

PARLIAMENT OF NEW SOUTH WALES

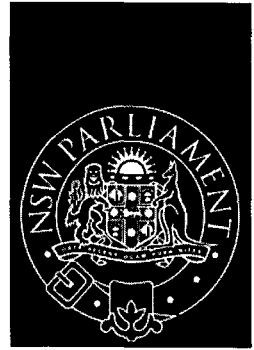
Committee on the Office of the Ombudsman and the Police Integrity Commission

Report No.4/53 · September 2004

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



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

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Table of Contents

Membership & Staff.....	iii
Functions of the Committee.....	v
Chairman's Foreword	ix
CHAPTER ONE - COMMENTARY.....	1
I EXTENDING THE INSPECTOR'S JURISDICTION	1
Conclusion.....	5
II LEGAL PROFESSIONAL PRIVILEGE.....	6
Conclusion.....	8
III EMPLOYMENT BAR ON NSW POLICE.....	8
IV. RECOMMENDATIONS ARISING FROM THE DISCUSSION PAPER OF THE REVIEW OF THE <i>POLICE INTEGRITY COMMISSION ACT 1996</i>	9
Amending the PIC's Functions.....	9
Legal Representation at Inquiries held by the Inspector.....	9
Further reviews of the PIC Act.....	10
Section 142 of the PIC Act.....	12
Conclusion.....	13
CHAPTER TWO - QUESTIONS ON NOTICE	15
Questions on notice	15
Recommendations arising from the Sixth General Meeting.....	15
Inspector's Annual Report 2003-4	15
Monitoring of PIC Operations.....	15
Assessment of practices and procedures	16
Practices and Procedures Report.....	16
Complaints	16
Future operations	17
Section 142 of the PIC Act.....	17
Review of the Police Integrity Commission Act 1996	18
CHAPTER THREE - TRANSCRIPT OF PROCEEDINGS	21
INDEX TO TRANSCRIPT OF PROCEEDINGS	37
APPENDICES	39
Appendix 1 Committee Minutes	39

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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

The Committee's report on the sixth General Meeting with the Inspector of the PIC revisits a number of issues raised in previous General Meeting reports as significant matters to be brought to the attention of the Parliament.

The first issue relates to the Committee's recommendation that the *Police Integrity Commission Act 1996* (PIC Act) be amended to ensure that the Inspector is able to fully exercise his functions with respect to the investigation of the PIC's activities. It has become obvious to the Committee that the Inspector's capacity to conduct such investigations may be seriously compromised by his lack of jurisdiction with respect to the conduct of non-PIC officers connected with the activities of the PIC. The Committee previously suggested that the PIC Act be amended by narrowly extending the Inspector's jurisdiction in limited circumstances, to overcome the practical inadequacies of the existing legislative framework, which requires the Inspector to refer the conduct of the PIC's investigative partners to the ICAC.

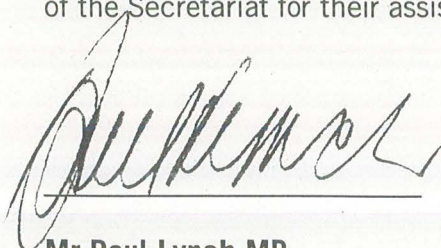
The Committee cannot see any valid reason as to why the amendment should not proceed and remains concerned about the capacity for the Inspector to perform his functions in its absence. The need for such amendment is clearly shown by two incidents occurring in Operation Florida in which the conduct of the PIC's investigative partners, in this case the NSW Crime Commission, was relevant. The proposed amendment also would provide an appropriate mechanism to deal with conflict of interest issues that might arise for the PIC when exercising its own jurisdiction.

The Committee has again visited the issue of legal professional privilege and its application to the PIC. Having done so, the Committee remains of the view that the principles underlying the construction of the relevant sections of the Act are sound. The Committee shares the Inspector's view that until the question of legal professional privilege arising under the PIC Act, or similar legislation, has been subject to judicial review it would be inappropriate to consider legislative amendments.

The Committee currently has the bar against the PIC engaging serving or former NSW police officers, contained in s.10(5) of the Act, under examination as part of a separate inquiry. The General Meeting was the first opportunity for the Committee to canvass the Inspector's views on this issue. The Inspector does not support the removal of the prohibition and the Committee will consider his evidence as part of its inquiry.

The outcome of the Ministry for Police's review of the PIC Act has been the subject of substantial comment by the Committee in its previous reports. The Committee further considered certain key recommendations arising from the review and remains unconvinced about the necessity for these measures, including the need for further five-year reviews of the PIC Act, particularly given the capacity of both the Committee and the Inspector to externally review the PIC's functions, jurisdiction and operations.

Finally, I would like to take this opportunity to thank the Inspector and the members of the Committee for their contribution to the General Meeting, and to express my appreciation to the staff of the Secretariat for their assistance.



Mr Paul Lynch MP
Chair

Chapter One - Commentary

I EXTENDING THE INSPECTOR'S JURISDICTION

- 1.1 *Background* - Following the fifth General Meeting with the Inspector of the Police Integrity Commission (PIC) on 25 June 2003, the Committee reported to Parliament expressing concern about limitations on the jurisdiction of the Inspector. The issue relates to the Inspector's inability to investigate the conduct of non-PIC officers connected with the activities of the Police Integrity Commission. The potential for this issue to arise was clearly demonstrated to the Committee by two incidents that occurred during Operation Florida. In both incidents the actions of NSW Crime Commission officers involved in the joint operation with the PIC were relevant.
- 1.2 The incidents were the provision of surveillance material to the television program *Four Corners*, without the material first being adduced into evidence at the PIC, and the granting of a listening device warrant that named a large number of people. The Committee has referred to these matters in detail in previous reports but two specific aspects of the investigations conducted by the former Inspector, Hon. M. D. Finlay QC, illustrate the need to extend the Inspector's jurisdiction in certain circumstances.
- 1.3 In the case of the *Four Corners* broadcast, which occurred on the evening of 8 October 2001, the PIC submitted that it seemed likely that *Four Corners* had obtained access to a telecommunications intercept (TI) tape from the custody of the NSW Crime Commission, perhaps while Mr Masters, the *Four Corners* journalist, and Crime Commission staff were present in the operations room on level 6 of the PIC's premises.¹ According to the PIC:
- the tape in question was communicated from the NSW Crime Commission to the PIC, pursuant to s.68 of the TI Act, via a letter dated 9 October 2001;
 - PIC records indicate that the tape was not delivered to it until 15 October 2001, one week after the commencement of hearings and the *Four Corners* broadcast;
 - the PIC received only one copy of the tape, consistent with procedures adopted during this operation. NSW Crime Commission officers, who had access to an operations room in the PIC's premises, retained a second copy of the tape. An unbarcoded copy of the tape was found in the operations room, to which Mr Masters also had access, and as the copy of the tape in question was not barcoded it would suggest that the copy in question was not that held by the PIC;
 - the tape was not specified in the receipts attached to the letters from the PIC to ABC reporter Mr Masters by which TI product was disseminated under the provisions of the TI Act.²
- 1.4 In terms of his investigation, Inspector Finlay concluded that the PIC was responsible for the failure of the system it had put in place to ensure that material would not be

¹ 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, Appendix 3: Copy of Report by the Inspector of the PIC of Preliminary Investigation, 8th November 2001, Re: Four Corners Program: 8 October 2001, p.16.

² *ibid*, pp.15-16.

put to air prior to its introduction into evidence. Accordingly, he recommended certain changes to PIC procedures. Inspector Finlay was not satisfied that the PIC was a party to a breach of the TI Act and he did not consider that his legislative functions required him to pursue any enquiries with Mr Masters or the NSW Crime Commission. He left such enquiries to be pursued by the PIC as it saw fit.³

- 1.5 The NSW Ombudsman has a role under the *Telecommunications (Interception)(NSW) Act 1987* to audit and inspect the records of agencies carrying out telephone interceptions and to ensure that requirements under the Act in relation to record keeping have been complied with. The Committee understands that dissemination of material under the TI Act in respect of the *Four Corners* broadcast was a matter reviewed by the Ombudsman in a special report for the Attorney General. However, the extent to which the conduct of the NSW Crime Commission officers, relevant to this aspect of the joint operation with the PIC, has been investigated by an independent body is not clear.
- 1.6 In the case of the listening devices warrant, Inspector Finlay conducted a preliminary investigation and concluded that the warrant was justifiably sought, that it complied with relevant legislation (except for one minor irregularity), and that the material obtained by the warrant was used appropriately. It is relevant to note that the material used by the PIC in its Operation Florida hearings derived from listening device information obtained by the NSW Crime Commission under warrants used for one of its operations, Operation Mascot⁴. With regard to the appropriate use of the material obtained by the warrant, the Inspector reported:

I have no reason not to accept the advice of the Crime Commission that:
The material was downloaded from the device worn by SEA and most of it transcribed in draft. Relevant portions were reviewed and certified as correct. It was securely held and used only for the purpose of preparing for PIC hearings, criminal prosecution briefs, and in furtherance of this investigation. We are not aware of any information obtained pursuant to this warrant being used or disseminated for any other purposes⁵.
- 1.7 Inspector Finlay indicated that he had seen documents that recorded instances of appropriate dissemination to the PIC, defendants in criminal prosecutions, and to the DPP.
- 1.8 *Committee's previous recommendation* - Both cases demonstrated to the Committee that in an investigation by the Inspector into possible abuse of power, impropriety or misconduct on the part of the PIC or its officers, the conduct of the PIC's investigative partners might be relevant or significant. Moreover, the Committee envisaged that in future there might well be situations under investigation by the Inspector where the activities of PIC officers and those of its investigative partners were so closely linked that it would be appropriate for the Inspector to carry out a full investigation of the conduct of all of the officers involved in the incident, unrestrained by the current jurisdictional limitations.
- 1.9 At present, the Inspector's powers extend only to reviewing the investigative processes of the PIC. Inspector Ireland gave evidence at the previous General Meeting that:

³ *ibid*, pp.17-18.

