission officers, at least where they may attract disciplinary action.

The Crime Commission is also accountable to its Management Committee, of which I am a member, and I am ultimately accountable to Parliament for the manner in which I discharge my functions under the New South Wales Crime Commission Act 1985.

The Crown Solicitor's advice also suggests the PIC Act contemplates a regime where the Inspector and ICAC may jointly deal with concerns arising from PIC joint operations, if appropriate, with there being considerable flexibility in how such matters are managed. The Inspector could investigate matters relevant to PIC and refer other matters to ICAC for investigation. Alternatively, the whole matter might be referred to ICAC. ICAC would be able to investigate matters and refer matters relevant to the Inspector's jurisdiction back to the Inspector at any time, for the Inspector to further deal with as appropriate.<sup>19</sup>

The Inspector responded on 23 August 2004, indicating his support for the Committee's proposal.<sup>20</sup>

The Committee subsequently revisited the issue during the Sixth General Meeting with the Inspector held on 7 September 2004. Evidence was taken from Inspector Ireland that:

The Crown Solicitor expressed the opinion that a pathway through the existing legislation could be threaded by alternatively hiving off from an inquiry being undertaken by the Inspector that part which related to non-PIC officers to the ICAC, alternatively passing to the ICAC the whole of an inquiry which required an investigation of the conduct of both PIC officers and non-PIC persons. The further suggestion was made that where a segment of a particular inquiry had been referred by me to the ICAC under that proposal and dealt with, it could then be referred back to me at any time for matters within the Inspector's jurisdiction to be dealt with.<sup>21</sup>

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<sup>17</sup> *ibid*, p.12.

<sup>18</sup> Letter from the Chair to the Minister for Police, dated 30 June 2004.

<sup>19</sup> Inspector's Annual Report for the year ending 30 June 2005, p.19

<sup>20</sup> *ibid*, p.20.

<sup>21</sup> Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report of the Sixth General Meeting with the Inspector of the Police Integrity Commission*, 2004, pp.22-23.

However, the Inspector found the existing “legislative pathway” to be unsatisfactory as an accountability mechanism and clearly pointed in his evidence to the inadequacies of the existing legislation:

I advised the Minister of my acceptance, without demur, of the Crown Solicitor’s opinion that it was possible to thread a pathway through the legislation to have conduct by PIC officers and non-PIC officers separately investigated by the ICAC and the Inspector of the PIC, but the piecemeal approach of contemplating multiple hearings of alleged misconduct in a single operation or, alternatively, abdicating the functions of the PIC Inspector in favour of the ICAC were devoid of practical efficacy. Apart from the abdication of a principal function of the Inspectorate or, alternatively, the fragmentation of investigations, there is a high degree of risk to the confidentiality and security of PIC operations.<sup>22</sup>

The Inspector had been left with the impression at the end of his discussions with lawyers from the Ministry for Police that there was agreement about an amendment to bring about the necessary legislative change.<sup>23</sup> A briefing by the Director-General of the Ministry for Police, and other officers of the Ministry in light of the Inspector’s evidence, failed to reveal to the Committee any new arguments for or against the proposal.<sup>24</sup>

In reiterating its earlier proposal, the Committee argued in its report on the sixth General Meeting that:

- 1.21 The Committee has considered the Inspector’s evidence, in particular, the practical difficulties associated with the approach identified in the advice from the Crown Solicitor. This advice puts forward a view which may well be correct in a technical legal sense, but does not resolve the concerns that motivated the Committee’s recommendation and which have been corroborated by Mr Ireland, namely, that there are significant practical and administrative difficulties in splitting or referring such inquiries between separate agencies.
- 1.22 It is the view of the Committee that failure to implement the proposed amendment to the PIC Act has the potential to compromise investigations by the Inspector, and leave him in a position where he is unable to effectively exercise his jurisdiction. Adhering to the status quo is not only impractical but also has the potential to compromise PIC investigations. The proposed extension to the Inspector’s jurisdiction is narrow and applicable in limited circumstances only, and would not prevent the Inspector from referring matters to the ICAC should he consider this to be appropriate, such as when the conduct of PIC officers is not the major focus of his investigation.
- 1.23 Apart from reasons of investigative inefficiency, the Committee also considers that it is inappropriate for such enquiries to be conducted by the ICAC because it lacks the employment bar on current or serving NSW police officers that applies to both the PIC and the Inspector. Consequently, should the Inspector elect to refer the conduct of PIC officers to the ICAC for investigation, the situation may arise where the ICAC, which engages or employs current or former NSW police officers, would be

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<sup>22</sup> *ibid*, p.23.

<sup>23</sup> *ibid*.

<sup>24</sup> *ibid*, pp.4-5.

examining the conduct of PIC officers involved in the investigation of police corruption and serious misconduct. Further, questions surrounding the conduct of the PIC's investigative partners also may result in ICAC investigators examining the conduct of NSW police officers, e.g. officers of the Special Crime and Internal Affairs Unit seconded to the NSW Crime Commission. The Committee regards the potential conflict of interest situations associated with such arrangements to be less than satisfactory.

- 1.24 For the aforementioned reasons, the Committee cannot see a plausible justification for not implementing its proposed amendment. Consequently, the Committee recommends that the following amendment should be brought forward by the Minister. The Committee notes that the Minister introduced the Police Integrity Commission Amendment Bill into the Legislative Assembly on 15 September 2004.

The *Police Integrity Commission Act 1996* be amended to provide the Inspector with jurisdiction to investigate alleged improprieties and misconduct<sup>25</sup> by non-PIC officers, in circumstances where:

- the conduct of a PIC officer also is involved; or
- there is a connection between the alleged misconduct and the activities of the PIC; or
- the legality or propriety of the PIC's activities is called into question;

**and, the conduct is conduct of a type that would fall within the Inspector's jurisdiction, as defined in the terms of s.89 of the Act.**<sup>26</sup> (emphasis added)

The Committee's report was tabled in Parliament on 23 September 2004, one week after the introduction and second reading speech<sup>27</sup> by the Minister for Police on the *Police Integrity Commission Amendment Bill 2004*, which did not include the Committee's proposed amendment. A copy of the report was forwarded to the Minister by letter on 30 September 2004. The Chair of the Committee drew attention to the absence of the Committee's proposed amendment in the Bill during the second reading debate on the Bill on 27 October 2004.<sup>28</sup>

On 13 December 2004, the Minister for Police wrote to the Committee confirming that the current legislative framework provides for the Inspector and the ICAC to cooperatively deal with concerns arising from PIC joint investigations.<sup>29</sup> He held the view that the Committee's proposal "would create an unnecessary system of dual oversight for non-PIC officers involved in joint PIC operations and as such is not supported".

On 3 March 2005 the Committee wrote to the Hon Carl Scully MP, who had succeeded Mr Watkins as Minister for Police, again raising the limitations on the Inspector's jurisdiction in

<sup>25</sup> The term "misconduct" was inserted in the Committee's recommendation (it did not appear in the original recommendation contained in the previous report on the fifth General Meeting with the Inspector) in order to clarify that the Inspector's proposed jurisdiction with respect to non-PIC officers should extend to the same classes of conduct that he can investigate in relation to PIC officers. Section 89(1)(b)(2) specifies that the second of the Inspector's principal functions is to deal with complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission.

<sup>26</sup> Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report of the Sixth General Meeting with the Inspector of the Police Integrity Commission*, 2004, pp. 5-6.

<sup>27</sup> Bill introduced and 1<sup>o</sup>R and 2<sup>o</sup>R, Legislative Assembly Hansard, 16 September 2004, p.11034.

<sup>28</sup> Legislative Assembly Hansard, p.12169.

<sup>29</sup> Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the Eighth General Meeting with the Police Integrity Commission*, 2005, p 4.

respect of oversight of PIC's investigative partners and the practical problems involved in relying on the current legislative provisions. The Minister replied on 14 April, advising that the Commissioner of the ICAC had proposed in January to initiate discussions with the PIC Inspector and the PIC to progress the development of guidelines for the handling and referral of complaints between each agency. Significantly, the Minister advised that he had requested that the guidelines be developed as a matter of priority by 31 May 2005 and indicated that "should these joint guidelines prove impractical, I shall request the Ministry for Police to re-examine the legislative option that has been proposed by the PJC to expand the PIC Inspector's jurisdiction."<sup>30</sup> The Chair of the Committee replied on 26 May 2005 seeking advice on the current status of the negotiations between the ICAC, PIC and PIC Inspector.

