

PARLIAMENT OF NEW SOUTH WALES



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

REPORT ON THE NINTH GENERAL MEETING WITH THE INSPECTOR OF THE POLICE INTEGRITY COMMISSION

Together with answers to questions on notice, transcript of evidence
and minutes of proceedings

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Membership and staff

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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 are set out in s.31B(1) 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 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;

Functions of the Committee

- 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*.

Chair's foreword

This report on the Ninth General Meeting with the Inspector of the Police Integrity Commission records the important matters discussed on that occasion. This meeting was the first occasion that I had met with the Inspector since my election as Committee Chair.

A number of matters were raised, including the scope of the Inspector's legislative power to publish certain of his complaint reports under the legislation. This issue is central to the oversight of the Commission and, after careful consideration, the Committee has recommended legislative amendment to put the Inspector's capacity to report on complaints beyond doubt.

The Committee sees the Inspector's work as vital to ensuring the proper functioning of the Commission, and as playing an important complementary role to that of the Committee. The General Meetings with the Inspector are an opportunity to discuss matters of mutual concern on a regular basis and they greatly assist the Committee in its oversight of the Commission.

I would like to thank the Members of the Committee for their participation in the General Meeting and their contribution to the reporting process. The Committee's report is a consensus document that represents the bipartisan and constructive approach taken by Members of the Committee to the exercise of its oversight role.



The Hon Kerry Hickey MP
Chair

List of recommendations

RECOMMENDATION 1: That the *Police Integrity Commission Act 1996* be amended to clarify that the PIC Inspector is able to report to any party, including Parliament, at his discretion, in relation to any of his statutory functions.....13

Chapter One - Commentary

- 1.1 On 19 November 2008, the Committee conducted the Ninth General Meeting with the Inspector of the Police Integrity Commission, the Hon Peter Moss QC. This was the first time the Inspector had met with the new Committee Chair, the Hon Kerry Hickey MP, who was elected to the position in September 2008 following the resignation of Ms Angela D'Amore MP from the Committee due to her appointment as a parliamentary secretary.
- 1.2 As part of the process of preparing for the General Meeting, the Committee sent questions on notice to the Inspector about matters discussed in his Annual Report for the year ending 30 June 2008 and about other issues which had arisen since the last General Meeting in November 2007. The Inspector's responses can be found at Chapter Two of this report.
- 1.3 A major part of the Committee's examination of the Inspector focused on issues arising from the Inspector's findings in his reports on complaints by Senior Constable Briggs concerning the Police Integrity Commission's report on Operation Whistler, summaries of which appeared in the Inspector's Annual Report¹. The commentary discusses these issues in detail, as well as a recent amendment to the Police Integrity Commission (PIC) Act.

Police Integrity Commission Amendment (Crime Commission) Act 2008

- 1.4 On 1 July 2008 the PIC Act was amended to give the PIC powers to detect, investigate and prevent serious misconduct within the NSW Crime Commission. The Committee wanted to ascertain whether this extension to the PIC's jurisdiction would impact on the Inspector and whether the Inspector considered operational difficulties could arise from the role of the NSW Crime Commission as one of the PIC's investigative partners.
- 1.5 The Inspector informed the Committee that, as a result of the legislative amendment, the number of PIC investigations falling within his auditing functions had increased and there was the potential for his workload to grow further should any Crime Commission officer wish to complain to him about the PIC or should he need to exercise his function under section 89(1)(c) of the PIC Act².
- 1.6 The Inspector is employed on a part-time basis, working two days a week. During the General Meeting he reported that he currently had a heavy workload owing to the complexity of complaints he had received, which required considerable investigation. The Committee will continue to monitor the Inspector's capacity to meet the demands of his workload under the current terms of appointment. The Committee intends to write to the Minister for Police to clarify the flexibility of the Inspector's working arrangements to ensure he is able to respond in a timely manner to any increase in his workload.
- 1.7 In relation to any implications for the PIC arising from its expanded jurisdiction, before forming an opinion the Inspector will take into account the report of PIC Assistant

¹ Inspector of the Police Integrity Commission, *Annual Report for the year ended 30 June 2008*, pp 18-24.

² i.e. to assess the effectiveness and appropriateness of the procedures of the PIC relating to the legality or propriety of its activities.

Commissioner Clark, who is assessing the Crime Commission's capacity to identify and manage risks of serious misconduct involving its officers. The Committee will continue to take an interest in this developing area of the PIC's activities.

PIC Inspector's capacity to publish complaint reports

1.8 During 2008, the Inspector corresponded with the Committee about his capacity to publish his complaint reports. The issue arose after Inspector Moss provided the Committee with a copy of a report on his investigation of a complaint about the Police Integrity Commission. Discussion primarily centred on the interpretation of section 89(1)(b) of the Police Integrity Commission Act, which provides that it is one of the Inspector's principal functions to:

to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission;

and the interpretation of section 101, which enables the Inspector to make a special report to Parliament on any matters affecting the Commission.

The Inspector's reports on complaints by Senior Constable Briggs

1.9 On 11 December 2007, Inspector Moss provided the Committee with a report in which he upheld a complaint concerning the procedural fairness afforded to Senior Constable Briggs by the PIC. Briggs had been named as an affected person in the PIC's report on Operation Whistler. He had complained to the Inspector that the Operation Whistler report contained material damaging to his reputation and integrity, which had formed no part of the issues defined by the Commission as concerning him.

1.10 The PIC is not bound by the rules of evidence and can inform itself on any matter in such manner as it considers appropriate (section 20(1), PIC Act). However, before publishing material damaging to a person's reputation and integrity, the Commission is bound to afford that person a full and fair opportunity to correct or contradict that material. The PIC had alleged that Briggs and a number of other police officers had not dealt with a critical incident in accordance with the established guidelines for the management and investigation of critical incidents. Following the conclusion of his evidence, this issue was submitted to Briggs and responded to by his Counsel. However, when the Whistler report was published, it contained a number of other allegations, namely that Briggs had:

- given 'untruthful' evidence in the local court proceedings;
- failed to include all relevant information in the brief of evidence; and
- pursued the prosecution of the person involved in the critical incident despite a lack of forensic and other evidence.