⁴ *Sixth General Meeting with the Commissioner for the Police Integrity Commission*, *op.cit*, p.70.

⁵ Inspector of the Police Integrity Commission, *Annual Report for the year ended 30 June 2002*, p.21.

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.⁶

1.10 The Committee sought to overcome this difficulty by recommending that:

The *Police Integrity Commission Act 1996* be amended to provide 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.

1.11 This recommendation is intended to cover all aspects of the Inspector's jurisdiction. It contemplates a narrow extension of the Inspector's jurisdiction, in specific circumstances, in order to enable full investigation of all matters relating to the PIC within his jurisdiction. The proposal does not involve a wide jurisdictional overlap with the ICAC, nor would it prevent the Inspector from referring matters to the ICAC where considered necessary. He already has the power to do so under s.90(1)(f) of the PIC Act, which enables the Inspector to refer matters relating to the PIC or its officers to other agencies for consideration or action.

1.12 *Correspondence with the Minister* – The Committee wrote to the Minister of Police in February 2004, and again in June, concerning the proposed amendment and querying whether it would be brought forward with other amendments arising from the review of the PIC Act. The Minister wrote on 26 May 2004 that the Ministry for Police was considering advice sought from the Crown Solicitor on the manner in which the Inspector and the ICAC may deal with matters connected with joint operations involving officers of the PIC. The Minister undertook to keep the Committee informed on the matter.

1.13 *Current situation* – In evidence to the Committee on 7 September 2004, Inspector Ireland stated that he continues to hold concerns about the capacity of the Inspector to effectively perform the functions of his office without an amendment to the Act. He indicated that he had been consulted concerning the Committee's recommendation and in the weeks leading up to the General Meeting he had met with staff of the Minister's Office and the Ministry for Police.

1.14 In August 2004, the Inspector received a request from the Ministry for Police to consider the Committee's recommendation in light of the advice from the Crown Solicitor. Inspector Ireland told the Committee:

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

⁶ Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on Fifth General Meeting with the Inspector*, Report No. 1/53 – September 2003, p.11.

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.

- 1.15 The Inspector accepted, "without demur", the Crown Solicitor's opinion that it was possible to thread a pathway through the legislation so that conduct by PIC officers and non-PIC officers could be separately investigated by the Inspector and the ICAC respectively. However, Inspector Ireland concluded that:

. . . 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 [is] 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.

- 1.16 For these reasons, the Inspector advised the Minister that the Crown Solicitor's advice did not provide a way of appropriately dealing with investigations into joint investigations involving the PIC and that he considered the amendment proposed by the Committee to be the appropriate remedy for this anomaly. The Inspector is of the view that a simple amendment to the PIC Act could give effect to the necessary change. He was under the impression that the lawyers from the Ministry and the staff of the Minister's office with whom he had met, were in agreement on this point.

- 1.17 Another argument made by the Inspector in support of the Committee's proposal relates to conflict of interest situations canvassed by the Ministry for Police in its Discussion Paper on the review of the PIC Act. The Ministry proposed that the Act be amended to enable the Inspector to exercise the PIC's jurisdiction, where the Commission and Inspector so agree, in circumstances where there is a conflict of interest or a perception of conflict of interest in the PIC exercising its own jurisdiction (Recommendation 24). In the Inspector's view, Recommendation 24 deals with circumstances similar to, if not identical with, those envisaged by the Committee when proposing its amendment. He understood Recommendation 24 to contemplate situations where the PIC is involved in joint operations with NSW Police and it is alleged that police misconduct has occurred. According to the Inspector, in such circumstances it would be inappropriate for the PIC to investigate the allegations involving police, given the participation of its own officers in the investigation in which that alleged misconduct took place.

- 1.18 He went on to give evidence that:

. . . in my view this Committee's proposed amendment would be sufficient to deal with the circumstances envisaged by Recommendation 24, and represents the better approach. That is, where misconduct is alleged against police officers or other public officials in circumstances which also involved the conduct of officers of the PIC, the matter should be looked at in its entirety in a single inquiry. Even though an allegation may be directed solely at an involved police officer or public official, in the majority of instances it would be difficult to quarantine the conduct of officers of the Commission from that of police or other officers with whom they had been working. Any investigation should have sufficient jurisdiction to examine the conduct of all those involved or potentially involved.

- 1.19 *Briefing by the Police Ministry* – Following the Inspector's evidence on 7 September 2004, the Committee was briefed by the Director-General of the Ministry for Police, and other officers of the Ministry, on the progress of the Committee's proposed amendment.

- 1.20 The information provided by the Ministry representatives during the meeting did not reveal any new arguments for or against the proposal.

Conclusion

- 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 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, eg 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 Committee recommends that:

The *Police Integrity Commission Act 1996* be amended to provide the Inspector with jurisdiction to investigate alleged improprieties and misconduct 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.

RECOMMENDATION 1: It is recommended that the Minister for Police bring forward the following amendment to the *Police Integrity Commission Act 1996* with the other amendments to the Act to be introduced in this parliamentary sitting period:

The *Police Integrity Commission Act 1996* be amended to provide the Inspector with jurisdiction to investigate alleged improprieties and misconduct 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.

II LEGAL PROFESSIONAL PRIVILEGE

- 1.25 *Legislative provisions* - Reference to legal professional privilege is made twice in the PIC Act: firstly at s.27, in relation to notices made by the PIC under s.25 and s.26 requiring a person to produce any statement of information, document or other thing for the purposes of an investigation; secondly at s.40(5), in relation to privilege as regards answers and documents required from a witness at a hearing.
- 1.26 Section 27(3) provides that where the PIC requires the production of any statement of information, or any document or other thing, in exercising its powers under ss.25 and 26, the person must comply with the requirement, despite:
- (a) any rule that in proceedings in a court of law might justify an objection to compliance with a like requirement on grounds of public interest, or
 - (b) any privilege of a public authority or public official could have claimed in a court of law, or
 - (c) any duty of secrecy or other restriction on disclosure applying to a public authority or public official.
- 1.27 Under s.40(5) of the Act, a legal practitioner or other person required at a PIC hearing to answer a question or produce a document which would disclose a privileged communication provided for the purpose of giving legal professional services in relation to a witness's appearance, may refuse to comply with the requirement (unless the privilege is waived by the individual with authority to do so i.e. the client or witness).
- 1.28 *Background* - In 2001, the PIC handed down two rulings during Operation Malta on issues relating to legal professional privilege, neither of which was subject to appeal.

- 1.29 Subsequently, questions concerning legal professional privilege and the proceedings of the PIC were raised during the review of the PIC Act conducted by the Ministry for Police in 2002. Based on legal advice obtained on the PIC rulings, NSW Police submitted that it was not the intention of the Parliament to abrogate the availability of legal professional privilege to public officials under the PIC or ICAC Acts. To rectify this perceived anomaly, NSW Police recommended that s.24(3)(b) of the ICAC Act (and s.27(3)(b) of the PIC Act) dealing with production of any statement or information regardless of 'privilege of a public authority or public official', be amended to clarify that legal professional privilege, or its statutory equivalent is not abrogated (at least in respect to communications for the purpose of a person's appearance before the PIC). NSW Police also raised s.40(5) of the Act as a provision requiring amendment and proposed that s.40(5)(a) be amended to make it clear that the reference to 'other person' includes a reference to the client.⁷
- 1.30 The Ministry for Police recommended that the Government, in consultation with representatives of the legal profession and other interests, should conduct a review into the manner in which legal professional privilege might be appropriately claimed in respect to the investigations and hearings of the Police Integrity Commission and other relevant statutory investigative bodies (Recommendation 14)⁸. The Committee understands that the Cabinet Office has carriage of this review.
- 1.31 *The Committee's position* - In its report on the Sixth General Meeting with the PIC, the previous Committee commented on the provisions within the PIC Act concerning legal professional privilege and expressed the view that the principle underlying section 27(3)(b), with its distinction between the capacity to claim privilege in an official as against a personal capacity, seems sound enough.
- 1.32 The amendment to the definition of "other person" in s.40(5) of the Act, as proposed by NSW Police, seems misplaced. This provision appears to be aimed at the position of a legal practitioner or other person dealing with or advising the client/witness. It would not seem appropriate to include the client in the definition of 'other person' as legal professional privilege is a privilege belonging to the client. Therefore, it would be the client who gives authority to waive privilege in this section. The Committee notes the PIC's interpretation of this particular section of the Act.⁹
- 1.33 *The Inspector's view* - Inspector Ireland recommended in his *Report on the Practices and Procedures of the Police Integrity Commission* (June 2003) that there should not be any change to the current procedures in place at the PIC to determine privilege over documents. He also gave evidence to the Committee at the time of the fifth General Meeting that he considers the provisions of the PIC Act to be appropriate and adequate for the purpose of an investigative arm of the government, such as the Police Integrity Commission. In the Inspector's view, until the Court of Appeal has considered these or other rulings on the question of legal professional privilege arising under the PIC Act, or similar legislation affecting law enforcement agencies, it would be inappropriate for consideration of a change or amendment by any other body to be undertaken.

⁷ Ministry for Police, Report on the Review of the *Police Integrity Commission Act 1996*, Discussion Paper, 2002, pp.78-9.

⁸ *ibid*, pp.81-2

⁹ Acting Commissioner Tim Sage decision 10 September 2001.