An account of the negotiations is given in the Inspector's Annual Report for the year ending 30 June 2005, which indicates that the Inspector, and the ICAC and PIC Commissioners met and resolved to support the Committee's recommendation as the most appropriate approach. Accordingly, the Inspector advised the Minister for Police, by letter dated 2 May 2005, that after conferring with the Commissioners of the ICAC and the PIC regarding the joint guidelines, it had been agreed that:

- The fragmentation of an inquiry by being heard in part by both the Inspector and the ICAC is unworkable.
- The alternative of the Inspector referring allegations of misconduct during joint operations to the ICAC is beset by the difficulties outlined above which cannot be overcome by the formulation of guidelines.
- The appropriate remedy lies in implementing the recommendation of the Parliamentary Joint Committee.<sup>31</sup>

In evidence at the seventh General Meeting on 31 August 2005, the Inspector advised the Committee that he had yet to receive a response from the Minister to his correspondence.

### 1.3 Conclusion

The Committee's inquiries into this issue have been conducted over a long period and in a fully transparent and open manner, utilising public hearings. The Committee notes the Minister's recognition of the potential impracticalities associated with the current legislative framework and it intends to vigorously pursue this issue, particularly in view of the consensus between the key stakeholders on the deficiencies of the existing legislation and the merits of the Committee's recommendation. The incidents outlined in relation to Operation Florida provide concrete examples of instances where the proposed extension of the Inspector's jurisdiction would have given greater accountability for the conduct of PIC's officers and that of non-PIC officers connected with PIC investigations. The Committee expects reconsideration to be given to bringing forward the legislative changes to extend the Inspector's jurisdiction that it has previously proposed.

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<sup>30</sup> Correspondence from the Minister for Police, 14 April 2005.

<sup>31</sup> *Annual Report for the year ended 30 June 2005 by the Inspector of the Police Integrity Commission*, June 2005, p.22.

## 2. THE ROLE OF COUNSEL ASSISTING THE PIC

### 2.1 Statutory provisions

Section 12 of the PIC Act provides that the Commissioner may appoint a legal practitioner to assist the Commission as counsel, either generally or in relation to a particular matter or matters. However, the Act does not contain any provisions relating to the role and conduct of counsel assisting, with the exception of:

- s.33 - which provides that the Commission may decide to hear closing submissions, including those of counsel assisting, in a private hearing;
- s.56(1)(c) – which provides that a legal practitioner appointed to assist the Commission is bound by the secrecy provisions of the Act.

### 2.2 Supreme Court judgment

Prior to the General Meeting with the Inspector, Young J observed in *Shaw v Police Integrity Commission* [2005] NSWSC 782<sup>32</sup> that the relationship between counsel assisting and the commissioner varies between commissions, and that the *Police Integrity Commission Act 1996* (PIC Act) does not clearly differentiate the various roles of the Commissioner, his or her staff, and counsel assisting.

On the conduct of Counsel Assisting the PIC in Operation Banff, Young J stated:

11. The introduction into the opening of an on air discussion between the Minister [for Police] and Mr [Alan] Jones was, in my view, unfortunate. This is for at least two reasons. First, it meant that the opening was being given a sensationalist flavour. The decision to use the words of a talkback radio interview to express the impetus for the investigation did not befit the independent role of counsel assisting, and carried a tone of “jury rhetoric” rather than disinterested inquiry.
12. Secondly, instead of the prime thrust being whether there had been misconduct by police, the attention was diverted to whether the Minister was correct that there might have been a major stuff up or a criminal act perhaps by hospital staff or the present plaintiff.
13. . . .
14. . . . I do not know whether that opening was presented on the initiative of counsel or on the instruction of the Commissioner. However, it shows the wisdom of the accepted view of counsel assisting a Royal Commission is as set out in Dr Hallett's book "Royal Commissions and Boards of Inquiry" (Law Book Co, Sydney, 1982) at pp 217-218.
15. Ordinarily counsel assisting is not presenting the case for one side or the other. He or she is assisting the inquiry by soberly outlining the facts which counsel properly regard as reasonably clear, outline the procedure to be adopted and then let the evidence unfold. Dr Hallett makes this particularly wise observation:  
"There is the additional consideration that inquiries are usually very fully reported in the press and public interest is very high at the outset of an inquiry. There is often a build-up which arouses public suspicions which can be inflamed by counsel's opening statement. However, as an inquiry progresses, it could be expected that interest might wane, particularly if

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<sup>32</sup> para16

there is a lack of foundation to the initial suspicion. In those circumstances much harm can be done, particularly if names have been mentioned by counsel in his opening statement. A person might be exonerated from all blame or guilt, but irreparable harm done by the original allegations."

16. The PIC Act does not clearly differentiate the various roles of the Commissioner, his or her staff and counsel assisting. It is clear, however, that the hearing under s. 32 is for the purposes of an investigation and is only part of the investigation.
17. Whilst, for some purposes, the PIC is akin to a Royal Commission, for many purposes it is not. The investigation is performed by the Commission, its staff and consultants and it by no means follows that every fact or probable fact that it considers it has discovered is revealed to public gaze.
18. The only limitation on the investigation is that the PIC is bound by rules of natural justice which require it, amongst other things, to give an opportunity of answering the allegations to people to be accused of misconduct.
19. As to the role of counsel assisting, in the case of what I might call the old style royal commission, matters were considered by the secretary of the Commission, statements from witnesses and others were forwarded to counsel assisting, and counsel assisting then made an independent assessment of what material would be placed before the Royal Commissioner. The reason for this is as was said by John Donaldson QC as he then was to the Salmon Royal Commission in 1966, that it is extremely difficult for the same person to assess the worth of the evidence objectively that has to be presented and also to make an objective and dispassionate assessment of that evidence when given.
20. However, with the PIC, it is unclear what the role is save that counsel has the task of conducting examination of witnesses and making submissions.

Later in the judgment Young J reiterated that,

89. . . . the relationship between counsel assisting, and the relevant commission itself is one which varies from commission to commission. It is just completely unclear what the respective roles are with the PIC and in particular with the PIC and the current inquiry.

These views have served as a catalyst for the Committee to consider the position of Counsel Assisting the Police Integrity Commission. The Committee is concerned that its oversight of the PIC should contribute towards increased awareness of PIC procedures and practices as they apply to key positions such as that of Counsel Assisting. Towards this end, the Committee raised a number of matters concerning Counsel Assisting the PIC with the Inspector at the General Meeting.

## 2.3 Practice and convention

Although the role of counsel assisting is guided by practice and convention, Peter Hall QC (now Justice Hall) has noted that the range of coercive and investigative powers, and the specialist functions, of modern commissions has led to a corresponding development in the role and functions of counsel assisting, requiring the latter's involvement in strategy and planning as well as in the more traditional functions associated with the hearing process (i.e. the examination or cross-examination of witnesses to the inquiry).<sup>33</sup> Counsel assisting

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<sup>33</sup> Peter M. Hall QC, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures*, LawBook Co., Sydney 2004, p.672.

participates in all stages of an investigation (at least up to the reporting writing stage).<sup>34</sup> Also, the role of counsel assisting will “vary according to the nature of the inquiry or investigation and the subject matter of the terms of reference”.<sup>35</sup>

The following matters have been identified as generally influencing the performance of the duties and functions of counsel assisting:

1. counsel assisting has no client, does not act on instructions and, in terms of evidence, is limited only by what is relevant to the letters patent;
2. there are no issues as is understood in inter partes litigation;
3. depending upon the nature of the particular inquiry, counsel assisting will usually be required to assist in defining its subject matter and advise on planning and programming the commission’s approach in dealing with discrete issues.
4. the effective examination of witnesses by counsel assisting is integral to the performance of the commission’s role as a fact-finding inquiry tribunal;
5. as an inquiry is not based on charges or claims against anyone, there is no obligation upon counsel assisting to provide particulars of specific lines of inquiry or of any allegations before embarking on an examination of a witness.<sup>36</sup>

In effect, counsel assisting has a “managerial role in relation to investigations, the assembling of evidence and presentation”, and should be encouraged to perform this role “fearlessly and independently”, but the commissioner retains responsibility for the “over-riding control and direction” of the inquiry.<sup>37</sup> Justice Hall considered that,

Commissioners conventionally encourage counsel assisting to act with a sense of independence for maintaining a certain detachment [sic] serves the overall interests of an effective inquiry.<sup>38</sup>

As Inspector Ireland’s report on the practices and procedures of the PIC (June 2003) emphasised, it is up to counsel assisting and the commissioner (or presiding officer) to maintain control over the evidentiary process during an inquiry. Counsel Assisting ensures that all relevant evidence is obtained and placed before the Commission in the most efficient and effective way and that proceedings remain focussed on the matters under investigation.<sup>39</sup>

Justice Hall has observed that during the Wood Royal Commission, Senior Counsel Assisting acted as tactician and overall co-ordinator of investigations and as the arbiter on priorities for surveillance and analytical services, thereby enabling the Royal Commissioner to remain independent of the day-to-day investigative work.<sup>40</sup>

## 2.4 Inspector’s evidence

During the General Meeting the Committee put the following questions to the Inspector concerning the role of Counsel Assisting the PIC:

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<sup>34</sup> *ibid*, p.673.