These matters had not been put to Briggs prior to publication of the report.

1.11 The Inspector found:

...that the Complainant had been denied procedural fairness by the presiding Commissioner and the Commission, and that to that extent the Whistler Report was produced in breach of the Commission's duty to observe procedural fairness in respect of the Complainant. Clearly this was due to inadvertence, but exactly how it came about is not, it appears, discoverable at this stage, particularly having regard to the lapse of

time since the Report was prepared and the fact that the presiding Commissioner's term of office expired in October 2006.³

- 1.12 The Commission then amended the relevant sections of the Whistler report and placed this amended version on its website.
- 1.13 In January 2008, Briggs wrote again to the Inspector making complaints about the amended Whistler report⁴. The Inspector again found that Briggs had been denied procedural fairness. The Inspector also provided this second report to the Committee.
- 1.14 Following legal advice on how to deal with the recommendations contained in the Inspector's reports, the Commission commenced Operation Alford in April 2008; however this investigation has now been discontinued.

*Inspector's correspondence with the Committee*⁵

- 1.15 On receipt of the Inspector's report on the first of the Briggs complaints, the Committee wrote to the Inspector seeking clarification as to whether the report was a public or confidential document. In his reply, Inspector Moss outlined his difficulties with the Police Integrity Commission Act, which, in his opinion, did not specify:
 - who, if anyone, is entitled to receive a copy of a complaint report;
 - what discretion, if any, the Inspector has to distribute copies of a complaint report to particular persons; and
 - what status is to be given to a complaint report once the Inspector has provided it to a particular person.

The Inspector considered that the legislation did not make clear whether he had the power to publish a complaint report to the general public or report on a complaint to Parliament. He therefore recommended that the legislation be amended to clarify the issues, and noted that he was examining a number of other complaints about which he might wish to report.

- 1.16 The Committee wanted to ensure that an amendment to the legislation did not curtail the Inspector's discretion to report to whomever he thought most appropriate, so it suggested that the Inspector develop some guidelines around special reports and reporting on complaint investigations in consultation with comparable agencies such as the Inspector of the Independent Commission Against Corruption and the NSW Ombudsman. The Committee also sought the Inspector's opinion as to what particular legislative amendments he felt were necessary.
- 1.17 The Inspector replied that the PIC and ICAC Inspectors are currently in the same legislative uncertainty in relation to complaint reports. He raised the issue of the public accountability of the Police Integrity Commission and asked whether the Inspector should be able to submit a complaint report to Parliament where a substantial complaint was upheld or where there were significant criticisms of the Commission or its officers. He suggested that the Committee liaise with the

³ op.cit. p. 21.

⁴ The amended report was later withdrawn from the PIC's website and replaced with the original. Once the Whistler report was tabled in Parliament, the Commission had no power to recall or rewrite it.

⁵ The correspondence is reproduced in Chapter Two of this report: Questions on notice and answers, Annexure B.

Committee on the Independent Commission Against Corruption, which oversees the ICAC Inspector, so that the latter's views could contribute to the debate.

- 1.18 In further correspondence the Inspector reiterated his opinion that legislative amendment was required. Reports upholding substantial complaints about the PIC should be in the public domain:

...because of the clear public interest involved in such a Report, and also as a means of ensuring that the Commission is seen to be publicly accountable where the Inspector has upheld a substantial complaint concerning the Commission.⁶

- 1.19 In his response to supplementary questions from the Committee following the Ninth General Meeting, the Inspector continued to argue strongly for legislative amendment:

Given that the report of the PIC giving rise to the complaint is itself a public document, what is the argument against a provision that the Inspector's complaint reports themselves also be public documents? Where the Inspector finds that an "affected person" in one of the PIC public reports has been denied procedural fairness, involving the publication of unauthorised material by the PIC damaging that person's reputation, why should not the Inspector's report pointing out this situation be made public?⁷

Former PIC Inspector Wood

- 1.20 The previous PIC Inspector, the Hon James Wood QC, also expressed concerns about his capacity to publish reports. In November 2006 the Committee of the 53rd Parliament tabled its *Report on the Ten Year Review of the Police Oversight System in New South Wales*. In evidence before that inquiry, then Inspector Wood suggested amendments to the PIC Act to clarify where the Inspector was to submit his reports and to make express provision for the Inspector to report to Parliament. The Committee consequently recommended amendments to the Act in line with Inspector Wood's suggestions, namely:

...that the *Police Integrity Commission Act 1996* should be amended to clarify that the Inspector is able to report to Parliament at his discretion in relation to any of his statutory functions. (Recommendation 16)

And further:

...that the Act be amended to make express provision for the Inspector to report to Parliament, as he considers necessary, on any abuse of power, impropriety and other forms of misconduct on the part of the PIC or its officers, regardless of whether or not these matters arise from the making of a complaint to the Inspector. (Recommendation 17)

- 1.21 It was that Committee's opinion that:

While the Committee interprets the Special Report provision found at s.101 of the Act widely, it is not specific to the Inspector's functions at s.89(1)(b), which state that he is to deal with complaints by way of reports and recommendations.⁸

⁶ Correspondence to the Committee, dated 27 June 2008, from the Inspector of the Police Integrity Commission. See Chapter Two of this report: Questions on notice and answers, Annexure B.

⁷ Inspector of the Police Integrity Commission, correspondence to the Committee, dated 12 December 2008, in response to questions following the 9th General Meeting hearing. See Chapter Three of this report: Follow-up questions and answers.

⁸ Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the Ten Year Review of the Police Oversight System in New South Wales*, 2006, p.124.