Commentary

- 1.34 During the public hearing on 7 September 2004, the Committee asked Inspector Ireland whether he had been consulted about the review being conducted by Cabinet Office. The Inspector advised that he had not been consulted on this issue and restated his opinion that 'unless and until the Commission's construction of the effect of the PIC Act in abrogating legal professional privilege is found to be incorrect in appropriate proceedings for a judicial review there should be no need for this matter to be the subject of a policy review'. He told the Committee that questions about the treatment of legal professional privilege under the PIC Act are matters of statutory construction and the PIC ought to be able to construe the Act as it considers its meaning to be, subject to the right of affected persons to seek judicial review of that construction.

Conclusion

- 1.35 The Committee concurs with the Inspector's views and has not been apprised of any new arguments that would cause it to alter its position on this issue, as previously stated in its reports to Parliament.

III EMPLOYMENT BAR ON NSW POLICE

- 1.36 The Committee examined the Inspector on two proposals concerning the bar against the PIC engaging serving or former NSW police officers, contained in s.10(5) of the PIC Act. This was the first opportunity for the Committee to examine the Inspector on the embargo provision, which the Committee has under consideration in a separate inquiry. The report by the Ministry for Police on the review of the PIC Act noted that the Inspector's predecessor, the Hon M. D. Finlay QC, supported lifting the ban. However, in evidence during the General Meeting, Inspector Ireland stated that he did not support removal of the prohibition at s.10(5) and that on the basis of his discussions with Mr Finlay he doubted that the former Inspector continues to hold the views he previously expressed. Inspector Ireland noted that the Commissioner of the PIC had also changed the position he previously maintained.
- 1.37 The Discussion Paper by the Ministry for Police further proposed that s.92(5) of the PIC Act, which contains a similar prohibition in relation to the Inspectorate, should remain in place. If given effect, the combination of these proposals would be that the PIC would be in a position to engage current or former NSW Police, whereas the Inspector would not. When asked about the proposals Inspector Ireland told the Committee:
- I do not support the removal of either section. The removal of section 10(5), while retaining section 92(5), would not have any significant implications for the performance of the Inspector's functions; it would, however, appear to create an unnecessary anomaly.
- 1.38 The Committee has noted the Inspector's views on these proposals and will consider them as part of its inquiry into s.10(5) of the PIC Act.

IV. RECOMMENDATIONS ARISING FROM THE DISCUSSION PAPER OF THE REVIEW OF THE *POLICE INTEGRITY COMMISSION ACT 1996*

Amending the PIC's Functions

- 1.39 In late December 2002, the Ministry for Police distributed a Discussion Paper on the Review of the *Police Act 1996*. Recommendation 2 of the Discussion Paper stated that:

Section 3(a) of the Act be amended to reflect that one of principal objective of the Act is to establish an independent and accountable body, with the principal function of detecting, investigating and preventing police corruption and other serious police misconduct. [Emphasis in original]¹⁰

- 1.40 In early February 2003, the Chair provided comments on the proposed amendments to the then Minister for Police, the Hon. M. Costa MLC, noting that this recommendation is superfluous and unnecessary.¹¹
- 1.41 Chapter Five of the Discussion Paper makes vague reference to comments contained in a number of submissions about the public accountability of the PIC. This seems to infer that the Act does not place sufficient emphasis on the PIC's accountability. Given that the PIC Act provides for the most comprehensive form of oversight for any independent statutory body in New South Wales, with both a Parliamentary Committee and an Inspector, such a conclusion is unfounded.
- 1.42 The Committee raised the adequacy of the PIC's oversight regime with the Inspector of the PIC during the Committee's Sixth General Meeting, in which he gave evidence that the proposed amendment to s.3(a),
- ... does not make any appreciable difference to the terms of the Act, which amply provides for the Commission's accountability to Parliament, to this Committee and to my Inspectorate.
- 1.43 In the briefing to the Committee following the Inspector's evidence, Mr Les Tree, the Director General of the Ministry for Police, stated that the PIC requested the Act should acknowledge its independence, as it believes this is not widely understood in the community. The Ministry supported emphasising both the PIC's independence and accountability. A thorough review of the PIC's original submission to the review of the Act has not revealed any reference to s.3(a) of the Act.

Legal Representation at Inquiries held by the Inspector

- 1.44 The Discussion Paper of the Review of the PIC Act also recommended that s.91 of the Act should be amended so that the Inspector is required to give a reasonable opportunity for a person to be legally represented when giving evidence to an inquiry held by the Inspector.¹² NSW Police originally put this amendment to the Ministry's review.
- 1.45 Section 91 of the PIC Act provides the Inspector with the power to hold inquiries as part of his oversight function. Section 91(2) provides that:

¹⁰ Ministry for Police, op. cit., p. 3.

¹¹ Correspondence from the Chair to the Minister, February 2003.

¹² Ministry for Police, op. cit., p. 9.

For the purpose of any inquiry under this section, the Inspector has the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the *Royal Commissions Act 1923* and that Act (section 13 excepted) applies to any witness summoned by or appearing before the Inspector in the same way as it applies to a witness summoned by or appearing before a commissioner.

- 1.46 Section 7(2) of the *Royal Commissions Act 1923* allows for legal representation at the Commissioner's discretion, of persons substantially and directly interested in the subject matter of the inquiry, or when a person's conduct in relation to any such matter has been challenged to their detriment. Consequently, the proposed amendment is unnecessary as the ability to apply to the Inspector for legal representation during an inquiry already exists.
- 1.47 The Inspector noted during evidence to the Committee that "the suggested amendment would seem to add nothing of substance to the existing situation". The Committee endorses the Inspector's view.

Further reviews of the PIC Act

- 1.48 Section 146 of the PIC Act provides for a review of the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. This review was to take place five years after the commencement of the Act, with a report to be tabled in both Houses of Parliament within 12 months after the end of the five-year period. This means that a review of the Act should have been tabled in both Houses on or before 21 June 2002.
- 1.49 The Committee understands that the then Minister, the Hon. M. Costa MLC, elected to put the report on the outcomes of the review forward as a Discussion Paper for the purpose of further discussion. However, the Committee understands that it received only a limited circulation. On 17 December 2002, after Parliament had risen for the year, a Discussion Paper was sent to the Clerks of both Houses. The Act provides that the report relating to the review of the PIC must be tabled to each House of Parliament. Consequently, it was not possible to table the Discussion Paper at this time. It was finally tabled in the Legislative Assembly on 21 September 2004 by the current Minister for Police, the Hon. J. Watkins MP.
- 1.50 Two recommendations made in the Discussion Paper relate to the review provision at s.146. Recommendation 26 of the Discussion Paper proposed that s.146 of the Act should be amended to require a further five-year review (from the date of assent to the amendment) of the validity of the policy objectives of the Act, and the appropriateness of the terms of the Act for securing those objectives.¹³ Recommendation 10 of the Discussion Paper proposed that the Minister for Police should required the Inspector of the PIC to review the appropriateness of the PIC's procedures and practices, having specific regard to s.20 of the Act, and to advise on whether those procedures and practices are appropriate, or whether specific improvements may be made to them.¹⁴ Both of these proposals were suggested by NSW Police in response to the long-running and controversial Operation Malta, which investigated a number of serious

¹³ Ministry for Police, op. cit., p. 9.

¹⁴ *ibid*, p. 5.

allegations against senior NSW police officers alleged to be deliberately obstructing the progress of reform in NSW Police.¹⁵

1.51 The Inspector tabled his report into the PIC's practices and procedures in June 2003.¹⁶ This report specifically examined the PIC's practices and procedures as they related to the formality and length of its hearings and functions, with particular emphasis on public hearings and reporting by the PIC on those public hearings, and any improvements that may be made to relevant practices and procedures. The PIC, during the Seventh General Meeting with the Committee, reported that they had fully implemented the recommendations arising from the Practices and Procedures Report.

1.52 Within the last two years, the PIC has already had two thorough and independent reviews both of the policy objectives and supporting terms of the Act, and the PIC's practices and procedures. As the PIC noted in answers to Questions on Notice at the Seventh General Meeting with the Committee:

...it is the Commission's view that the first review process unnecessarily canvassed issues associated with the Commission's performance and its management and operational practices. The Commission's performance is regularly reviewed by the Parliamentary Committee. The Commission's practices are regularly reviewed by the Inspector and, in some respects, by the Ombudsman and the Audit Office. A further review which canvasses these same issues is unnecessary and a waste of time and money. Responding to these extraneous issues proved burdensome for the Commission. It is the Commission's view that any further review should be confined strictly to broader consideration of the objectives of the Act and the terms of the Act in achieving those objectives. It should not consider the Commission's performance in specific investigations, nor should it consider the Commission's practices or its preferred application of authorised powers.¹⁷

1.53 It is worth considering the review provisions for the Acts establishing other statutory bodies with similar investigative powers. The *New South Wales Crime Commission Act 1985*, *Independent Commission Against Corruption Act 1989* and *Ombudsman Act 1974* do not contain a review provision. The Inspector's Practices and Procedures Review, taken in combination with the Discussion Paper produced by the Ministry for Police, means that the PIC has effectively been reviewed twice in the past two years. A further review five years from the date of the proposed amendment would make the PIC the most externally reviewed investigative commission in NSW. The Inspector emphasised the excessive nature of the proposal for ongoing reviews in his evidence to the Committee:

The idea that the PIC Act should be reviewed at five-yearly intervals suggests a qualified commitment to the existence of the Commission as an independent watchdog on police corruption. Overseas studies and experience have, of course, underscored the need for a permanent commitment to independent oversight of police, lest corruption occur on a cyclical basis, dependent on whether such an oversight body exists at any particular juncture. In my view, to the extent that the PIC Act may require amendment from time to time to ensure that the Commission is appropriately equipped to deal with police

¹⁵ Police Integrity Commission, *Report to Parliament – Operation Malta*, January 2003, p. i; Ministry for Police, op. cit, p126.