<sup>35</sup> *ibid*, p.672.

<sup>36</sup> *ibid*, pp.680-1.

<sup>37</sup> *ibid*, p.676.

<sup>38</sup> *ibid*, p.676.

<sup>39</sup> *ibid*, p.682.

<sup>40</sup> *ibid*, p.674.

**10(a) What is your view of the appropriate relationship between the Commissioner or Acting Commissioner and Counsel Assisting in an inquiry and hearing conducted by the PIC?**

The Inspector responded that there is no short and adequate answer that would do justice to this question. He referred the Committee to the work of Justice Hall, in particular, to a paper entitled "The role of Counsel Assisting in Commissions of Inquiry", which is published in the Winter 2005 edition of the Bar Association's journal *Bar News*. The paper analyses the role of counsel assisting in terms of the management and administration of inquiry processes and procedures, the development of investigation strategies and investigation programs, the proper and effective conduct of commission hearings (in public or, as appropriate, in private), and the report writing phase of the inquiry. Inspector Ireland concurred with the views expressed by Justice Hall in his paper.

**10(b) Has this 'appropriate relationship' been the relationship in fact during your period as Inspector?**

Inspector Ireland indicated that he believed that this was the case. He explained to the Committee that Counsel Assisting the PIC is engaged by means of a detailed and comprehensive letter of appointment, several pages in length, which specifies the legal services Counsel is engaged to provide with regard to a particular operation (attached at Appendix 1):

Its terms call for Counsel to furnish suggestions and assistance in the preparation and investigation stages of the particular operation, the hearing stage if deemed necessary, and the furnishing of final submissions on the final conclusions open to the Commission on the evidence adduced during the hearing.

It is not, however, the role of Counsel Assisting to determine the topics to be canvassed during the hearings without prior consultation with the Commission. It is also not the role of Counsel Assisting to direct the course of and investigation. Ultimately, the Commissioner is responsible for all operational decisions and significant operational decisions. For example, decisions to commence an investigation or to make an application for a warrant under the Listening Devices Act 1984 or the Telecommunications Interception Act 1979 (Commonwealth) are taken by the Commissioner on advice from the director of operations and the OAG [Operations Advisory Group]. The information disseminated to Counsel is divulged pursuant to sections 18 (3) and (4) of the Police Integrity Commission Act and is confidential. Acceptance of engagement by Counsel requires a signed acceptance and an undertaking of the terms and conditions on the Commission's standard form.<sup>41</sup>

**10(c) How does either this appropriate relationship or actual relationship differ from the traditional relationship between a Royal Commissioner and Counsel Assisting?**

Inspector Ireland indicated that he was not aware of any material difference in the traditional relationship between a Royal Commissioner and Counsel Assisting, and the PIC Commissioner and Counsel Assisting the PIC, apart from the fact that the terms and

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<sup>41</sup> Transcript of Proceedings, p. 21 of this report.



conditions of engagement are structured around the particular provisions of the Police Integrity Commission Act as they relate to the duties and functions of the PIC.

Commenting on a view attributed to Ian Temby QC that “there should be a creative tension between the commissioner and counsel assisting”, the Inspector emphasised the distinct nature of the inquisitorial proceedings of an investigative commission in comparison with curial proceedings. He observed that one of the most difficult aspects of an operational inquiry to overcome is,

the general tendency to view things in the way in which a criminal trial is the situation, where the Crown is putting forward the Crown case, the defence is putting forward the defence case and the judge is much more a true arbiter than in a Commission of Inquiry. Because it is inquisitorial in nature and counsel has to assist the inquisitor to find out the truth. I think that the tensions are lessened rather than highlighted in any such situation, and so they should be, because it is a search for the truth. That is why counsel assisting controls the evidence that comes forward, to make sure that it is evidence that is relevant to and will be of assistance to the inquiry, to the commission.<sup>42</sup>

It was apparent from the following evidence that the Inspector considered counsel assisting should present a reasonable interpretation of the evidence in an inquiry:

**The Hon. PETER BREEN:** Could I ask you about this question of counsel assisting. The tension that Temby talks about I think is that, in my experience, counsel assisting often takes the worst-case scenario, the commissioner takes some kind of middle ground and that I think is the tension that they talk about. The submissions of counsel assisting maybe the best case from the commission's point of view and that case is often then moderated by the commissioner. I do not think that is the way it was intended or what the Act contemplated; I think counsel assisting, as Hall suggests, should have a balanced view and try to take the middle ground and the same ground as the commissioner. But there is this tendency in practice for counsel assisting to be out there with the material that needs to be tested.

**Mr IRELAND:** Yes. That is putting the case at the highest, you mean, for that particular view?

**The Hon. PETER BREEN:** Yes.

**Mr IRELAND:** I think there is little to be gained by adopting that approach. My own view is that that is unnecessary. What should be put before the commission is a fair and reasonable interpretation of the evidence that can be put; it is not a question of negotiating a result where you put it at the highest and you are prepared to give some ground to reach a result. The result should be the aim, and it should be the aim of counsel assisting.<sup>43</sup>

As to the merits of increased regulation of the role of Counsel Assisting the PIC, Inspector Ireland was of the view that:

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<sup>42</sup> Ibid, p. 22.

<sup>43</sup> Ibid, p. 23.

**Mr IRELAND:** . . . Sometimes in seeking to regulate you turn up problems that do not normally exist and you throw up as many barriers as you overcome by regulation. Overregulation is a dangerous outcome of seeking to regulate.<sup>44</sup>

Conversely, Inspector Ireland acknowledged there would be difficulties with a lack of regulation for the position. However, he considered the letter of appointment for Counsel Assisting the PIC to be an adequate regulation mechanism:

**Mr IRELAND:** . . . I think if you were to look at the letter . . . and you see the extent of the constraints that are placed on counsel, or the direction that is given to counsel and which counsel must, on a standard form, acknowledge to be bound by, if there were suggestions that could be made to that to incorporate further considerations, that would be a good thing to put to the Police Integrity Commission. But it is 6 or 6½ pages long; it spells out what is expected of counsel pretty clearly. If something important has been missed out I am sure it can be added, but my own experience is that it is adequate.<sup>45</sup>

## 2.5 Conclusion

1.2 The relationship between the Commissioner, the PIC staff and Counsel Assisting is grounded in the PIC's investigative functions and is distinguished by the inquisitorial nature of its proceedings. The Committee intends to examine the Commissioner of the PIC, Mr Terry Griffin, at the next General Meeting with the PIC, scheduled for November 2005, on the role of Counsel Assisting the PIC and the relationship between Counsel Assisting and the Commissioner. This examination will focus on the conventions and procedures observed by the PIC with respect to the role and functions of counsel assisting, and the extent of the latter's management of investigation and inquiry processes.

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<sup>44</sup> *ibid*, p. 24

<sup>45</sup> *ibid*.

## Chapter Two - Questions on Notice

### **INSPECTOR'S ANNUAL REPORT 2004 – 2005**

#### **Report of Operations**

Question 1.