1.22 There have subsequently been no amendments to the Act to give effect to the Committee's recommendations.

1.23 Inspector Moss commented on the legislative amendments recommended by the previous Committee:

...if the Inspector produces a number of complaint reports each year, let it be assumed finding a failure on the part of the PIC to accord procedural fairness to the Complainant, is it the best avenue in order that such reports be made public for them to be presented to the Parliament, rather than to the PJC (Parliamentary Joint Committee), or is there some other method of giving the Reports the status of a document tabled in the Parliament?⁹

Inspector's functions and powers

1.24 The relevant provisions of the Police Integrity Commission Act relating to the Inspector are:

- section 89(1)(b):

89 Principal functions of Inspector

(1) The principal functions of the Inspector are:

...

- (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission;

- section 93:

93 Incidental powers

The Inspector has power to do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of the Inspector's functions. Any specific powers conferred on the Inspector by this Act are not taken to limit by implication the generality of this section.

- sections 101, 102 and 103:

Division 2 Reports by Inspector

101 Special reports

The Inspector may, at any time, make a special report to the Presiding Officer of each House of Parliament on:

- (a) any matters affecting the Commission, including, for example, its operational effectiveness or needs,
- (b) any administrative or general policy matter relating to the functions of the Inspector.

102 Annual reports

The Inspector is required to prepare, within the period of 4 months after each 30 June, a report of the Inspector's operations during the year ended on that 30 June and furnish the report to the Presiding Officer of each House of Parliament.

Division 3 General

103 Provisions relating to reports

(cf ICAC Act s 78)

⁹Inspector of the Police Integrity Commission, correspondence to the Committee, dated 12 December 2008, in response to questions following the 9th General Meeting hearing. See Chapter Three: Follow-up questions and answers.

Commentary

- (1) A copy of a report furnished to the Presiding Officer of a House of Parliament is to be laid before that House within 15 sitting days of that House after it is received by the Presiding Officer.
- (2) In the case of a report of the Commission, the Commission may include in it a recommendation that the report be made public forthwith. In the case of a report of the Inspector, the Inspector may include in it a recommendation that the report be made public forthwith.
- (3) If a report includes a recommendation that the report be made public forthwith, a Presiding Officer of a House of Parliament may make it public whether or not that House is in session and whether or not the report has been laid before that House.
- (4) If such a report is made public by a Presiding Officer of a House of Parliament before it is laid before that House, it attracts the same privileges and immunities as if it had been laid before that House.
- (5) A Presiding Officer need not inquire whether all or any conditions precedent have been satisfied as regards a report purporting to have been made and furnished in accordance with this Act.

- section 137:

- 137 Protection from liability**

- (cf ICAC Act s 109)

- (1) A matter or thing done or omitted to be done by the Commission, the Commissioner, the Inspector or any person acting under the direction of the Commission, Commissioner or Inspector does not, if the matter or thing was done in good faith for the purpose of executing this or any other Act, subject the Commissioner, Inspector or a person so acting personally to any action, liability, claim or demand.

1.25 In addition, Clause 28(1)(c) of Schedule 1 of the Defamation Act affords the PIC Inspector absolute privilege in respect of the publication of a matter in his capacity as Inspector:

28 Matters arising under *Police Integrity Commission Act 1996*

(cf Act No 18 1974, s 17S)

- (1) Without limiting section 27 (2) (a)–(c), matter that is published:

...

- (c) to or by the Inspector of the Police Integrity Commission in his or her capacity as Inspector, or

...

- (2) This clause applies in relation to any hearing before the Police Integrity Commission or Inspector of the Police Integrity Commission or any other matter relating to the powers, authorities, duties or functions of the Commission or Inspector.

1.26 Inspector Moss takes the view that section 89(1)(b) only empowers the Inspector to release complaint reports to the complainant and the Commission, and a limited number of others, such as the Minister for Police, the Police Commissioner and the Director of Public Prosecutions (DPP), as relevant. It is the Inspector's opinion that:

...apart from what might arise by implication, there is no guidance whatsoever as to whether the Inspector has a discretion to publish as the Inspector sees fit, and more

importantly, ...there is no provision giving the document the status of a public document so that it may freely be discussed by members of the public.¹⁰

- 1.27 He advised the Committee that the Defamation Act deters recipients of a complaint report from publishing it further.
- 1.28 The Inspector sees section 101 as being:
...confined to reports that can properly be described as “special reports”, which I would view as being “one-off” reports delivered by the Inspector from time to time, and otherwise coming within the terms of that Section. ...I do not see Section 89(1)(b) reports as fitting that description.¹¹
- 1.29 In relation to the protections provided to him by the Defamation Act, the Inspector argued that, as section 89(1)(b) does not provide the Inspector with the power to publish a complaint report:
...if the Inspector published a document which the Inspector had no power to publish, an issue might arise as to whether the Inspector in so doing, could be said to have been “acting in his or her capacity as Inspector.”¹²

Inspector’s proposed amendment

- 1.30 In questions on notice prior to the General Meeting, the Committee sought the Inspector’s view on how to amend the PIC Act so as to avoid being overly prescriptive¹³. The Inspector recommended amending section 95(1)(c), which provides for the Parliamentary Joint Committee:
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.
- 1.31 The Inspector suggested that:
If the legislation, in particular, Section 95(1)(c), was amended so as to provide that the Committee were empowered to receive such a report and to deal with such a recommendation [by the Inspector to make the report public], provision could be made for the Committee to have a discretion to consider submissions, if any, from interested parties, including the Complainant and the PIC, and perhaps representatives of the media, as to whether or not a particular report should be ordered to be made public in whole or in part. Further provision may be desirable to ensure the Committee on the receipt of such a Report acted expeditiously in the exercise of its discretion whether or not to make the Report a public document.
- 1.32 The Committee expressed concerns that such an amendment might conflict with the limitations on the Committee’s functions found at section 95(2) of the PIC Act, which specify that the Committee is not authorised to:
- investigate a matter relating to particular conduct, or
 - reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, a particular matter or particular conduct, or

¹⁰ Inspector of the Police Integrity Commission, correspondence to the Committee, dated 12 December 2008, in response to questions following the 9th General Meeting hearing. See Chapter Three: Follow-up questions and answers.