¹⁶ Inspector of the Police Integrity Commission, *Report on the Practices and Procedures of the Police Integrity Commission*, June 2003.

¹⁷ Committee on the Office of the Ombudsman and Police Integrity Commission, *Report on the Seventh General Meeting with the Police Integrity Commission*, December 2003, p.30.

corruption, review and amendment should occur as and when needed rather than at five yearly intervals.

- 1.54 The Inspector also highlighted that there is nothing to prevent the Committee, the PIC or the Inspector from recommending amendments to the PIC Act on an as needs basis.
- 1.55 The Committee agrees with the Inspector on this issue. The Committee has always held that it is appropriate that the Minister with responsibility for administering a piece of legislation should be responsible for policy review and development in relation to that legislation. However, the need for a further five-year review of the PIC Act has not been sufficiently demonstrated and in the view of the Committee is unnecessary, onerous, and gives rise to the impression that there is a lack of long-term commitment to the PIC, especially in the absence of any parallel review provision for similar investigative bodies in NSW.

Section 142 of the PIC Act

- 1.56 *Review of the PIC Act* - The Police Ministry's report on the review of the PIC Act makes the following two recommendations concerning s.142 of the PIC Act, which requires the concurrence of the Minister for Police in respect of any investigative, surveillance or enforcement functions undertaken by a police officer for the purpose of the Act:

Recommendation 8

Section 142 of the Act should be amended to remove the requirement that the Commission obtain the approval of the Minister for Police where a NSW police officer is required to exercise investigative surveillance or enforcement functions under, or for the purposes of, the Act (whether in connection with joint task force arrangements, or otherwise). A police officer should be able to exercise such functions with the approval of the Commissioners for Police and the Police Integrity Commission.

Recommendation 9

Section 142 of the Act should be amended to require the Commissioner of the Police Integrity Commission—to notify the Minister for Police where a NSW police officer is required to exercise investigative, surveillance or enforcement functions under, or for the purposes of the Act.¹⁸

- 1.57 *The PIC Inspector's position* - In his Annual Report for 2003-4 the Inspector refers to the need to urgently review this section, particularly in the context of controlled operations authorised by the PIC that involve police officers. In evidence to the Committee, the Inspector stated:

Section 142 would seem to work in two ways: First, it is consistent with both the general prohibition of section 10 (5) against the appointment, employment or engagement by the Commission of police officers and the Commission's power under section 10 (6) of the PIC Act to make arrangements for the limited use of police in the setting of joint task forces or in individual investigations. Thus under section 142 (1) the exercise by police officers of investigative surveillance or enforcement functions under the PIC Act is prohibited except where the Commissioner for the Police Integrity Commission gives his specific authorisation.

¹⁸ Ministry for Police, op. cit., pp.4-5.

Second, the requirement that such an authorisation receive the concurrence of the Minister seems to have been intended as a safeguard against the use of the provision in such a way as to subvert the general prohibition of section 10 (5).

- 1.58 The Inspector told the Committee that the need for an urgent review of this provision had been highlighted by recent PIC operations in which an urgent need arose to engage a police officer in the exercise of investigative or surveillance functions on behalf of the Commission. The Inspector emphasised that in cases of urgency the Minister may not be available to consider the matter, particularly in view of the Minister's parliamentary and other commitments. He also made reference to considerations of operational security, pointing out that once sensitive information about an investigation leaves the PIC its control over the information is lost. As a result, the Inspector was concerned that it would not be possible to guarantee that the PIC's investigations would not be jeopardised, as things currently stand.

Conclusion

- 1.59 The Committee considers that the issue of authorising investigative, surveillance or enforcement functions by a police officer, under or for the purposes of the PIC Act, is an operational matter.
- 1.60 From the Committee's perspective, the primary concern with regard to the proposed amendment of s.142 is that there should be an appropriate mechanism whereby the use of police officers in connection with the performance of the PIC's functions could be examined if the need arose.
- 1.61 The Inspector would be an appropriate independent oversight body to whom notifications could be made concerning such authorisations. The Inspector would be at liberty to report on any matter within his functions that may arise in relation to authorisations by the PIC Commissioner under s.142 of the Act. However, the Committee notes that without an amendment to the Act, to enable the Inspector to investigate the conduct of non-PIC officers connected with the operations of the PIC, including police officers, there remains a serious gap in accountability for the PIC's investigative partners that, in practical terms, cannot be met within the existing legislative framework.

Chapter Two - Questions on Notice

Questions on notice

Recommendations arising from the Sixth General Meeting

Question 1.

In the Committee's report on the fifth General Meeting with the Inspector of the PIC (September 2003), it was recommended that:

The *Police Integrity Commission Act 1996* be amended to provide 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.

- (a) Have you been consulted concerning this recommendation and what is your understanding of its current status?
- (b) Do you continue to hold concerns about the capacity of the Inspector to effectively perform the functions of his office without such an amendment to the Act?

Inspector's Annual Report 2003-4

Monitoring of PIC Operations

Question 2.

At page 7 of the Inspector's Annual Report, reference is made to the regular meetings held with the Commissioner of the PIC and the Executive Officer to discuss the issues of the day, longer term strategies and to review representative samples of operational files.

- (a) What is meant by "longer term strategies" in this context eg is this a reference to the PIC's long term operational objectives and priorities?
- (b) How are the file samples selected and what matters do you examine in your review of the files?

Question 3.

Mention is made that the Inspector also meets with the other senior officers of the PIC as the need arises.

- (a) Does the Inspector meet with all of the members of the PIC's senior management team on a regular basis?
- (b) Does the Inspector attend meetings of the PIC's Operations Advisory Group?

Assessment of practices and procedures

Question 4.

The Annual Report notes that it is important that the timeliness of the PIC's procedures should continue to be closely monitored (p.8).

- (a) Are there any particular matters regarding the timelines of the PIC's procedures that continue to be of concern?
- (b) What sorts of considerations come into play when focussing on the question of timeliness and procedures that are likely to achieve the best and most balanced outcome in terms of the PIC's productivity?
- (c) Have you observed any significant trends or matters of concern with respect to the PIC's exercise of its coercive powers, and has the PIC met the requirements of relevant legislation in exercising these powers?

Question 5.

The Annual Report notes that the Inspector may inspect the PIC's written applications made in respect of s.125 of the Act (i.e. applications to obtain information, documents or other things). Did you inspect these records during the last reporting period and did the written applications meet the PIC's internal requirements?

Practices and Procedures Report

Question 6.

Recommendation 14 of the Inspector's report on Practices and Procedures proposes that an Internal Practice Guidelines Committee be established, comprising the Commissioner, Assistant Commissioner and the Solicitor to the Commission.

- (a) What is the current membership of this Committee following the departure of the Assistant Commissioner?
- (b) Are you satisfied that the PIC observes the procedures referred to in Recommendation 17 in the conduct of proceedings?

Complaints

Question 7.

One complaint concerned a major operation conducted by the PIC that highlighted the need for the PIC to implement the conflict of interest management guidelines that were formulated and introduced during the reporting period.

- (a) Could you clarify the nature of the matter leading to this complaint?
- (b) Are you confident that the guidelines have been communicated effectively to the staff of the PIC?

Question 8.

Two complaints relate to dissatisfaction with criticisms levelled at the complainants in recent PIC reports to Parliament.

- (a) Can you provide further information as to the nature of the complaints received eg did they relate to matters of procedural fairness?
- (b) What has been the outcome of the complaint that was subject to a preliminary investigation?

Question 9.

- (a) Are you able to provide further information concerning the issues involved in the preliminary investigation undertaken in relation to an apparent contracting discrepancy?
- (b) What were the issues relating to the chain of authority in IT operations that the recommendations were aimed at clarifying?
- (c) Did the preliminary investigation have any significance in terms of the approach taken towards risk management within the PIC?

Future operations

Question 10.

Are there adequate resources currently available to the Inspector to enable the performance of his functions?

Section 142 of the PIC Act

Question 11.

The Ministry's report on the review of the PIC Act makes the following two recommendations concerning s.142 of the PIC Act, which requires the concurrence of the Minister for Police in respect of any investigative, surveillance or enforcement functions undertaken by a police officer for the purpose of the Act:

- 8 *Section 142 of the Act should be amended to remove the requirement that the Commission obtain the approval of the Minister for Police where a NSW police officer is required to exercise investigative surveillance or enforcement functions under, or for the purposes of, the Act (whether in connection with joint task force arrangements, or otherwise). A police officer should be able to exercise such functions with the approval of the Commissioners for Police and the Police Integrity Commission.*
- 9 *Section 142 of the Act should be amended to require the Commissioner of the Police integrity Commission to notify the Minister for Police where a NSW police officer is required to exercise investigate, surveillance or enforcement functions under, or for the purposes of, the Act.*

Questions on Notice

At p.20 of Inspector's Annual Report 2003-4 reference is made to the need to urgently review this section, particularly in the context of controlled operations authorised by the PIC that involve police officers.

- (a) What is your understanding of the purpose of this section and the way in which it currently operates?
- (b) What has occurred in the conduct of PIC's controlled operations to support the need for an urgent review of s.142?
- (c) What did you envisage would be involved in the review of this particular section?

Question 12.

At p.57 of the report on the review of the PIC Act, the Ministry noted that the then Inspector, the Hon. M. Finlay QC, agreed with the submission made by the PIC that it should be able to resolve with the other agencies in a joint taskforce, without resort to the Minister, the identity of the persons to be attached to the taskforce and the level of their involvement.