On page 9 of your Annual Report you note that as part of your monitoring duties you have regular meetings with the PIC Commissioner, Mr Terry Griffin and the Executive Officer, Mr James Slater. How often do these meetings occur?

Question 2.

Page 9 of the Report also notes that at these meetings representative samples of operational files are reviewed. How are these representative samples of operational files selected?

Question 3.

You indicate that your examination of operational records is retrospective. Generally, what period of time has elapsed since the operational records were created by the time your examination occurs eg how long after a warrant is issued in an operation would your examination usually occur?

#### **Complaints**

Question 4.

Under the section of the Annual Report titled Complaints (p.13) you have noted one complaint received was in relation to the alleged improper use of telephone intercept product by members of NSW Police. Was this complaint dealt with by the PIC's Operation Vail?

Question 5.

Are there any significant trends in complaints that you have noticed during this reporting period or during your tenure as Inspector?

#### **Extending Inspector's Jurisdiction**

Question 6.

The section of the Annual Report called Extending Jurisdiction includes your most recent correspondence to the Minister for Police dated 2 May 2005 (pp 22-23). Has there been any response by the Minister to your report of discussions between yourself, the Commissioner of the PIC and the Commissioner of the ICAC?

Questions on Notice

## **Assessment of Procedures**

Question 7.

On page 11 of your Annual Report, in the section titled Assessment of Procedures, you note that the PIC has issued a code of conduct which sets out the standards of behaviour all Commission staff are to observe. Were you consulted during the development of this code?

Question 8.

Page 10 of your Annual Report notes that you have had ongoing discussions with the Commissioner focusing on the question of timeliness and the adoption of procedures likely to achieve the best and most balanced outcome of the Commission's investigations. Timeliness has been a theme of Inspector's Annual Reports from those of the previous Inspector, Mr Mervyn Finlay onwards. What measures have been taken by the PIC to address the issues of timeliness in their investigations?

Question 9.

What procedures and measures has the PIC taken to achieve the best and most balanced outcome for their investigations?

## **OTHER MATTERS**

Question 10.

- a) What is your view of the appropriate relationship between the Commissioner or Acting Commissioner and Counsel Assisting in an inquiry and hearing conducted by the PIC?
- b) Has this 'appropriate relationship' been the relationship in fact during your period as Inspector?
- c) How does either this appropriate relationship or actual relationship differ from the traditional relationship between a Royal Commissioner and Counsel Assisting?

Question 11.

Are there any other matters you would care to raise with the Committee?

## Chapter Three - Transcript of Proceedings

REPORT OF THE PROCEEDINGS BEFORE  
COMMITTEE ON THE OFFICE OF THE OMBUDSMAN  
AND THE POLICE INTEGRITY COMMISSION

SEVENTH GENERAL MEETING WITH  
THE INSPECTOR OF THE POLICE INTEGRITY COMMISSION

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At Sydney on Wednesday 31 August 2005

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The Committee met at 11.40 a.m.

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**PRESENT**

Mr P. G. Lynch (Chair)

**Legislative Council**  
The Hon. P. J. Breen

**Legislative Assembly**  
Mr G. Corrigan  
Mr M. J. Kerr

**MORRIS DAVID IRELAND**, Inspector of the Police Integrity Commission, PO Box 5215, Sydney, 2001, sworn and examined:

**CHAIR:** Thank you for coming. We circulated some questions to you. Do you have a written response?

**Mr IRELAND:** I do not have a written response to the questions but I will take the opportunity to answer them orally now, if that is satisfactory to you.

**CHAIR:** Certainly. Do you want to make an opening statement?

**Mr IRELAND:** No, I do not, thank you. There is a matter I would like to raise by way of statement at the end of these questions. That relates to my successor, Justice Wood.

**CHAIR:** You can certainly do that.

**Mr IRELAND:** The first question relates to page 9 of my annual report and is a reference to part of my monitoring duties and regular meetings with the Commissioner of the Police Integrity Commission, Mr Terry Griffin, and the Executive Officer, Mr James Slater. The question asks how often these meetings occur. The answer is the meetings occur on a weekly basis.

Question 2 once again relates to page 9 of my annual report and these meetings. It is indicated that representative samples of operational files are reviewed. The question is how these representative samples of operational files are selected. The answer is the files which are briefly reviewed at the meetings with the Commissioner and the Executive Officer are those operations in which the Commission has issued notices or summons, or sought listening device or telephone intercept, warrants during the previous week. In addition to the above reviews, of course, which are necessarily brief, I review routinely and sequentially all operational matters by accessing the Commission's operational records on the matrix system.

Question 3 states: You indicate that your examination of operational records is retrospective. Generally what period of time has elapsed since the operational records were created by the time your examination occurs? For example, how long after a warrant is issued in an operation would your examination usually occur? The answer is within a maximum of seven days and, in cases where the access is in response to a complaint, the period may be shorter.

Question 4 relates to complaints and it raises an issue on a matter that is presently operational. I should like to deal with question 4 in camera.

**CHAIR:** Certainly.

**Mr IRELAND:** Question 5 asks: Are there any significant trends in complaints that you have noticed during this reporting period or during your tenure as Inspector? The answer is, first, the tendency to confuse the role of the Inspector of the PIC with functions of the Commission by complaining about alleged police misconduct. This is a continuing trend, which is readily dealt with by forwarding to would-be complainants a copy of the brochure

*Making a Complaint to the Inspector.* Second is the tendency of persons unfavourably mentioned in reports by the PIC to, in effect, seek to mount an appeal from the outcome of the operational inquiry in the guise of a complaint. Such complaints are reflective of misunderstanding, and complainants are usually satisfied by an explanation of the statutory role and function of the inspectorate.

Question 6 relates to the section of the annual report under the heading Extending Jurisdiction and includes my most recent correspondence to the Minister for Police, dated 2 May 2005, at pages 22-23. The question is: Has there been any response by the Minister to your report of discussions between yourself, the Commissioner of the PIC and the Commissioner of the ICAC? The answer is there has been no response to date.

Question 7 is in these terms: On page 11 of your annual report, in the section titled Assessment of Procedures, you note that the PIC has issued a code of conduct which sets out the standards of behaviour all Commission staff are to observe. Were you consulted during the development of this code? The answer is that my predecessor, Hon Mervyn Finlay QC, was kept apprised of the status of the Commission's code of conduct as it was being developed, through regular meetings with the Commissioner. A draft of the code was provided to Mr Finlay prior to the formal adoption of the code.

Question 8 says: Page 10 of your annual report notes that you have had ongoing discussions with the Commissioner focusing on the question of timeliness and of the adoption of procedures likely to achieve the best and most balanced outcome of the Commission's investigations. Timeliness has been a theme of Inspector's Annual Reports from those of the previous inspector, Mr Mervyn Finlay, onwards. What measures have been taken by the PIC to address the issue of timeliness in their investigations? The answer is that the theme of timeliness is one of the important aspects of the Inspectorate. The fact that the theme continues to warrant emphasis is as it should be, but the routine reference to it should not be interpreted as indicating tardiness.

The aim is to keep the theme in the forefront of the Commission and the Commission's senior officers as well as subordinate officers. One measure adopted in addressing this issue was to introduce a classification system of particular matters as preliminary investigations. When so classified, the particular matters are routinely reviewed by the Operations Advisory Group [OAG], which meets fortnightly. The status of all active investigations is put before the OAG for regular review and management. The relevant case officer prepares a detailed report for consideration by the OAG. The procedure adopted for Recommendation Three from the June 2003 report on the practices and procedures of the Police Integrity Commission conducted by this Inspectorate makes that recommendation.

Question 9 is: What procedures and measures has the PIC taken to achieve the best and most balanced outcome for their investigations? The answer is the balance sought to be struck is centred upon achieving the best investigation result in fulfilment of the Commission's statutory functions on one hand and the judicious expenditure of its available resources on the other. Given the fluid nature of investigations, the changing priorities in and between investigations conducted, management of its investigations requires regular and detailed review of the status of each investigation. The Commission's primary procedure for ensuring this is to review each investigation in detail in the forum of the OAG.