¹¹ See Chapter Two: Questions on notice and answers, Question 6.

¹² *ibid.*, Question 7.

¹³ *ibid.*, Question 8.

Commentary

- reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or a particular complaint.

1.33 The Inspector did not think so. It was his view that:

The Committee would be simply receiving the Inspector's complaint report with a view to publishing it as a public document.¹⁴

If the Committee were given a discretion to make a report public, it would only be considering the public interest in the matter.

1.34 However, the Committee considers that, if it were to decide whether a complaint report by the PIC Inspector should be made public, such deliberations might lead to allegations of political interference in the functioning of both the PIC and the Inspector. In order to maintain their autonomy, it is important that the Inspector independently make decisions about the public status of his reports and have the capacity to give effect to those decisions.

Previous public reports of PIC Inspectors

1.35 Apart from Annual Reports, only two reports by PIC Inspectors have been made public. At the end of 2001 and in early 2002, former PIC Inspector Mervyn Finlay provided his preliminary report on the November 2001 'Four Corners' program concerning Operation Florida to the Director General of the NSW Ministry for Police, to all Members of the NSW Parliament and to the Committee on the Office of the Ombudsman and the PIC, pursuant to section 56(4)(c) of the PIC Act. He later provided the report to the libraries of the NSW Parliament and the Attorney General. Section 56 is the secrecy provision of the Act and allows the Inspector, if he certifies that it is in the public interest to do so, to divulge information acquired in the exercise of his functions.

1.36 In May 2002, Inspector Finlay considered that, in the circumstances of his having already distributed the report to so many parties, its tabling in Parliament was not called for. However, in June 2002, in response to a request for clarification from the Committee about the report's status, he certified that, pursuant to section 56(4)(c) of the PIC Act, it was necessary in the public interest that the contents of his report be divulged to the public at large. The Committee subsequently attached the report as an appendix to its report on the Sixth General Meeting with the Commissioner of the Police Integrity Commission (June 2002)¹⁵.

1.37 The second public report, *Report on the practices and procedures of the Police Integrity Commission* (June 2003), by former PIC Inspector Morris Ireland QC, was undertaken in response to a referral by the then Minister for Police, the Hon Michael Costa MLC, and dealt with the appropriateness of the PIC's practices and procedures with respect to the formality and length of its hearings and functions. Inspector Ireland advertised for written submissions and consulted with a number of interested parties before writing his report. The report was tabled in Parliament.

1.38 In relation to the 'Four Corners' incident, Inspector Finlay commenced the investigation on his own initiative. He wrote to the PIC that:

Whilst I have not as yet received a formal complaint concerning this matter, Section 89 of the Act provides that:

¹⁴ Inspector of the Police Integrity Commission, correspondence to the Committee, dated 12 December 2008, in response to questions following the 9th General Meeting hearing.

¹⁵ This report is available on the Committee's website: www.parliament.nsw.gov.au/ombudsmanpic

The functions of the Inspector may be exercised on the Inspector's own initiative.

Having regard to my concern on reading this material, I exercise my initiative by asking the Commission to provide a comprehensive explanation for what has happened¹⁶.

1.39 Inspector Ireland was requested by the Police Minister to conduct an inquiry and furnish a report '[p]ursuant to Part 6 of the *Police Integrity Commission Act 1996...*'¹⁷. As neither of these reports is a complaint report, they do not set a precedent which would enable the current Inspector to publish a complaint report.

1.40 The Committee sought Inspector Moss's view of Mr Finlay's interpretation of his certification power under the secrecy provisions as providing for the dissemination, in the public interest, of information gained in the performance of the Inspector's functions. He advised the Committee that it was not clear to him why Inspector Finlay had followed this particular course:

First, I am not entirely clear as to why he chose Section 56(4) as a vehicle for the release of the report, apparently to Members of Parliament, and second, how the second release under that provision could result in the report being available to members of the public, given the effect of subsection (5) of Section 56, which provision clearly applies to releases under subsection (4).¹⁸

Under section 56(5) a person to whom information is divulged under subsection (4), is subject to the same rights, privileges, obligations and liabilities as set out in subsections (2) and (3), ie they cannot make a record of the information, or divulge or communicate it to other persons, except for the purposes of the PIC Act or otherwise in connection with the exercise of the person's functions under the Act, nor can they be required to produce or divulge anything in court, unless for the purposes of a prosecution, disciplinary proceedings or proceedings under the Police Act, arising out of a PIC investigation.

1.41 Elsewhere in his answers to supplementary questions, the Inspector asseverated that section 56(4) of the PIC Act was not a suitable vehicle for the release of a complaint report. He commented:

If the release by the Inspector, as currently happens, of a complaint report to the [complainant, the Commission and limited relevant parties, such as the Minister for Police, the Police Commissioner and the Director of Public Prosecutions] meant that each of those parties individually was restricted to access to the content of the report, this could give rise to practical difficulties. For example, if the Commissioner of Police is a recipient, as happened in the Briggs case, the Commissioner would want to be in a position to disseminate the material to various organs of NSW Police. If the DPP were a recipient, there would be little point in releasing the report on an individual basis to the DPP, if the latter could not disseminate the information within the DPP's office. Similarly, if the Complainant were compelled to receive a copy of the Inspector's complaint report on an individual basis, this, in my opinion, would unduly inhibit the reasonable dissemination that the Complainant may want to undertake in respect of the content of the Report, for example among members of his family and colleagues, and, perhaps, to seek legal advice in respect of the report.¹⁹

¹⁶ Inspector of the Police Integrity Commission, *Report by the Inspector of a preliminary investigation re: "Four Corners" program: 8 October 2001, 8 November 2001*, p.2.