- (a) Do you agree with the PIC's submission on this point?
- (b) What is your view of the proposal contained in Recommendation 9 of the Ministry's report, and how do you anticipate this notification process would work?
- (c) Do you consider that Recommendation 9 should apply to joint operations generally, or only in relation to controlled operations previously authorised by the PIC?
- (d) What problems do you envisage may occur should Recommendations 8 and 9 be adopted?
- (e) Do you have any views on other ways in which this provision might operate so as not to threaten the outcome of PIC investigations?

Review of the Police Integrity Commission Act 1996

Question 13.

Recommendation 2 of the report on the review of the Act proposes that s.3(a) should be amended to reflect that one of the principal objects of the Act is to establish an independent and accountable body, with the principal function of detecting, investigating and preventing police corruption and other serious police misconduct (emphasis as occurs in the report). In your opinion does this proposal make any appreciable difference to the terms of the Act, particularly in relation to the accountability scheme provided for by the legislation, which includes the Inspectorate?

Question 14.

Recommendation 3 of the report on the review suggests that further consultation should occur between all interested parties as to the merits of the Police Integrity Commission's jurisdiction being extended to cover the corrupt conduct of civilian employees of NSW Police. Have you been involved in any consultations for this purpose and does the proposed extension have any implications for the workload of the Inspector?

Question 15.

Recommendation 4 of the report concerns submissions for the removal of s.10(5) of the Act, which prohibits the PIC from engaging current or former NSW Police. As you would be aware, this particular provision is the subject of a current inquiry by the Committee. At p.49 of the report the Ministry notes that the previous Inspector of the PIC supported the lifting of the ban preventing the PIC from engaging current or former NSW Police. Do you support the removal of s.10(5) of the Act?

Question 16.

Recommendation 5 of the Ministry's report states that s.92(5) of the Act, which contains a similar prohibition in relation to the Inspectorate, should remain in place. Do you consider that the proposal to remove s.10(5) of the Act while retaining s.92(5), would have any significant implications for the performance of the Inspector's functions?

Question 17.

The Ministry's report recommended that the flexibility of cl. 3(1) of Schedule 2 to the Act should be maintained, thereby allowing for either the full-time or part-time appointment of the Inspector. Is there any particular view you would like to express on this recommendation?

Question 18.

Recommendation 11 of the Ministry's report proposes amendment to s.23(3) of the Act to require the PIC to consider the public interest when deciding whether or not to conduct, continue or discontinue an investigation.

- (a) Do you have any specific comments to make on this recommendation?
- (b) If adopted, do you consider that this proposal would impact on the performance of the Inspector's functions?

Question 19.

On the question of legal professional privilege and the proceedings of the PIC, the Ministry recommended that the Government conduct a review into the manner in which legal professional privilege might be appropriately claimed in respect to the investigations and hearings of the PIC and other relevant statutory investigative bodies. The Committee understands that the Cabinet Office has commenced this review. Have you been consulted concerning the review and would any changes to the current statutory provisions within the PIC Act concerning legal professional privilege have any impact upon the Inspectorate?

Question 20.

Recommendation 24 of the report on the review proposed that the PIC Act be amended to enable the Inspector to exercise the PIC's jurisdiction, where the Commission and Inspector so agree, in circumstances where there is a conflict of interest or a perception of conflict of interest in the PIC exercising its own jurisdiction.

Questions on Notice

- (a) Are you aware as to how it is proposed that such an arrangement would work and in what sort of circumstances do you think this would occur?
- (b) What are your views on the proposal?

Question 21.

Recommendation 25 of the review report proposes that the PIC Act be amended to provide that the Inspector is required to give a reasonable opportunity for a person giving evidence to an inquiry under s.91 to be legally represented.

- (a) What is your opinion of this proposal?
- (b) In particular, if adopted what impact do you consider this proposal would have on the length of time it takes you to investigate a matter?

Question 22.

Finally, recommendation 26 of the report suggested that s.146 of the PIC Act should be amended to require a further five year review of the validity of the policy objectives of the Act, and the appropriateness of the terms of the Act for securing those objectives.

- (a) Do you consider that another five-year legislative review in such terms should be undertaken?
- (b) In view of the findings of your June 2003 review of the PIC's practices and procedures, would there be any comment you would wish to make on the direction of such a review, should it proceed?

Chapter Three - Transcript of Proceedings

REPORT OF PROCEEDINGS BEFORE

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

SIXTH GENERAL MEETING WITH THE INSPECTOR OF THE POLICE INTEGRITY COMMISSION

At Sydney on Tuesday 7 September 2004

The Committee met at 2.00 p.m.

PRESENT

Mr P. G. Lynch (Chair)

Legislative Council

The Hon. J. C. Burnswoods

The Hon. D. Clarke

Legislative Assembly

Mr G. Corrigan

Mr M Kerr

MORRIS DAVID IRELAND, Inspector, Inspectorate of the Police Integrity Commission, Sydney, sworn and examined:

Inspector IRELAND: I hold the office of Inspector by appointment from the Government on the advice of the Executive Council.

CHAIR: Inspector, there have been some questions sent to you of which you have notice. I propose to read the questions out and you can respond in a way that you think is appropriate. The first question is:

1. In the Committee's *Report of the Fifth General Meeting with the Inspector of the PIC* (September 2003), it was recommended that:

The *Police Integrity Commission Act 1996* be amended to provide 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.

- (a) Have you been consulted concerning this recommendation and what is your understanding of its current status?
- (b) Do you continue to hold concerns about the capacity of the Inspector to effectively perform the functions of his office without such an amendment to the Act?

Inspector IRELAND: If it is convenient, I will deal with question 1 (b) first. The answer is yes; I do continue to hold concerns about the capacity of the Inspector to effectively perform the functions of his office without such an amendment to the Act. As to question 1 (a) "Have I been consulted", the answer is yes, I have been consulted concerning this Committee's recommendations and I have met with officers of the Minister's office and the Ministry for Police. Recently, in August 2004, I received from the Minister a request to consider the proposed amendment to the Act recommended by this Committee in light of the advice given to the Minister by the Crown Solicitor on the question of whether there existed within the framework of the present legislation an available mechanism to meet the hiatus in legislation which this Committee's recommendation sought to address.

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.

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.

For these reasons, in answer to the Minister's question whether I believed that the Crown Solicitor's advice showed a way of appropriately dealing with investigations into joint investigations involving the PIC, I advised that I did not so believe and that an amendment of the Act as proposed by this Committee is the appropriate remedy for this anomaly. Sections 129 and 130 of the Police Integrity Commission Act are examples of how a simple amendment could bring about the necessary change. As to the current status of the matter, the impression I was left with at the end of my discussion with the lawyers from the Ministry and the office of the Ministry is that we were in agreement.

The Hon. JAN BURNSWOODS: When was that meeting? How long ago?

Inspector IRELAND: It would be within the last three weeks but I do not know the precise date.

The Hon. JAN BURNSWOODS: I just wanted to know approximately.

CHAIR: I should have said logically that at the end of each question if Committee members have issues arising, this is the appropriate time to deal with them.

Mr MALCOLM KERR: On the first question, were the only people who consulted you those you have mentioned from the Minister's office and the Ministry?

Inspector IRELAND: Yes.

CHAIR: Inspector, I understand you wish to deal with questions 2 and 3 in camera?

Inspector IRELAND: Yes. They concern operational issues and I would prefer to deal with them in camera.

CHAIR: We will return to those at the end of these questions. Question 4 states:

The Annual Report notes that it is important that the timeliness of the PIC's procedures should continue to be closely monitored.

- (a) Are there any particular matters regarding the timeliness of the PIC's procedures that continue to be of concern?
- (b) What sorts of considerations come into play when focusing on the question of timeliness and procedures that are likely to achieve the best and most balanced outcome in terms of the PIC's productivity?
- (c) Have you observed any significant trends or matters of concern with respect to the PIC's exercise of its coercive powers, and has the PIC met the requirements of relevant legislation in exercising these powers?

Inspector IRELAND: In answer to question 4 (a), "timeliness in the completion of investigations" is raised from time to time in complaints to my office. However, it is difficult to define how long an investigation should take and each such issue of delay, as raised, can only be dealt with on its merits. Apart from the matters considered in my report on the practices and procedures of the Commission in relation to Operation Malta, particularly those relating to control over proceedings in the hearing rooms, for example, adjournments to suit counsel's convenience and control of the presentation of evidence, I have not had cause to be critical of the Commission's timeliness nor do I have any particular matters of ongoing concern.

As regards to question 4 (b), "What sorts of considerations come into play", from a systemic perspective this is perhaps more a question for a management consultant than a matter squarely within my functions and expertise. However, as my report on the Commission's practices and procedures shows, from the standpoint of an investigative hearing, timeliness can be affected by any number of factors, internal and external to the Commission. For example, the path an investigation takes in terms of evidence which is received, the conduct of representation before a Commission hearing and how the hearing is controlled by the presiding officer and also, of course, by counsel assisting, as well as the limited resources of the Commission and the consequential need to prioritise the workload, they are all factors that bear upon this question.

As to question 4 (c) "Have I observe significant trends", the Commission relies heavily upon the use of listening device and telecommunications interception warrants in its investigations. This is unremarkable given the largely secret nature of police corruption and the consequent need to utilise covert electronic surveillance. I have observed no significant trends or matters of concern.

CHAIR: Question 5:

5. The Annual Report notes that the Inspector may inspect the PIC's written applications made in respect of s.125 of the Act (i.e. applications to obtain information, documents or other things). Did you inspect these records during the last reporting period and did the written applications meet the PIC's internal requirements?