Question 10 (a) is: What is your view of the appropriate relationship between the Commissioner or Acting Commissioner and Counsel Assisting in an inquiry and hearing conducted by the PIC? The answer is that it is not possible to furnish an answer which is both short and adequate to do justice to that question. In the current winter 2005 edition of the *Bar News*, which is published by the New South Wales Bar Association, there is a published paper delivered by Justice Peter Hall of the New South Wales Supreme Court entitled "The Role of Counsel Assisting in Commissions of Inquiry". Prior to his recent elevation to the bench of the Supreme Court, Justice Hall published a comprehensive text book entitled *Corruption and Misconduct in Public Office: Commission of Inquiry Powers and Procedures*. That was the proposed title of the book. I have not actually seen the book itself but I assume that that proposed title reflects the title pretty substantially.

**CHAIR:** It does indeed, according to my law book 2004 edition.

**Mr IRELAND:** It is correct, is it? You are more up-to-date than I am.

**CHAIR:** I as always benefit from the Secretariat's work.

**Mr IRELAND:** Now I understand.

**The Hon. PETER BREEN:** I read the chapter which you are speaking about, about the relationship between Counsel Assisting and the Commission. Peter Hall has a moderate view of it; others would have a stronger view, I suggest.

**Mr IRELAND:** Yes, thank you. I have brought with me a copy of that published paper in the Bar Association news, and I will leave that with your Secretariat. I do not believe it is a breach of copyright to disseminate it to members of this Committee. It only runs to seven pages but it certainly gives Peter Hall's view and I have great respect for him in every aspect of his career as a lawyer. I would respectfully agree with the matters that he has put here which I have looked at. The comprehensive text exceeds 600 pages and I think Chapter 5, as Mr Breen notes, is the one that is devoted to the Police Integrity Commission, not necessarily of course to that relationship alone, with four other chapters containing segments and references to PIC powers, procedures and other aspects.

In the paper I have mentioned, published in the *Bar News*, which occupies some seven pages, the learned author addresses the role of Counsel Assisting in commissions of inquiry under the following headings: first, the management and administration of inquiry processes and procedures; secondly, the development of investigation strategies and investigation programs; thirdly, the proper and effective conduct of Commission hearings (in public or, as appropriate, in private); and, fourthly, the report writing phase of the inquiry and the constraints that operate in that respect. I commend the paper to the Committee members and, as I say, I have a copy with me. I respectfully concur with the views that he in there expresses but I am sure you will appreciate that there is no short answer to the question that I have been asked.

Question 10(b) is: Has this "appropriate relationship" been the relationship in fact during your period as Inspector? The answer is I believe so. The Commission appoints Counsel to assist by means of a letter of appointment which sets out in some six pages the legal services which Counsel is engaged to provide with regard to the particular operation.



The letter of appointment is detailed and comprehensive. Its terms call for Counsel to furnish suggestions and assistance in the preparation and investigation stages of the particular operation, the hearing stage if deemed necessary, and the furnishing of final submissions on the final conclusions open to the Commission on the evidence adduced during the hearing.

It is not, however, the role of Counsel Assisting to determine the topics to be canvassed during the hearings without prior consultation with the Commission. It is also not the role of Counsel Assisting to direct the course of an investigation. Ultimately, the Commissioner is responsible for all operational decisions and significant operational decisions. For example, decisions to commence an investigation or to make an application for a warrant under the *Listening Devices Act 1984* or the *Telecommunications Interception Act 1979 (Commonwealth)* are taken by the Commissioner on advice from the Director of Operations and the OAG. The information disseminated to Counsel is divulged pursuant to sections 18 (3) and (4) of the Police Integrity Commission Act and is confidential. Acceptance of engagement by Counsel requires a signed acceptance and an undertaking of the terms and conditions on the Commission's standard form.

Question 10(c): How does either this appropriate relationship or actual relationship differ from the traditional relationship between a Royal Commissioner and Counsel Assisting? The answer is that I am not aware of any material difference, apart from the fact that the terms and conditions of engagement are structured around the particular provisions of the Police Integrity Commission Act as they relate to the duties and functions of the Police Integrity Commission so that the letter of appointment—which runs to some seven pages and is, I might say, more comprehensive than any other letter of appointment that I have seen—is specifically structured about the duties and functions which devolve upon the Commission in the course of its conduct of an operation.

Question 11 is: Are there any matters you would care to raise with the Committee? The answer is there are no further matters which I would wish to raise other than to refer the Committee to, and reiterate, the penultimate paragraph on page 24 of my annual report. The fact that I know every word of it is in the forefront of the minds of members of this Committee will not stop me from repeating what I there say, that my association with the Chairman, Mr Paul Lynch, MP, and the members of the Parliamentary Joint Committee has been both cordial and of interest, and my gratitude extends in particular to the outstanding staff of the Committee and their pleasant and competent rendering of responses, and assistance at all times. I would not want to miss the opportunity to say that. If it is convenient, the short answer to Question Four, purely because it relates to a virtually operational matter, might be dealt with in camera, then that might take place.

**CHAIR:** I do not know that we need to do that right at this minute. Perhaps members of the Committee could ask a couple of questions about some of the matters you have raised and there is another matter we need to raise in the public session and then we can proceed in camera.

**Mr IRELAND:** Thank you.

**CHAIR:** The letter of appointment of Counsel Assisting, do I understand from what you have said that there is essentially a standard form that is used for every Counsel Assisting in every separate inquiry?

**Mr IRELAND:** Yes. There is a letter of appointment that goes out to each Counsel Assisting in each operation, and it is standard except that it relates to the individual matters of the operation—which, of course, do vary quite substantially.

**CHAIR:** Are you able to provide the Committee with a copy of one of those standard form letters?

**Mr IRELAND:** Yes. I do not have one with me but I will speak to the Commissioner about that. I do not think there is anything in it that would require confidentiality.

**CHAIR:** If it is easier, I am not so much interested in the particular bits about a particular investigation; I am interested in the form of it.

**Mr IRELAND:** Yes, I understand that. That would apply generally except the aspects of it that related to particular fact situations. I do not think that would impinge. It would just be that the sections of the Act that are incorporated in the letter may vary a bit depending on the matter itself.

**CHAIR:** While we are talking about Counsel Assisting, in his book Peter Hall makes reference to a view of Ian Temby that there should be a creative tension between the Commissioner and Counsel Assisting. I am wondering whether that is a view you would share and whether, during the course of your duties as Inspector, you have noted a creative tension between the Commissioner or Acting Commissioner and Counsel Assisting?

**Mr IRELAND:** I am not even sure I know what it means.

**CHAIR:** I was hoping you might be able to tell me.

**Mr IRELAND:** I think it is the author's flourish, what he perceives to be the tension that is generated between a prosecutor and the Bench. That is one of the most difficult aspects of an operational inquiry to overcome, that is to say the general tendency to view things in the way in which a criminal trial is the situation, where the Crown is putting forward the Crown case, the defence is putting forward the defence case and the judge is much more a true arbiter than in a Commission of Inquiry. Because it is inquisitorial in nature and Counsel has to assist the inquisitor to find out the truth. I think that the tensions are lessened rather than highlighted in any such situation, and so they should be, because it is a search for the truth. That is why Counsel Assisting controls the evidence that comes forward, to make sure that it is evidence that is relevant to and will be of assistance to the inquiry, to the Commission. Mr Temby might be able to expound upon what he means by "tension". I think it is much better in a court if you do not have too much tension—in any inquiry.

**CHAIR:** Picking up on that point, that an inquiry is not the same as a trial, I am wondering then whether there is any role or any place in the role of Counsel Assisting to use what might be called "jury rhetoric" in opening addresses or opening submissions? Without particularly commenting upon the recent Supreme Court proceedings, which we clearly should not be doing and are not doing, I wonder whether in general that would be appropriate?

**Mr IRELAND:** My own view is that it is to be avoided if at all possible.

**The Hon. PETER BREEN:** Could I ask you about this question of Counsel Assisting. The tension that Temby talks about I think is that, in my experience, Counsel Assisting often takes the worst-case scenario, the Commissioner takes some kind of middle ground and that I think is the tension that they talk about. The submissions of Counsel Assisting may be the best case from the Commission's point of view and that case is often then moderated by the Commissioner. I do not think that is the way it was intended or what the Act contemplated; I think Counsel Assisting, as Hall suggests, should have a balanced view and try to take the middle ground and the same ground as the Commissioner. But there is this tendency in practice for Counsel Assisting to be out there with the material that needs to be tested.