¹⁷ Inspector of the Police Integrity Commission, *Report on the practices and procedures of the Police Integrity Commission*, June 2003, p.3.

¹⁸ Inspector of the Police Integrity Commission, correspondence to the Committee, dated 12 December 2008, in response to questions following the 9th General Meeting hearing.

¹⁹ *ibid.*

Commentary

1.42 The Committee asked Inspector Moss whether he thought that Mr Finlay could have tabled the report with the Presiding Officers, since he had made it available to Members of Parliament and a number of other individuals and agencies. It was Inspector Moss's opinion that Mr Finlay did not consider he had power to present his report to Parliament under section 89(1)(b). The Inspector did not understand:

...why if each Member of Parliament had a copy of the report, one of those Members did not simply table it²⁰.

Report of the ICAC Inspector

1.43 In September 2008, the Inspector on the Independent Commission Against Corruption (ICAC) tabled a special report on issues relating to ICAC's investigation of allegations against the Hon Peter Breen MLC. Mr Breen had complained about the investigation to the ICAC Committee, which had then referred the complaint to the Inspector. The ICAC Inspector provided the report to the Presiding Officer of each House of Parliament and recommended that it be made public, pursuant to sections 77A and 78(1A) of the ICAC Act:

77A Special reports

The Inspector may, at any time, make a special report to the Presiding Officer of each House of Parliament on:

- (a) any matters affecting the Commission, including, for example, its operational effectiveness or needs, and
- (b) any administrative or general policy matter relating to the functions of the Inspector.

78 Provisions relating to reports

...

(1A) The Inspector may include in a report a recommendation that the report be made public forthwith.

1.44 Sections 101 and 103 of the Police Integrity Commission Act make the same provisions for the PIC Inspector. The ICAC Inspector's report would seem to create a precedent for a complaint report to be made public by the PIC Inspector.

1.45 In correspondence dated 11 February 2008, Inspector Moss told the Committee that he did not think that the provisions of sections 101 and 102 could be construed as covering the Inspector's reports dealing with complaints concerning the Commission. He explained further, in his answer to question on notice number 6, that he viewed 'special reports':

...as being "one-off" reports delivered by the Inspector from time to time, and otherwise coming within the terms of that Section. ...I do not see Section 89(1)(b) reports [ie complaint reports] as fitting that description.²¹

1.46 At the time of the General Meeting, Inspector Moss was not aware that the ICAC Inspector's report was publicly available. The Committee, in a supplementary question, sought his view of the approach adopted by the ICAC Inspector in relation to reporting on the Peter Breen complaint investigation. Inspector Moss considered that:

²⁰ *ibid.*

²¹ See Chapter Two: Questions on notice and answers, Question 6.

It may be that such an unusual situation, involving such an important subject matter [ie a breach of parliamentary privilege], may have justified regarding the resultant report as a “special” report within the meaning of the legislation.

1.47 He referred the Committee to the ICAC Inspector’s Annual Report 2007-08 where Inspector Kelly expressed the view that:

...it is in the public interest to amend the relevant legislation so that any uncertainty is removed. The legislation should make it clear that the Inspector has a discretion as to how and to whom reports concerning complaints can be published.²²

Inspector’s capacity to publish pending a legislative amendment

1.48 As discussed above, recommendations to clarify the Inspector’s power to publish complaint reports, which were contained in the previous Committee’s *Report on the Ten Year Review of the Police Oversight System in New South Wales*, have yet to be given effect.

1.49 The Committee is mindful of the possible damage the Whistler report may have caused to Briggs’s integrity, reputation and promotion prospects.

1.50 The Inspector had also advised the Committee that ‘it is likely that the problem [of the lack of clarity concerning the Inspector’s capacity to publish reports] will get worse rather than go away’²³ as he was dealing with a number of other complaints on which he might report.

1.51 As well, the Committee is conscious of the Inspector’s desire to publish particular complaint reports as he thinks appropriate. The Committee agrees with the Inspector’s opinion that:

...there seems sound reasons why those Inspector’s Reports which uphold substantial complaints concerning the Commission, for example, in the case of a denial of procedural fairness, such as in the case of Detective Briggs, should be in the public domain and available for public scrutiny, because of the clear public interest involved in such a Report, and also as a means of ensuring that the Commission is seen to be publicly accountable where the Inspector has upheld a substantial complaint concerning the Commission.²⁴

The Committee is also of the view that it is just as important to make public the Inspector’s findings that are in favour of the PIC.

1.52 The Committee sought the Inspector’s advice on how, until Parliament amended the legislation, he proposed to make public any substantive matters relating to the PIC that he might uncover in complaints investigations.

1.53 Inspector Moss considers that the only way the Inspector can make complaint reports public is to produce summaries in his annual reports. This was the course he followed in the case of his two reports on the Briggs complaints, summaries of which appear in the Inspector’s Annual Report 2007-08. However, the Inspector considered that, not only might this mean that there is a considerable delay before his findings are publicly reported, but a summary does not provide the detail of a full report. He explained:

The importance of there being a public document containing details of complaints upheld by the Inspector was graphically exemplified by the content of written

²² Office of the Inspector of the ICAC, *Annual Report 2007-2008*, page 3.

²³ Correspondence to the Committee from the Inspector of the Police Integrity dated 11 February 2008.

²⁴ Correspondence to the Committee from the Inspector of the Police Integrity dated 27 June 2008.

submissions in the matter of *Alford* addressed to the PIC in confidential proceedings last Monday afternoon. Those submissions, in effect, relied on my 2008 Annual Report, in which a summary of the Briggs' complaints appeared, in order to provide a basis for an important aspect of the submissions. But for the Annual Report being a public document, the Police officer, on whose behalf the submissions were made, would have been denied access to the content of the Briggs' complaint reports²⁵.