Inspector IRELAND: Assuming that the reference to section 125 is a typographical error and for section 25 to be the provision which was intended to be referred to, during my weekly meetings with the Commissioner I am provided with details of both section 25, public authorities, and section 26, persons other than public authorities, notices issued in relation

to Commission investigations, and I am, of course, able to make such further inquiries of the Commission's records as I see fit and all of the requirements have been complied with. It is important to recognise that the people doing this work in the Commission are highly experienced and they know what they are doing when they make applications to issue notices and so the steps, you might say, are second nature to them really—the legalities involved.

CHAIR: Question 6:

6. Recommendation 14 of the Inspector's Report on Practices and Procedures proposes that an internal Practice Guidelines Committee be established, comprising the Commissioner, Assistant Commissioner and the Solicitor to the Commission.
 - (a) What is the current membership of this Committee following the departure of the Assistant Commissioner?
 - (b) Are you satisfied that the PIC observes the procedures referred to in Recommendation 17 in the conduct of proceedings?

Inspector IRELAND: As to Question 6 (a), the current membership, as you mentioned the Committee formerly comprised of the Commissioner, the Assistant Commissioner and the Commission's Solicitor. The Practice Guidelines Committee is presently constituted by the Commissioner and the Commission's solicitor. As to Question 6 (b), since my report no occasion has arisen whereby control by the presiding officer over hearing room procedures has been tested, that is to say, no major long-running hearing, similar to Operation Malta, has been conducted. I am satisfied that those hearings which have been conducted have been appropriately controlled and that Recommendation 17 will be implemented when the occasion arises.

Mr MALCOLM KERR: How active is the committee?

Inspector IRELAND: They have been very active because they have had to redraft and incorporate all the recommendations I made in my report. They numbered in their twenties. They did not require that many amendments, because a number of the recommendations related to things that should not be changed. I think there might have been some five or six of those. But there were something like 14 recommendations, which required nine amendments, all of which had to be drafted or redrawn. That has all been done.

CHAIR: Do you wish to deal with Questions 7 to 9 in camera?

Inspector IRELAND: Yes, they are matters, which relate to complaints.

CHAIR: Question 10:

10. Are there adequate resources currently available to the Inspector to enable the performance of his functions?

Inspector IRELAND: The resources available to me are adequate for the performance of my functions. I am pleased to note that that is not a question that relates to my remuneration.

CHAIR: Question 11:

11. The Ministry's report on the review of the PIC Act makes the following two recommendations concerning s.142 of the PIC Act, which requires the concurrence of the Minister for Police in respect of any investigative, surveillance or enforcement functions undertaken by a police officer for the purpose of the Act:

Recommendation 8 was:

Section 142 of the Act should be amended to remove the requirement that the Commission obtain the approval of the Minister for Police where a NSW police officer is required to exercise investigative surveillance or enforcement functions under, or for the purposes of, the Act (whether in connection with joint task force arrangements, or otherwise). A police officer should be able to exercise such functions with the approval of the Commissioners for Police and the Police Integrity Commission.

Recommendation 9 was:

Section 142 of the Act should be amended to require the Commissioner of the Police Integrity Commission—to notify the Minister for Police where a NSW police officer is required to exercise investigative, surveillance or enforcement functions under, or for the purposes of the Act.

At p 20 of the Inspector's Annual Report 2003-4 reference is made to the need to urgently review this section, particularly in the context of controlled operations authorised by the PIC that involve police officers.

- (a) What is your understanding of the purpose of this section and the way in which it currently operates?
- (b) What has occurred in the conduct of PIC's controlled operations to support the need for an urgent review of s.142?
- (c) What did you envisage would be involved in the review of this particular section?

Inspector IRELAND: Section 142 would seem to work in two ways: First, it is consistent with both the general prohibition of section 10 (5) against the appointment, employment or engagement by the Commission of police officers and the Commission's power under section 10 (6) of the PIC Act to make arrangements for the limited use of police in the setting of joint task forces or in individual investigations. Thus under section 142 (1) the exercise by police officers of investigative surveillance or enforcement functions under the PIC Act is prohibited except where the Commissioner for the Police Integrity Commission gives his specific authorisation.

Second, the requirement that such an authorisation receive the concurrence of the Minister seems to have been intended as a safeguard against the use of the provision in such a way as to subvert the general prohibition of section 10 (5).

What has occurred in the conduct of the PIC's controlled operations to support the need for urgent review of section 142? That is question (b). There have been some recent operations where an urgent need has arisen to engage a police officer in the exercise of investigative or surveillance functions on behalf of the Commission. That is not to say that the Minister has not been forthcoming with his concurrence but in cases of urgency it cannot be guaranteed that the Minister will be available to consider the matter, given the parliamentary and other commitments that he may have. As well, there are matters of operational security. It must be acknowledged that once sensitive information about a Commission investigation leaves the Commission's walls control over the information is lost. Consequently it cannot be guaranteed that the Commission's investigation will not be jeopardised.

Question 11 (c): What do I envisage would be involved in the review of this particular section? The position now adopted by the PIC is that no external agency or individual be involved in expressing concurrence but that notification of the Commissioner granting approval be conveyed to my office. I see no reason why this course of action would not be appropriate. The PIC has made a submission to the Minister in this regard and I support the amendment proposed by the Commission.

CHAIR: Question 12:

12. At p.57 of the report on the review of the PIC Act, the Ministry noted that the then Inspector, the Hon. M. Finlay QC, agreed with the submission made by the PIC that it should be able to resolve with the other agencies in a joint taskforce, without resort to the Minister, the identity of the persons to be attached to the taskforce and the level of their involvement.
 - (a) Do you agree with the PIC's submission on this point?
 - (b) What is your view of the proposal contained in Recommendation 9 of the Ministry's report, and how do you anticipate this notification process would work?
 - (c) Do you consider that Recommendation 9 should apply to joint operations generally, or only in relation to controlled operations previously authorised by the PIC?
 - (d) What problems do you envisage may occur should Recommendations 8 and 9 be adopted?
 - (e) Do you have any views on other ways in which this provision might operate so as to not threaten the outcome of PIC investigations?

Inspector IRELAND: I agree with the principle of the Commission's submission that the Minister should not need to be involved in such matters. The Commission's recently expressed position is that no person external to the Commission should have authority to veto its operational decisions. A submission has been made to the Ministry to that effect, and I agree with that point of view. My view of the proposal contained in Recommendation 9 of the Ministry's report is that having expressed my agreement with the Commission's recent proposal I can see no good purpose behind Recommendation 9 of the Ministry's report. It is not clear what notification to the Minister under the Ministry's proposal would achieve. Notification to my office according to the Commission's present proposal would seem a relatively simple matter of providing a copy of the Commission's written authorisation together with any relevant controlled operation authority, and I have complete access to the Commission's records and would be well placed to conduct any further enquiries.

As to (c), do I consider Recommendation 9 should apply to joint operations generally or only in relation to controlled operations previously authorised? Whichever proposal is implemented, section 142 would apply across-the-board to any circumstances where police officers are to exercise investigative surveillance or enforcement functions under or for the purposes of the PIC Act, whether in the context of a joint task force and investigations solely by the Commission or a controlled operation, and I see no reason to draw any distinction between these operations.

As to (d), what problems do I envisage should Recommendations 8 and 9 be adopted? The problems both in practice and in principle have been articulated in some detail in the Commission's submission to the Minister, and at a later time we may go to those, if it is the Committee's wish. I have set out at page 19 of my annual report some of the problems associated with controlled operations that apply, but those considerations apply right across-the-board to all of those three heads of activity of police in conjunction with the PIC.

As to (e), do I have any views on the way in which this provision might operate so as not to threaten the outcome of PIC investigations? As I have intimated, the Commission's present proposal would appear the most appropriate way to achieve the objectives of section 142, while not exposing its investigations to prejudice.

CHAIR: Any questions arising? Question 13:

Recommendation 2 of the report on the review of the (Police Integrity Commission) Act proposes that s.3(a) should be amended to reflect that one of the principal objects of the Act is to establish an independent and accountable body, with the principal function of detecting, investigating and preventing police corruption and other serious police misconduct. In your opinion does this proposal make any appreciable difference to the terms of the Act, particularly in relation to the accountability scheme provided for by the legislation, which includes the Inspectorate?

Inspector IRELAND: The proposal does not make any appreciable difference to the terms of the Act, which amply provides for the Commission's accountability to Parliament, to this Committee and to my Inspectorate. That is really as much as I can say about that.

CHAIR: Any questions?

Mr MALCOLM KERR: Obviously the objective to establish an independent and accountable body is an admirable one and we also have the Independent Commission Against Corruption—perhaps this might be a question on notice—in the sense that that is a precedent, a body that was also established to be accountable and to be independent. Do the terms of the legislation that govern those bodies differ in terms of their accountability and independence? I wonder if I could get you to perhaps have a look at the legislation and see what distinctions there are?

Inspector IRELAND: Certainly.

Mr MALCOLM KERR: The accountability, I think you have said, is to Parliament, to this Committee and to the Inspectorate. What do you believe the relationship with the Police Minister and the PIC is?

Inspector IRELAND: The Police Minister is the chief executive officer of his ministry and the PIC falls within his direct area of responsibility.

Mr MALCOLM KERR: Does that give the Police Minister any power over the PIC, in your view, to perhaps require them to report to him before reporting to Parliament, if he so wished?

Inspector IRELAND: I do not believe so. The PIC is independent. It is designed to be independent and it functions in an independent fashion.

Mr MALCOLM KERR: So in terms of reporting procedure you would expect the PIC simply to report to Parliament?

Inspector IRELAND: The report of the PIC should be, and to my observation is, directed to Parliament, certainly.

Mr MALCOLM KERR: And you would not expect that any report that the PIC did would be made available to the Minister first before Parliament, would you?