**Mr IRELAND:** Yes. That is putting the case at the highest, you mean, for that particular view?

**The Hon. PETER BREEN:** Yes.

**Mr IRELAND:** I think there is little to be gained by adopting that approach. My own view is that that is unnecessary. What should be put before the Commission is a fair and reasonable interpretation of the evidence that can be put; it is not a question of negotiating a result where you put it at the highest and you are prepared to give some ground to reach a result. The result should be the aim, and it should be the aim of Counsel Assisting.

**The Hon. PETER BREEN:** Yes, I agree with you that it should be the aim of Counsel Assisting, but I just had this fear that it is not working that way in practice.

**Mr IRELAND:** Is the suggestion that Mr Temby felt that it was a good thing to have this tension?

**The Hon. PETER BREEN:** Well, he did say that.

**Mr MALCOLM KERR:** He said "creative tension", did he not? I mean the word "creative" is positive.

**Mr IRELAND:** It does not have much place in the judgment.

**Mr MALCOLM KERR:** I would not have thought so.

**CHAIR:** To be fair, we are taking it from a footnote in Peter Hall's book and I do not think any of us have seen Temby's original paper. There may be some explanation, with a more coherent sense of what it means, in the original paper.

**Mr IRELAND:** Yes.

**The Hon. PETER BREEN:** Judge, you were going to make some comments about Judge Wood, I think?

**Mr IRELAND:** Yes, I would like to.

**CHAIR:** Before we do that are there any other questions arising out of the answers we have been given? Do you want to ask some questions about Counsel Assisting, Mr Kerr?

**Mr MALCOLM KERR:** Yes. Mr Inspector, you have read Mr Justice Young's judgment, I take it?

**Mr IRELAND:** Yes, I have. It was some time ago, on the day it was published.

**Mr MALCOLM KERR:** He mentioned in his judgment that the Police Integrity Commission [PIC] was not a royal Commission; that it was really a special creature, I suppose, and that that raised the difficulty of the role of Counsel Assisting because there was no statement of duties or boundaries in the legislation that set up the PIC.

**Mr IRELAND:** Is that what he said?

**Mr MALCOLM KERR:** I think in effect he said that. He actually talked about Lord Salmon's report on the inquiry.

**Mr IRELAND:** I noticed that got a run. He obviously had not read my paper.

**Mr MALCOLM KERR:** In any event, the role of Counsel Assisting is not spelt out within legislation that governs the PIC.

**Mr IRELAND:** That is correct.

**Mr MALCOLM KERR:** Is there an argument for perhaps regulating the role of Counsel Assisting in PIC inquiries?

**Mr IRELAND:** Well, there may be. Sometimes in seeking to regulate you turn up problems that do not normally exist and you throw up as many barriers as you overcome by regulation. Overregulation is a dangerous outcome of seeking to regulate.

**Mr MALCOLM KERR:** But a free market in advocacy might also be dangerous.

**Mr IRELAND:** Oh, absolutely it is. Quite so. It raises the problem that Mr Breen adverted to.

I think if you were to look at the letter, which I hope I can let you have a copy of, and you see the extent of the constraints that are placed on Counsel, or the direction that is given to Counsel and which Counsel must, on a standard form, acknowledge to be bound by, if there were suggestions that could be made to that to incorporate further considerations, that would be a good thing to put to the Police Integrity Commission. But it is 6 or 6½ pages long; it spells out what is expected of Counsel pretty clearly. If something important has been missed out I am sure it can be added, but my own experience is that it is adequate.

**Mr MALCOLM KERR:** What is the letter you referred to?

**Mr IRELAND:** It is the letter that Counsel receives on appointment. I think I referred to it in one of my answers. It is 6½ pages long, and it is the most comprehensive letter of

appointment. In my 22 years at the bar I never received a more comprehensive document than that, or anything that approached it.

**Mr MALCOLM KERR:** It would seem that it would be in the public interest to make the letter public.

**Mr IRELAND:** That is what I would hope to be able to do. I will put it before the Committee. I just need to speak to the Commissioner about that.

**CHAIR:** The Inspector has indicated that he is happy for us to see it; he simply needs to check with the Commissioner.

**Mr IRELAND:** I do not think there would be any difficulty. I will send it to you today.

**Mr MALCOLM KERR:** Perhaps there should even be a wider circulation. It is a matter that the Bar Association—

**Mr IRELAND:** I would not be sure that it is not there. It comes to every barrister, and that means those who are in a position to refuse to accept the retainer as well as those who accept it. So it is pretty much an open house as to the practices and procedures; they are all available in published form.

**CHAIR:** It was certainly my intention, subject to the Commissioner's agreement, that it be part of the transcripts of these hearings so it is on the public record.

**Mr MALCOLM KERR:** From your memory, when you read Mr Justice Young's judgment, were there any aspects of the judgment that surprised you?

**Mr IRELAND:** Yes.

**Mr MALCOLM KERR:** What were they?

**Mr IRELAND:** That is a big question.

**Mr MALCOLM KERR:** Would you like to take it on notice?

**Mr IRELAND:** My response would be *ultra vires*; my appointment expires with this meeting. Yes, there were some surprising aspects of it, I thought. If I may just say this about it. I do not have the feeling that Mr Justice Young appreciated the ramifications of his interpretation of the extent of jurisdiction.

It seems to me that if the jurisdictional point can be taken, why is it not taken with every civilian witness who is called to give evidence at an inquiry? Many of them come first. How do you then establish whether there will be police involvement before you are even up and running? If the jurisdictional point is to be taken at every available period in a hearing, you will never finish. You will never even get to the meat of it; you will be arguing jurisdiction all the way.

When is the appropriate time to determine jurisdiction? Do you have to wait until the end? Then what do you do—excise all the evidence of people who do not fall within the ambit of the police or have police association? There are only two answers: either he is wrong, and the ambit of the inquiry is wider than he sees it as being, or else the Act must be amended. Otherwise you might as well close the shop down.

**CHAIR:** The appeal period has not expired yet, has it?

**Mr IRELAND:** No. So my observations are not binding on anyone.

**CHAIR:** I invite the Inspector to make some comments about his successor.

**Mr IRELAND:** The reason I want to address that issue is that in last Saturday's *Sydney Morning Herald*, over the authorship, as I understand it, of Mr Michael Pelly, some observations were made which were attributed to Justice Wood. They came as a great shock to Justice Wood, I might say, and to me, and I spoke to him about it. Justice Wood wrote me a letter, which I would like to place on record. It reads:

The article in Saturday's *Sydney Morning Herald*, which I had understood was intended to deal with my reflections on retirement from the Bench, did not represent an accurate representation of the interview with the journalist. It most certainly does not reflect my current views in relation to the Police Service, the Police Association or the Police Integrity Commission, nor does it reflect my understanding of the role of the Inspector or my intentions as holder of that office.

That article was a complete misfire. It clearly makes plain that the author of the article has not the faintest understanding of the functions of either the Police Integrity Commission or the Inspectorate. The letter continues:

Much of it seems to have been drawn from a paper, which I delivered some little time ago at an international conference, which examined the problems of police corruption from an historical perspective and outlined a blueprint for other jurisdictions. My response to the article has been relayed to the Police Minister and to the Police Integrity Commission. I also understand that my response has been passed on to the Police Commissioner and to the Police Association.

While holding the office I do not intend to engage in public debate or to participate in any interview with the media.

I might say, that is the position I adopted before I left the bench, as well as since, because you really cannot rely on them getting it right. I had the impression when I saw that article on Saturday that the article had been written before the man had been spoken to, and those words are not his words—they could not possibly be; nobody could get the job so wrong.

In Justice Wood's farewell address this morning—and I obtained a copy of his address from his associate—he said:

While I do not claim credit for what followed the Royal Commission, since it was the NSW Police which effected the necessary changes, I believe that one can say with confidence that the way in which law enforcement now operates is light years away from that which was the norm, when I began to practise in the 1960s. The Service has on any fair assessment made

very significant strides since then, most particularly in recent years, in embracing professionalism and proper standards of conduct.

It has had to do so in the face of two most serious challenges to law and order, each of which emerged during my time in practice, or on the Bench.