Committee's conclusions and recommendation

- 1.54 Following the Ninth General Meeting with the PIC Inspector in November the Committee was not persuaded that the Inspector is unable to report to whomever he thinks appropriate on any matter relating to his functions. It was the Committee's view that the legislation should be interpreted broadly and that the Inspector should be able to publish a complaint report if he considered it to be in the public interest.
- 1.55 However, the Committee must pay due regard to the concerns of the current PIC Inspector, the ICAC Inspector and Justice Wood in his former capacity as PIC Inspector and the decision by former PIC Inspector Mervyn Finlay to use section 56 of the PIC Act to make public his 'Four Corners' report. Inspector Moss has made it clear that he does not consider he has the power to make his complaint reports public and that he can provide only a summary of these reports in his annual reports. The Committee does not consider this is a satisfactory solution, in terms of either timeliness or completeness of reporting.
- 1.56 On behalf of the Committee, the Clerk of the Legislative Assembly sought the Crown Solicitor's advice in order to clarify whether:
- explicit statutory authority is required to enable the Inspector to furnish reports on his investigation of a complaint to interested parties and persons adversely mentioned in the report;
 - the Inspector can use s. 101 of the Act to furnish reports to Parliament on complaint investigations generally;
 - the Act as presently constructed enables the Inspector to use his discretion to determine to whom he may furnish reports made pursuant to his function under s.89(1)(b) of the Act, as well as the level of confidentiality attaching to those reports.
- 1.57 The Crown Solicitor's advice unequivocally supports the position of the current Inspector (and the former Inspector), that he is unable to make public his complaints reports. Accordingly, and to put the matter beyond doubt, the Committee will write to the Minister requesting that the *Police Integrity Commission Act* be amended to clarify that the PIC Inspector is able to report to any party, including Parliament, at his discretion in relation to any of his statutory functions.

²⁵ Inspector of the Police Integrity Commission, correspondence to the Committee, dated 12 December 2008, in response to questions following the 9th General Meeting hearing.

RECOMMENDATION 1: That the *Police Integrity Commission Act 1996* be amended to clarify that the PIC Inspector is able to report to any party, including Parliament, at his discretion, in relation to any of his statutory functions.

Procedural fairness

- 1.58 The Inspector has found in his investigation of two complaints that the Commission denied Senior Constable Briggs procedural fairness. He also indicated that he is examining two other complaints regarding denial of procedural fairness, relating to the PIC's reports on Operations Rani and Mallard. The Committee is concerned to ensure that the Commission has in place practices and procedures to provide affected persons, in any future investigation report, with procedural fairness. The Inspector indicated in his response to question on notice number 9 that once he had completed his reports on the Rani and Mallard complaints he would be in a better position to consider whether there were any recommendations he could make to the PIC to ensure procedural fairness is accorded to witnesses appearing before the PIC.
- 1.59 In light of the Inspector's findings in the Briggs complaint reports, the Committee intends to raise this issue at its next General Meeting with the Commission and will seek further advice from the Inspector as to whether the complaints about procedural fairness suggest systemic problems that need to be addressed.

Operation Alford

- 1.60 During the General Meeting, in answer to a question from the Chair concerning Operation Alford (the inquiry commenced by the PIC following the Inspector's recommendations in his Briggs reports), the Inspector commented:
- ...to some extent I think that there is new ground being broken here, in that an administrative decision-making body such as the Police Integrity Commission having dealt with a particular investigation, is now purporting to enter upon the same investigation for a second time and there is High Court authority about that. Whether they can bring themselves within that authority I suppose one day will have to be determined.²⁶
- 1.61 The Inspector was referring to *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11, where the High Court examined whether the Immigration Review Tribunal could of its own motion reconsider its decision on a matter. The background to this appeal was that an administrative oversight had meant that the Tribunal had not been aware that Mr Bhardwaj was ill and had sought a postponement of the hearing to reconsider the decision to cancel his student visa. The hearing went ahead and the Tribunal upheld the decision on the grounds that Mr Bhardwaj had not provided any information suggesting that the visa cancellation was unfair or inappropriate. After the oversight was brought to the Tribunal's attention, it re-heard the matter and revoked the cancellation of the visa.
- 1.62 The Minister for Immigration and Multicultural Affairs contended that the power of the Tribunal to review the visa decision was spent after it made the initial decision. The High Court therefore considered the capacity of the Tribunal to proceed as it did. It

²⁶ Transcript, Ninth General Meeting with the Inspector of the Police Integrity Commission. See Chapter Four.

Commentary

found that the Tribunal had acted in accordance with the requirements of the Migration Act, and dismissed the appeal.

- 1.63 Inspector Moss cautioned: 'Just how far that particular principle extends remains to be seen.' The Committee intends to pursue this matter at its next General Meeting with the Police Integrity Commission.

Chapter Two - Questions on notice and answers

QUESTION ONE:

To what extent, if any, has the conferral of the Crime Commission oversight role on the Police Integrity Commission (PIC) impacted on the PIC Inspector's jurisdiction?

Have you any comment to make on the implications for the PIC of this extension to its jurisdiction? In particular, do you envisage the potential for any operational difficulties arising from the role of the NSW Crime Commission as one of PIC's investigative partners?

INSPECTOR'S RESPONSE TO QUESTION ONE:

The amendments made to the *Police Integrity Commission Act* by Act 60 of 2008, in particular, the inclusion of Section 13B (in effect, to detect or investigate misconduct of NSWCC officers and to prevent such conduct), so far as the Inspector's jurisdiction is concerned, have the effect of enlarging the classes of persons who may, in a proper case, make a complaint to the Inspector pursuant to Section 89(1)(b) of the legislation; such amendments also have an effect on the Inspector's functions pursuant to Sections 89(1) (a) and (c), to the extent that the effect of those statutory provisions add to the workload of the Commission, and thus impact on the Inspector's regular audit of the Commission's operations pursuant to Section 89(1)(a), and upon the procedures referred to in section 89(1)(c). To date, in practice, the effect has been to increase the number of PIC investigations falling within the Inspector's auditing functions.