Inspector IRELAND: That, in my view, would depend on the terms of the availability. If the Minister has available to him an embargoed copy of a report, which is concluded, I would see no problem with that at all. But if he were to be provided with a draft report, the inference being that it was open to amendment to reflect any view the Minister may hold on some matter raised in the report that would be an entirely different matter.

Mr MALCOLM KERR: In terms of that embargoed report, would it be for the Minister's eyes only, in your view, or could it be made available to people in the Ministry?

Inspector IRELAND: I do not really know the mechanics of a Minister's office.

Mr MALCOLM KERR: Perhaps just in terms of principle that is involved?

Inspector IRELAND: If it is embargoed then I would expect it would only be shown to persons who can honour that embargo, and if that meant nobody past the Minister then it would be the Minister.

Mr MALCOLM KERR: It does seem to put the Minister in perhaps a different position to Parliament in the sense that he receives an embargoed copy before the people's representatives do. Do you see any problem with that?

Inspector IRELAND: Not if the embargo is honoured.

Mr MALCOLM KERR: What would be the meaning of an embargo in that context?

Inspector IRELAND: That he would not disclose or in any way publish the contents prior to tabling in Parliament. The purpose, I would think, of such a procedure—

Mr MALCOLM KERR: That is what I am leading to really.

Inspector IRELAND: —would be that he would be in a position to answer questions without the need for notice, if he was in a position to do so, that might arise when the report is tabled and people would spring to their feet and ask him questions as the head of the executive division, of which the Commission is a part.

Mr MALCOLM KERR: But it could, of course, then be argued that the ICAC could give an embargoed copy to the Premier before tabling it in Parliament on the same basis that the Premier would be asked questions about something in the ICAC report?

Inspector IRELAND: Yes, that would follow.

CHAIR: Any further questions? Just on that, I take it one of the matters that would be in issue is how long in advance of release of a report the embargoed copy was given; that there would be far less objection in principle if it was given two days before release rather than given three weeks before release?

Inspector IRELAND: Quite so. The longer the period the more the risk that the embargo would be broken.

CHAIR: And the more likely it would be that there might be some pressure brought to bear to change the contents of the report?

Inspector IRELAND: Yes. If there were any risk of that then, in my view, there should be no release of an embargoed report. It would have to be on the undertaking, and the acceptance of the undertaking, that it not be disclosed.

CHAIR: Any further questions?

Mr MALCOLM KERR: Just on that, in terms of an embargoed document, it really serves the purpose of, in effect, a briefing paper so the Police Minister is capable of giving an informed answer to questions?

Inspector IRELAND: Well, yes, if he has sufficient prescience to foretell what the questions are likely to be.

Mr MALCOLM KERR: But if the questions are about the report, obviously, having read the report, he is in a position to?

Inspector IRELAND: I would hate to take on the task of being so well informed about an annual report that I could handle any question on it in advance. You never know what is coming out of left field unless you actually are in left field.

Mr MALCOLM KERR: But I mean if you have read a brief you would be in a better position to answer questions in relation to that brief?

Inspector IRELAND: True. And I think that, in a commonsense way, is the sole purpose of that.

Mr MALCOLM KERR: That would be the sole purpose?

Inspector IRELAND: I believe so.

Mr MALCOLM KERR: Do you know if there is any protocol in existence in relation to that between the PIC and the Minister?

Inspector IRELAND: I am not aware.

Mr MALCOLM KERR: But it might be desirable that there was a protocol?

Inspector IRELAND: Do you mean if a procedure were laid down whereby an embargoed report would not be presented longer than 48 hours or so before—

Mr MALCOLM KERR: I was also thinking in terms of the use that could be made of the embargoed report, that it is desirable to ensure that the Minister or members of the Ministry who have access to it are aware of their responsibility, and it is only for the purpose that you have mentioned here today?

Inspector IRELAND: Yes, that would be an acceptable measure, I am sure.

CHAIR: Question 14:

Recommendation 3 of the report on the review (of the Police Integrity Commission Act) suggests that further consultation should occur between all interested parties as to the merits of the Police Integrity Commission's jurisdiction being extended to cover the corrupt conduct of civilian employees of NSW Police. Have you been involved in any consultation for this purpose and does the proposed extension have any implications for the workload of the Inspector?

Inspector IRELAND: I have not been involved in any consultation regarding this proposal. The widening of the jurisdiction of the PIC to encompass civilian employees of NSW Police would not, per se, increase the workload of the Inspector. However, amendment of the powers of the Inspector may be required to embrace the complaints by and with respect to persons included in the PIC's wider jurisdiction.

CHAIR: Any questions arising? Question 15:

Recommendation 4 of the report (on the review of the Police Integrity Commission Act) concerned submissions for the removal of s.10(5) of the Act, which prohibits the PIC from engaging current or former NSW Police. As you would be aware, this particular provision is the subject of a current inquiry by the Committee. At p.49 of the report the Ministry notes that the previous Inspector of the PIC supported the lifting of the ban preventing the PIC from engaging current or former NSW Police. Do you support the removal of s.10(5) of the Act?

Inspector IRELAND: I do not support removal of section 10(5), prohibition, which extends to the Inspector as well as to the PIC. My discussions from time to time with my predecessor, the Hon. M D Finlay, QC, caused me to doubt that he continues to hold the view previously held by him. The weight of contrary opinion has also persuaded the Commissioner to change the position that he previously contended for.

CHAIR: Question 16 states:

Recommendation 5 of the Ministry's report states that section 92(5) of the Act, which contains a similar prohibition in relation to the Inspectorate, should remain in place. Do you consider that the proposal to remove section 10(5) of the Act while retaining section 92(5), would have any significant implications for the performance of the Inspector's functions?

Inspector IRELAND: Thank you. I do not support the removal of either section. The removal of section 10(5), while retaining section 92(5), would not have any significant implications for the performance of the Inspector's functions; it would, however, appear to create an unnecessary anomaly.

CHAIR: No questions arising. Question 17 states:

The Ministry's report recommended that the flexibility of clause 3(1) of Schedule 2 to the Act should be maintained, thereby allowing for either the full-time or part-time appointment of the Inspector. Is there any particular view you would like to express on this recommendation?

Inspector IRELAND: Well, Mr Chairman, whilst the duties and functions of the Inspector remain as prescribed by the *Police Integrity Commission Act 1996*, the flexibility of clause 3(1) of Schedule 2 should be retained. The alternative is a full-time appointment for a function that has now been performed on a part-time basis for seven years. There does not seem to be any reason for change.

CHAIR: No questions arising. Question 18 states:

Recommendation 11 of the Ministry's report proposes amendment to section 23(3) of the Act to require the PIC to consider the public interest when deciding whether to conduct, continue or discontinue an investigation.

(a) Do you have any specific comments to make on this recommendation?

- (b) If adopted, do you consider that this proposal would impact on the performance of the Inspector's functions?

Inspector IRELAND: In answer to (a), the Commission's functions are aimed at protecting the public interest by preventing and dealing with police misconduct. To suggest that section 23(3) should especially require consideration by the Commission of any matters of public interest when deciding whether an investigation should be conducted or discontinued is really no more than the statement of a prominent and well-recognised consideration. Such an amendment would seem to serve no more than to state the obvious.

As to (b), if adopted do I consider that this proposal would impact on the performance of the Inspector's functions? The concept of the public interest can mean different things to different people. Not infrequently private interests are confused with the public interest. While it is for the Commission to determine what the public interest requires in any particular circumstance, the proposed amendment may have the effect of inviting ill-formed challenges to the Commission's jurisdiction. Be that as it may, presently it is not uncommon for challenges to decisions of the Commission to be made on the basis of the complainant's personal view as to what the decision should have been. Such issues are governed by settled principles concerning administrative decision-making. I cannot say that the proposed amendment would have any beneficial, or for that matter adverse, impact upon the performance of the Inspector's functions.

CHAIR: Are there any matters arising?

Mr MALCOLM KERR: Yes. Having regard to what you have said, Mr Inspector, it may well have adverse consequences because the term "public interest" is open to interpretation—that is a subjective term—and what one person considers is in the public interest another person may not. On that basis, as you say, it may provide a further basis for litigation or dispute, which is not in the public interest.

Inspector IRELAND: I agree with that analysis. As a practical matter, if it is a question open to debate in a hearing, for example, and time has to be taken in determination of whether some matter raised is in the public interest, what you say would be likely to cause substantial delay while that issue is dealt with as a hearing within a hearing. To open that Pandora's box would be ill-advised.

Mr MALCOLM KERR: I cannot think of an argument for, given this amendment would really give a considerable degree of potency to that consideration of public interest. As you say it would certainly be an issue that would be argued, and a consequence may well be that the PIC would not continue because it thought something was not in the public interest. It would certainly be worth arguing if you did not want the investigation to continue.

Inspector IRELAND: You mean if it might be successfully argued?

Mr MALCOLM KERR: Yes, because the legislation would give it a high degree of potency.

Inspector IRELAND: Yes. I think there is that risk, certainly.

CHAIR: Question 19 states:

On the question of legal professional privilege and the proceedings of the PIC, the Ministry recommended that the Government conduct a review into the manner in which legal professional privilege might be appropriately claimed in respect to the investigations and hearings of the PIC and other relevant statutory investigative bodies. The Committee understands that the Cabinet Office has commenced this review. Have you been consulted concerning the review and would any changes to the current statutory provisions within the PIC Act concerning legal professional privilege have any impact upon the Inspectorate?

Inspector IRELAND: I have not been consulted in relation to this review. While I previously expressed the view that unless and until the Commission's construction of the effect of the PIC Act in abrogating legal professional privilege is found to be incorrect in appropriate proceedings for a judicial review, there should be no need for this matter to be the subject of policy review. I cannot see how any changes to the PIC Act in this regard would impact on my office. As is presently the case questions about the treatment of legal professional privilege under the PIC Act come down to matters of statutory construction. The Commission ought to be able to construe the PIC Act as it considers its meaning to be, subject to the right of affected persons to seek judicial review of that construction.