The first concerns the organised trade in drugs, which began during the late 1960s and early 1970s. It changed for ever the face of crime in this State, in so far as a different category of offender chose to enter the criminal ranks, and it has presented a real threat to the well being of the community and particularly that of its youth. Paradoxically, it has been instrumental in bringing about a significant shift in policing to evidence-based investigations, that is, inquiries which are principally dependent upon the use of forensic science, electronic and physical surveillance and the like, which are capable of identifying the true suspect while, at the same time, providing hard and incontrovertible evidence.

So that is his position, and to try to reconcile that with what was written by Mr Michael Pelly is quite impossible; they are two birds of an entirely different colour.

**The Hon. PETER BREEN:** The judge did have an interview with Pelly though, did he not?

**Mr IRELAND:** He did. I think Mr Pelly must have written the article before he went to see the judge. Did you read the article?

**The Hon. PETER BREEN:** I did, yes. It is a very strong article. It is strong in the sense that it presupposes that Justice Wood has an idea about the police which seemed to me to be a bit out of touch, and therefore I, like you, thought it was a bit strange.

**Mr IRELAND:** If the aroma that arises from a dead carcass indicates strength, yes, it was strong.

**The Hon. PETER BREEN:** Pelly also conducted an interview with the Chief Justice, Jim Spigelman, in the same week.

**Mr IRELAND:** Was it of equal quality?

**The Hon. PETER BREEN:** The article was also quite extraordinary. It suggested that the Chief Justice was much more frank than I certainly experienced him. I was surprised by both articles. Perhaps Mr Pelly needs to be called to account.

**Mr IRELAND:** That is always the problem. I heard him mentioning on John Laws this morning that his colleague—if you could call him that—Mr Jones, of renown or infamy, once had a morning session in which he enjoyed an attack upon me for granting bail to a person who the Bail Act clearly made plain had to have bail. I think Mr Jones's knowledge of the Bail Act, to put it at its highest, is limited.

At the end of the day, he finished up saying that he had had to take the judges of the Supreme Court to task on the subject on a whole number of occasions when they let these criminals out on bail. One was tempted to ask whether you can be a criminal before you have

actually been tried. But he went on in that vein, and he said that we were jokes, that the system was a joke, and, "Who is this Justice Ireland?"

My telephone nearly jumped off the desk when I got into chambers at about 7.30 that morning, with people saying, "What are you going to do?" So I discussed it with Murray Gleeson. We decided that if he was going to be replied to, it would just fuel the fire, throw gasoline on what was no more than perhaps a passing ember. So that is the way we proceeded with it, and I did not respond in any way, and that has been my policy since. I suspect that as long as it did not suggest that I was guilty of soliciting improper activities outside London lavatories, I would not do anything.

**The Hon. PETER BREEN:** There was a time when the Attorney General used to go to the defence of the judiciary.

**Mr IRELAND:** That has long gone. I always continue to wonder why.

**The Hon. PETER BREEN:** I wonder why too.

**Mr IRELAND:** Because it was the proper way to deal with it dispassionately, correctly and put it out of issue. Now the judges are expected to defend themselves and there is a big downside to that.

**The Hon. PETER BREEN:** You cannot really do what I did, that is, right up and say "Well, I'll talk to you as long as I can go into the studio." It would hardly be appropriate for a judge to do that.

**Mr MALCOLM KERR:** An article appeared in the *Daily Telegraph* and the *Sydney Morning Herald* by Mr Justice Wood, as he was then.

**Mr IRELAND:** He is still.

**Mr MALCOLM KERR:** He has not retired?

**Mr IRELAND:** Oh yes, he was not actually sworn out today. I think his appointment finishes today.

**Mr MALCOLM KERR:** That article was certainly mentioned to me and obviously caused disquiet in the community, and no doubt shocked the Commissioner, I would have thought?

**Mr IRELAND:** And the Police Commissioner. The Police Commissioner, I can tell you. Are we *in camera*?

**The Hon. PETER BREEN:** No, but there is nobody here.

**CHAIR:** It is recorded.

**Mr MALCOLM KERR:** The point I am making is that there needs to be some action of rectification in relation to the record, I would have thought?



**CHAIR:** In relation to—

**Mr MALCOLM KERR:** I suppose it is a matter for Justice Wood.

**CHAIR:** To some extent that has been done today, and I think that is why it has been done.

**Mr IRELAND:** That is why the matter was raised today. That is why he has been in touch with each of those heads of department, making it plain. I would have hoped that it has been undone, as it so properly should be.

**Mr MALCOLM KERR:** I think it would be probably difficult to undo it, given the circulation of the original report, and the limited circulation of the rebuttal.

**Mr IRELAND:** Yes, that is always the way.

(Evidence continued in camera)

(Public hearing resumed)

**CHAIR:** I would thank the Inspector for his attendance today and on numerous other occasions, and place on record our gratitude for the frankness with which he has dealt with this Committee and his courtesy in dealing with what are sometimes irrelevant escapades.

**Mr IRELAND:** Thank you.

(The Committee adjourned at 12.34 p.m.)

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## Appendices

### **APPENDIX 1: Pro forma letter of appointment for Counsel Assisting the Police Integrity Commission**

**Our Ref:**  
[Date]

[Name of Counsel Assisting]  
[Address of Counsel Assisting]

Dear [Salutation]

**Re: Appointment as Counsel Assisting the Police Integrity Commission**

I refer to recent conversations between yourself and [name of Commission Solicitor], Commission Solicitor, and confirm that, pursuant to s 12 of the *Police Integrity Commission Act 1996* (“the Act”), the Commissioner for the Police Integrity Commission, [name of Commissioner], has appointed you to the position of Counsel Assisting the Commission in relation to a particular matter, namely, to advise and as necessary appear in hearings before the Commission in respect of an investigation by the Commission into suspected police misconduct codenamed “Operation [name of operation].”

It is expected that, as Counsel Assisting, you shall provide the following legal services in respect of this matter:

1. Having regard to:
  - (a) the fact that hearings constitute an investigative methodology for use by the Commission in the pursuit of its statutory functions;
  - (b) the fact that, pursuant to s 40(3) of the Act, an answer made, or document or other things produced, by a witness at a hearing before the Commission is not admissible in evidence against the person in any civil or criminal proceedings if the witness objects to giving the answer or producing the document or other thing, but may be used in:
    - (i) any disciplinary proceedings;
    - (ii) deciding whether to make an order under section 173 or 181D of the *Police Act 1990*;
    - (iii) any proceedings under Division 1A or 1C of Part 9 of the *Police Act 1990* with respect to an order under section 173 or 181D of that Act;
    - (iv) proceedings for an offence against the Act;
    - (v) proceedings for contempt under the Act;
    - (vi) civil proceedings in respect of any right or liability conferred or imposed by the document or other thing,
  - (c) the public reputation and stature of the Commission;
  - (d) the Act and other relevant law and practice;

(e) the public interest;

to provide advice upon the following:

- (i) the suitability of the matter for hearing;
- (ii) whether the hearing should be conducted in public or in private;
- (iii) evidence to be obtained prior to hearing and methods of obtaining same;
- (iv) such other matters as may be the subject of a request for advice by the Commission.

2. At times mutually convenient to the Commission and Counsel Assisting, to attend at the Commission's premises for conferences.

3. After reasonable consideration of the Commission's instructions as to the matters to be canvassed in hearings before the Commission and having regard to any specific instructions by the Commission as to matters that should not be pursued at hearings (eg, because to do so may jeopardise an ongoing or future investigation):—

(a) to settle the terms of the general scope and purpose of the hearing, as required by s 32 of the Act;

(b) to appear in hearings before the Commission for the purposes of:

- (i) assisting the Commissioner to arrive at the truth of the matter under investigation;
- (ii) impartially seeking to adduce the whole of the evidence before the Commission that is relevant to the general scope and purpose of the hearing; and
- (iii) making such legal submissions as are necessarily incidental to conduct of the hearing and to enable the law to be properly applied to the facts, if necessary, after consultation with the Commission Solicitor.