In the short term, at least, the implications for the PIC as a result of its relevantly increased functions may be clearer once the report of Assistant Commissioner Clark SC is available. The latter was appointed an Assistant Commissioner on 25 September 2008 to assess the capacity of NSWCC to identify and manage risks of serious misconduct involving CC officers. Until then it would be difficult to form an impression as to how much additional strain any investigations by the PIC involving or potentially involving NSW Crime Commission Officers would place on the limited resources of the PIC, nor whether future investigations, if any, will be assigned to an Assistant Commissioner especially appointed for that purpose. As to consequent potential difficulties emerging in respect of future joint operations involving the PIC and NSWCC, this may depend, in part, on the content of Assistant Commissioner Clark's report, and the NSWCC's perception of the PIC's management of these additional functions concerning the NSWCC.

QUESTION TWO:

You commented in your previous annual report on the legislative constraints upon the PIC's power to oversight investigations of complaints that it has referred to the NSW Police Force. You also discussed the matter in more detail in your response to a question on notice from the Committee during the 8th General Meeting. Have any matters arisen during the past year to renew your concern about the restrictions on the PIC's oversight powers, in this regard?

INSPECTOR'S RESPONSE TO QUESTION TWO:

I remain of the views to which the question refers. Those views were formed, in part, as a result of my investigation of a particular complaint, and the Complainant's dissatisfaction with the PIC's "oversight" of the investigation by NSW Police of his complaint, which dissatisfaction I thought was not unreasonable. Since that time I have not had cause to look closely at any particular case involving a relevant "oversight" by the PIC. However, I note that the recently-added Sub-sections 13B(3) and (4) are couched in language similar to Sub-sections 13(4) and (5) of the legislation, and thus there is the potential to give rise to the problems earlier identified by me.

In this context I reproduce for the benefit of the Committee the relevant portion of a letter to me from the Commission dated 28 October 2008:

The Commission's Annual Report for 2007-08 will note that the Commission oversighted 32 matters during 2007-08. This figure represents the number of oversight matters that were completed during that time. Currently the Commission is oversighting 95 matters. Each matter could contain a number of complaints and be made by different complainants, although most would be from a single complainant. This number changes from day to day.

The Commission conducts quarterly reviews of all open oversight matters to check on progress with each related investigation.

QUESTION THREE:

In relation to your investigation of complaint C15/07, which concerned allegations that a PIC investigator had informed the complainant that the investigator knew he had made a complaint to the PIC Inspector, are you satisfied with the PIC's procedures to apprise its officers of their obligations under s.56 of the Police Integrity Commission Act?

INSPECTOR'S RESPONSE TO QUESTION THREE:

In the light of the following provided to me by the PIC Commissioner in letter dated 28 October 2008, there would seem no reason to be concerned regarding the relevant PIC procedures:

I am more than satisfied that the Commission has in place appropriate measures to apprise its officers of their obligations under section 56 of the PIC Act.

In November 2007 the Commission promulgated a revised Code of Conduct for all Commission staff. Section 2 of the Code deals with "Confidentiality" and paragraph 2.2.2 specifically addresses the obligations of Commission staff under section 56(2) of the PIC Act. Associated with the new code, all staff attended a learning and development session on practical application of the Code conducted by the Institute of Public Administration Australia.

The Commission has also endorsed a revised Staff Induction Manual which reinforces to all new staff their obligations under section 56 of the PIC Act.

As an example of a specific instance that highlights how the Commission regularly deals with sensitive information, the Commission is also subject to a regime of audits and checking by the NSW Ombudsman in relation to its handling and managing of product obtained under the *Telecommunications Interception and Access Act 1979*. The latest report of the NSW Ombudsman of its inspection of the Commission's records indicates the Commission has fully complied with its record keeping obligations in this area.

Other than the matter referred to in complaint C15/07, there have been no other instances of any established breaches of section 56 of the PIC Act since my term as Commissioner commenced in October 2006. The breach the subject of complaint C1507 was also relatively minor and somewhat technical in nature.

QUESTION FOUR:

The Committee noted that one issue discussed during your meeting with the Police Commissioner on 3 December 2007 (para 96), was:

...the need for reasonable expedition in respect of the finalisation by NSW Police of recommendations by the PIC that particular NSW Police officers be dealt with under the relevant provisions of the Police Act.

- a. To what extent do you consider it appropriate for the PIC Inspector to monitor the implementation of the PIC's recommendations?*
- b. Do you consider that your support for the PIC's recommendations may be seen to conflict with your role as a check on the use of the PIC's considerable powers and an investigator of complaints about the conduct of the PIC and its officers?*

INSPECTOR'S RESPONSE TO QUESTION FOUR:

I should, perhaps, mention, at the outset, that what prompted me to raise that matter with the Police Commissioner was the suggestion by a member of the Parliamentary Joint Committee during my appearance before the Committee on 8 November 2007, that I should undertake a survey as to how many recommendations of the PIC in respect of Sections 173 or 181D of the *Police Act* remained outstanding at that time. Also relevant to that topic at that time, was the fact that I had recently delivered my first report concerning Detective Briggs, and as a consequence was aware of what I regarded as the inordinate delay in the NSW Police's finalising of the relevant PIC recommendation in his case.

As to (a), to the extent the PIC has a responsibility to follow up such recommendations to ensure their timely disposition by NSW Police, the monitoring of that procedure by the Inspector with a view to ascertaining whether the recommendations were in fact being disposed by NSW Police in a timely manner (as distinct from implemented) would seem to fall within one of the Inspector's principal functions as described in terms of Section 89(1)(c) of the legislation.

As to (b), as formulated in answering (a), I do not consider there is any conflict in the Inspector's monitoring of this particular PIC procedure, which monitoring is not for the purpose of supporting the PIC recommendations but rather to monitor their timely disposition by NSW Police.