CHAIR: Question 20 states:

Recommendation 24 of the report on the review proposed that the PIC Act be amended to enable the Inspector to exercise the PIC's jurisdiction, where the Commission and Inspector so agree, in circumstances where there is a conflict of interest or a perception of conflict of interest in the PIC exercising its own jurisdiction.

- (a) Are you aware as to how it is proposed that such an arrangement would work and in what sort of circumstances do you think this would occur?
- (b) What are your views on the proposal?

Inspector IRELAND: In answer to (a), Recommendation 24 deals with circumstances similar to, if not identical, with those envisaged by this Committee's proposal for the jurisdiction of the Inspectorate to be extended to cover alleged improprieties by non-Commission officers, where conduct by an officer of the Commission is also involved. That is the issue we dealt with in Question 1. In the case of Recommendation 24, the concern, as I understand it, arises where the Commission is involved in joint operations with NSW Police and it is alleged that police misconduct has occurred. In such circumstances it would be inappropriate for the Commission to investigate the allegations involving police, given the participation of its own officers in the investigation in which that alleged misconduct took place.

In answer to (b), in my view this Committee's proposed amendment would be sufficient to deal with the circumstances envisaged by Recommendation 24, and represents the better approach. That is, where misconduct is alleged against police officers or other public officials in circumstances which also involved the conduct of officers of the PIC, the matter should be looked at in its entirety in a single inquiry. Even though an allegation may

be directed solely at an involved police officer or public official, in the majority of instances it would be difficult to quarantine the conduct of officers of the Commission from that of police or other officers with whom they had been working. Any investigation should have sufficient jurisdiction to examine the conduct of all those involved or potentially involved.

CHAIR: Question 25 states:

Recommendation 25 of the review report proposes that the PIC Act be amended to provide that the Inspector is required to give a reasonable opportunity for a person giving evidence to an inquiry under section 91 to be legally represented.

- (a) What is your opinion of this proposal?
- (b) In particular, if adopted, what impact do you consider this proposal would have on the length of time it takes you to investigate a matter?

Inspector IRELAND: In answer to (a) the proposed amendment is unnecessary in my view. Section 91(2) of the PIC Act provides that the *Royal Commissions Act 1923* applies to any witness summoned to appear before an inquiry under section 91 in the same way as it applies to a witness who is summoned to appear before a Royal Commissioner. Section 7(2) of the *Royal Commissions Act 1923* relevantly provides as follows:

7. Right of Appearance

- (2) Where it is shown to the satisfaction of the Chairperson or of the sole Commissioner, as the case may be, that any person is substantially and directly interested in any subject matter of the inquiry or that the person's conduct in relation to any such matter has been challenged to the person's detriment, the Chairperson or sole Commissioner may authorise such person to appear at the inquiry and may allow the person to be represented by counsel or solicitor.

Accordingly, a witness whose circumstances fit the requirements of section 7(2) may be granted leave to be legally represented before an inquiry constituted under section 91 of the PIC Act. As to (b), the suggested amendment would seem to add nothing of substance to the existing situation and would not impact upon the length of an investigation.

CHAIR: Question 22 states:

Recommendation 26 of the report suggested that section 146 of the PIC Act should be amended to require a further five-year review of the validity of the policy objectives of the Act, and the appropriateness of the terms of the Act for securing those objectives.

- (a) Do you consider that another five-year legislative review in such terms should be undertaken?
- (b) In view of the findings of your June 2003 review of the PIC's practices and procedures, would there be any comment you would wish to make on the direction of such a review, should it proceed?

Inspector IRELAND: Yes, thank you. The idea that the PIC Act should be reviewed at five-yearly intervals suggests a qualified commitment to the existence of the Commission as an independent watchdog on police corruption. Overseas studies and experience have, of course, underscored the need for a permanent commitment to independent oversight of police, lest corruption occur on a cyclical basis, dependent upon whether such an oversight body exists at any particular juncture. In my view, to the extent that the PIC Act may require amendment from time to time to ensure that the Commission is appropriately equipped to deal with police corruption, review and amendment should occur as and when needed rather than at five yearly intervals.

There is nothing to prevent the Commission, this Committee or the Inspectorate from raising the need for review and amendment to the PIC Act at any time, noting further that section 98 of the PIC Act also empowers the Commission to make a special report to Parliament "on any administrative or general policy matter relating to the functions of the Commission". With regard to the findings of my review of the PIC's practices and procedures, and whether there is any direction I would suggest, nothing comes to mind. I certainly would not see it as appropriate for any legislative review to consider matters involving the Commission's internal management or policy or procedures. Apart from that, it is difficult to predict what legislative issues might exist five years from now.

CHAIR: If there are no questions arising from that, the only questions remaining to be dealt with are the ones to be dealt with in camera. Before moving into in camera are there any matters Committee members wish to put to the Inspector?

Mr MALCOLM KERR: I would like a clarification referring to question 13 on notice, which refers to embargoed reports. Mr Inspector, I think you mention the Annual Report. My question in terms of embargoed reports was more general. For example, you would not see anything wrong if the Minister were to receive an embargoed report on Malta before it was presented to Parliament?

Inspector IRELAND: Subject to the qualifications that I made plain before: that it is a concluded report, that it is not something which is open to review or even to suggestion, that it is the document ready to be tabled and that, as the Chairman made the significant point, it is not something that is available for a lengthy period in advance and that it is secure in the brief period prior to tabling, I cannot see any problem with that.

Mr MALCOLM KERR: Right. I just wanted clarification that it was more general than simply the Annual Report.

Inspector IRELAND: Yes.

(Evidence continued in camera)

Index to Transcript of Proceedings

Annual Report	23, 24, 26, 28, 31, 36
Cabinet Office	34
Crown Solicitor	22, 23
Embargo	29, 30, 31, 36
Finlay	27, 32
Independent Commission Against Corruption.....	22, 23, 29, 30
Jurisdiction	22, 23, 31, 33, 34
Legal professional privilege.....	34
Listening device	24
Ministry for Police	22, 23, 26, 27, 28, 29, 31, 32, 34
Non-Commission officers.....	34
Non-PIC officers.....	22, 23
Operation Malta.....	24, 25, 36
Police Integrity Commission Act 1996.....	22, 23, 26, 28, 34, 35, 36
Practice Guidelines Committee	25
Public interest.....	32, 33
Report on Practices and Procedures	25
Resources	24, 25, 26
Review of the Police Integrity Commission Act.....	26, 27, 28, 32
Section 10(5).....	32
Section 142.....	26, 27, 28
Section 91	35
Section 92(5).....	32
Telecommunications interception.....	24
Timeliness	23, 24

Appendices

APPENDIX 1 COMMITTEE MINUTES



PARLIAMENT OF NEW SOUTH WALES
COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE
INTEGRITY COMMISSION

Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission

Wednesday 23 June 2004 at 6.30pm
Room 1043, Parliament House

Members Present

Mr Lynch (Chair), Ms Burnswoods (Vice-Chair), Mr Breen, Mr Clarke, Mr Corrigan and Mr Kerr

In attendance: Helen Minnican, Pru Sheaves

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Resolved in globo on the motion of Mr Kerr, seconded by Mr Clarke, that:

- (i) *Extending the jurisdiction of the PIC Inspector* - the Committee await the Minister's further advice and, in the interim, seek an indication from the Minister as to the timeframe for a decision on this matter. The Committee will follow-up its recommendation with the Inspector again at the next General Meeting, following the release of his Annual Report at the end of June 2004;

...



PARLIAMENT OF NEW SOUTH WALES
COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE
INTEGRITY COMMISSION

Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission

Tuesday 7 September 2004 at 2.00pm
Waratah Room, Parliament House

Members Present

Mr Lynch (Chair), Ms Burnswoods (Vice-Chair), Mr Clarke, Mr Corrigan and Mr Kerr

Apologies: Mr Breen, Ms Hay

In attendance: Helen Minnican, Hilary Parker, Kylie Rudd, Pru Sheaves

1. SIXTH GENERAL MEETING WITH THE INSPECTOR OF THE POLICE INTEGRITY COMMISSION

The public hearing commenced at 2.00pm.

The Hon Morris David Ireland QC, Inspector of the Police Integrity Commission, was sworn and examined. The Inspector was questioned on his answers to questions on notice by the Chairman, followed by other members of the Committee.

The evidence continued in camera at 3.05pm. The Inspector tabled a document. Questioning concluded, the Chairman thanked the witness and the witness withdrew at 3.30pm. The Committee adjourned until 4.00pm.

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PARLIAMENT OF NEW SOUTH WALES
COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE
INTEGRITY COMMISSION

Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission

Wednesday 22 September 2004 at 10.30pm
Room 1153, Parliament House

Members Present

Mr Lynch (Chair), Ms. Burnswoods (Vice-Chair), Mr Clarke, Mr Corrigan, Ms Hay and Mr Kerr

Apologies: Mr Breen

In attendance: Helen Minnican, Hilary Parker, Pru Sheaves

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5. Inquiry program

(a) Draft report of the Sixth General Meeting with the PIC Inspector

The Committee agreed to a number of minor amendments to the Report of the Sixth General Meeting with the Inspector of the Police Integrity Commission.

Resolved on the motion of Mr Corrigan, seconded Ms Hay that:

- the draft report (as amended) be the Report of the Committee and that it be signed by the Chair and presented to the House, together with the minutes of evidence;
- that the Chair, Committee Manager and Project Officer be permitted to correct stylistic, typographical and grammatical errors.

...