4. If such hearings are conducted in public — at the conclusion of hearings and in consultation with the relevant operational lawyer, to prepare written submissions in accordance with the timetable set by the presiding officer to assist the Commission to:

(a) pursuant to sub-ss 16(1)(a) and (3) of the Act, make assessments and form opinions, on the basis of its investigation, as to whether police misconduct or other misconduct:

- (i) has or may have occurred, or
- (ii) is or may be occurring, or
- (iii) is or may be about to occur, or
- (iv) is likely to occur; and

(b) pursuant to sub-s 97(2) of the Act, state in respect of each "affected person"<sup>46</sup> whether or not in all of the circumstances the Commission is of the opinion that consideration should be given to:

- (i) the prosecution of a person for a specified criminal offence,
- (ii) the taking of action against the person for a specified disciplinary offence,
- (iii) the taking of action (including the making of an order under s 181D of the *Police Act 1990*) against the person as a police officer on specified grounds, with a view to dismissing with the services or otherwise terminating the services of the police officer,

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<sup>46</sup> An "affected person" is a person against whom in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation concerned: sub-s 97(3).

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- (iv) the taking of reviewable action within the meaning of s 173 of the *Police Act 1990* against the person as a police officer;
  - (c) pursuant to sub-s 16(1)(b) of the Act, otherwise make recommendations as to whether consideration should or should not be given to the prosecution of or the taking of other disciplinary action against particular persons; and
  - (d) pursuant to sub-s 16(1)(c) of the Act, make recommendations for the taking of other action that the Commission considers should be taken in relation to the subject-matter of its assessments or opinions or the results of any such investigations,
- and, in so doing, to ensure that the Commission does not:
- (i) make a finding or form an opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (sub-s 16(2)(a)), or
  - (ii) make a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence (sub-s 16(2)(b)).
5. To appear before hearings of the Commission convened for the purpose of tendering written submissions prepared by Counsel Assisting.
  6. To consider such submissions in reply made in response to the written submissions of Counsel Assisting,
  7. If the hearings were conducted in public or the Commissioner otherwise determines that it is a matter in respect of which a report should be furnished to Parliament, then in consultation with the relevant operational lawyer, to:
    - (a) prepare part or all of a draft report to Parliament for consideration by the Commissioner,<sup>47</sup> and
    - (b) submit the draft report to the Commissioner under cover of a memorandum of advice drawing attention to issues in dispute, the manner in which the draft report seeks to resolve such issues and the reasons therefor.
  8. As necessary and in accordance with instructions given by the Commission during the period of the appointment as Counsel Assisting, to provide advice and representation in any court in ancillary matters or proceedings, for example:
    - (a) tender of advice as to the merit of proposed prosecutions for offences under the *Police Integrity Commission Act*;
    - (b) appearing before the Supreme Court of NSW in respect of a hearing on a prosecution for contempt of the Commission.
  9. As necessary, to confer with the relevant operational lawyer, the Director Operations, the Commission Solicitor, the Commissioner and others.

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<sup>47</sup> This process will necessarily involve Counsel Assisting formulating views as to findings of fact and opinions and recommendations of the kind set out in paragraph 4 (above). It is expected that Counsel Assisting's written submissions will form the basis for the draft report, modified appropriately having due regard to submissions received in response to Counsel Assisting's written submissions.

The Commission welcomes advice from Counsel Assisting in relation to operational initiatives, especially if the initiative is likely to have an impact upon the conduct of a hearing. The Commission also recognises that it is incumbent upon Counsel Assisting to conduct the hearing in accordance with his or her professional obligations.

It is not, however, the role of Counsel Assisting to determine the topics to be canvassed during hearings without prior consultation with the Commission. It is also not the role of Counsel Assisting to direct the course of an investigation. Ultimately, the Commissioner is responsible for all operational decisions. Significant operational decisions (eg, the decision to commence an investigation or to make application for a warrant under the *Listening Devices Act 1984* or the *Telecommunications (Interception) Act 1979* (Cth)) are taken by the Commissioner, on advice from the Director Operations and the Operations Advisory Group (OAG).

The Commission adopts a multi-disciplinary approach towards investigations, with the Investigations Unit comprising police investigators, operational lawyers, financial investigators, analysts and researchers. Having regard to the general prohibition in s 10(5) of the Act upon the engagement of NSW police officers, all police investigators employed by the Commission are either seconded from, or formerly employed by, a police service of another State or Territory or an overseas police service.

The Investigations Unit has carriage of multiple investigations, responsibility for each of which is shared among particular staff attached to the investigation team. Operation [name of operation] represents one of a number of investigations currently being carried out by the Investigations Unit.

In relation to Operation [name of operation], your primary relationship will be with Operational Lawyer, [name of operational lawyer], who may be contacted on telephone (02) 9321 [extension]. [Name of operational lawyer] will consult with the Director Operations and Commissioner as and when necessary for the purpose of establishing the issues and topics to be canvassed before any hearings. In the event that legal or procedural issues arise, it may be necessary to consult with the Commission Solicitor, [name of Commission Solicitor]. [name of Commission Solicitor] acts as solicitor on the record for the Commission.

It may also be necessary for you to consult with and receive instructions from the Commissioner during the course of the investigation. That said, however, in view of the fact that the Commissioner will preside at the hearings, where necessary, make rulings during the course of hearings and, ultimately, make recommendations in accordance with the Commission's statutory functions, the Commission remains conscious of the need to avoid circumstances which may give rise to actual bias or an apprehension of bias.

Pursuant to s 176 of the *Legal Profession Act 1987*, I note that the basis of the costs of legal services to be provided by you to the Commission is as set out below and that these rates are suitable to the Commission:

- (a) the amount of costs for:
  - (i) conferences;
  - (ii) reading and research; and
  - (iii) providing advices,

is \$[per diem rate] per day and \$[hourly rate] per hour for work outside the hours of 9:00 am to 5:00 pm daily.

- (b) the amount of costs for appearing in the Commission's Hearing Room is \$[appearance fee per diem] per day or two-thirds of this daily rate for half-day matters;

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As much of the material comprising Commission briefs is sensitive — including at times some telephone intercept transcripts and details of witnesses whose security is at risk — it is proposed that conferences be held at the Commission's premises and that, as a general rule, sensitive material not be taken away from the Commission's premises. An office will be made available for you at the Commission premises.

In the meantime, to further assist in your gaining some appreciation of the way in which the Commission operates, I enclose a background brief containing, among other things, the Act together with current policies and procedures relevant to the conduct of hearings and investigations. Some of these policies and procedures may be under review. Should you have any questions in relation to this material, please contact [name of Commission Solicitor] on telephone (02) 9321 [extension].

The information enclosed herewith, save that information that is already in the public domain, together with such further information as is disseminated to you in briefs of evidence, conferences with members of staff of the Commission and other forums in connection with your duties as Counsel Assisting, is divulged to you pursuant to sub-ss 18(3) and (4) of the Act on the understanding that the information is confidential. Your attention is drawn to s 56(5), pursuant to which you are prohibited from further disclosing information contained herein except in the following circumstances:

- (a) for the purposes of and in accordance with the Act;
- (b) for the purposes of a prosecution or disciplinary proceedings instituted as a result of an investigation conducted by the Commission in the exercise of its functions; or
- (c) in accordance with a direction of the Commissioner of the Police Integrity Commission or the Inspector of the Police Integrity Commission, if the Commissioner or Inspector certifies that it is necessary to do so in the public interest.

Please confirm in writing, by signing the Acceptance and Undertaking overleaf, that the abovementioned terms of engagement are suitable, upon receipt of which the Commission shall attend to necessary administrative arrangements, including your access to the Commission's premises.

I look forward to working with you in relation to Operation [name of operation] and in other matters to come.

Yours sincerely

**A S Nattress**  
**Director Operations**



### **Acceptance of Engagement as Counsel Assisting the Police Integrity Commission**

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I, [Name of Counsel Assisting], hereby accept the terms and conditions of the retainer to advise and as necessary appear at hearings of the Commission in respect of an investigation by the Commission into suspected police misconduct codenamed [ Name of Operation], the terms of which are set out in a letter from Director Operations [Name of Director Operations] dated [Date of letter] (PIC Ref:[Matrix reference]).

I further agree to participate in any vetting procedures which may be required by the Commission and to declare any conflict of interest or other matter of which I am aware or become aware which may affect my suitability to appear and advise as Counsel Assisting the Commission.

I consent to a criminal record check by the Commission and provide the following particulars for that purpose:

Full name:

Address:

Date of Birth:

\_\_\_\_\_ Dated:

[Name of Counsel Assisting]