QUESTION FIVE:

You report that you reviewed the PIC's Annual Report and provided it with a written commentary on the document (para 99).

- a. What was the purpose of this exercise and what was the nature of the commentary you provided?*

b. *Is there any potential for duplication of the role of the Committee “to examine each annual and other report of the Commission” (s.95 (1)(c), PIC Act)?*

INSPECTOR’S RESPONSE TO QUESTION FIVE:

As to (a): if the production and content of the PIC’S Annual Report is seen not only as being in purported compliance with Section 99 of the *Police Integrity Commission Act*, but also as a public account of its stewardship during the relevant year, then the monitoring of the content of such Annual Reports to ensure compliance with Section 99 of the legislation, in particular sub-section (2), would seem to come within the Inspector’s principal function in terms of Section 89(1)(a) of the legislation. Such monitoring by the Inspector should also include an assessment of the clarity and accuracy of the presentation of the relevant material in the Annual Report to ensure it is readily intelligible, and that it does not contain significant errors or omissions, because such defects, if present, would detract from its reliability and usefulness, and might call into question its compliance with the terms of section 99 of the legislation. The nature of the commentary may be discerned from the content of the copies of the relevant correspondence between Inspector and PIC *annexed hereto and marked “A”*.

As to (b), if, as suggested in the answer to (a), the exercise by the Inspector of such a review falls within the Inspector’s functions, then any potential for duplication should be seen as irrelevant. However, given the different perspectives of the Inspector, on the one hand, and the Committee, on the other, in particular taking into account the Inspector’s access to the inner workings of the PIC, the better view would seem to be that any such conflict is unlikely to emerge in practice, and, as far as I am aware, has not done so to date.

QUESTION SIX:

In correspondence to the Committee and in your Annual Report you advocate amending the Police Integrity Commission Act to make it clear to whom the Inspector can publish his reports about complaint investigations, including whether he can report on these matters to Parliament. The Inspector’s statutory functions under s.89(1) of the PIC Act include:

- (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and*
- (c) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.*

For the purpose of performing his functions, s.93 of the Act gives the Inspector:

...power to do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of the Inspector’s functions. Any specific powers conferred on the Inspector by this Act are not taken to limit by implication the generality of this section.

Section 101 of the PIC Act also provides that the Inspector may, at any time, make a special report to the Presiding Officer of each House of Parliament on any matters affecting the Commission, including, for example, its operational effectiveness or needs.

Section 103 of the PIC Act provides:

In the case of a report of the Inspector, the Inspector may include in it a recommendation that the report be made public forthwith.

Section 137 of the PIC Act protects the Inspector from liability.

- a. In light of these provisions can you please outline for the Committee the specific difficulties you have in respect of reporting on the exercise of your functions?*
- b. Has your capacity and discretion to report on matters arising from the performance of your functions, including complaint investigations, been subject to challenge?*
- c. Would it not be the case that a report by the PIC Inspector, which addresses a complaint about lack of procedural fairness, is a report dealing with a matter "affecting the Commission" and, therefore, one which may be tabled in Parliament?*

INSPECTOR'S RESPONSE TO QUESTION SIX:

As to (a): I have previously attempted to set out in some detail the "specific difficulties" which I see as inhibiting or unduly limiting the scope of the Inspector's powers as to the publication of the Inspector's reports under Section 89(1)(b) of the legislation: see copies of the Inspector's correspondence to the Chair of the Committee *annexed hereto and marked "B"*. Three issues appear to arise for consideration, none of which are expressly referred to in Section 89(1)(b) or other provisions in the legislation. First, who, if anyone, is entitled to receive a copy of the report; second, what discretion, if any, does the Inspector possess to distribute copies of the report to particular persons; third, what status is to be accorded to the report once it has been provided by the inspector to a particular person? By way of contrast, as pointed out in the correspondence referred to above, provision is made that copies of certain reports issued by the Ombudsman either must, or, alternatively, may, be provided to particular persons: see Sections 26(3) and (4), 28 and 29(1) and (2) of the *Ombudsman Act 1974*.

As to (b): having regard to the position I take, as outlined in the correspondence referred to above, as to the Inspector's limited powers in this regard, there has been no occasion to mount such a challenge, as far as I am aware. In any event, there has not been any challenge to the limited distribution of such reports to date (bearing in mind that only two reports have been published by me upholding a substantial complaint concerning the PIC, namely, the two reports in respect of the complaints by Detective Briggs (summaries of which also appeared in the Inspector's Annual Report for 2008)).

As to (c): the reference therein is to Section 101, which is confined to reports that can properly be described as "special reports", which I would view as being "one-off" reports delivered by the Inspector from time to time, and otherwise coming within the terms of that Section. As mentioned in the correspondence referred to above, I do not see Section 89(1)(b) reports as fitting that description.

QUESTION SEVEN:

Clause 28(1)(c) of Schedule 1 of the Defamation Act affords the PIC Inspector absolute privilege in respect of the publication of a matter in his capacity as Inspector. In view of the defence afforded by this provision, what particular legal issues are you concerned about in respect of publications made by the Inspector in the course of performing his statutory

functions under the PIC Act? (This particular provision is not limited to the Inspector's reports to Parliament but would appear to apply to any report by the Inspector).

INSPECTOR'S RESPONSE TO QUESTION SEVEN:

My concerns relevant to Question 6, relate to the relevant *power* of the Inspector to publish a report. However, if the Inspector published a document which the Inspector had no power to publish, an issue might arise as to whether the Inspector in so doing, could be said to have been "acting in his or her capacity as Inspector."

QUESTION EIGHT:

In the event that it is considered necessary to amend the PIC Act to clarify the reporting provisions, how do you consider the amendment could be framed so as to avoid being overly prescriptive?

INSPECTOR'S RESPONSE TO QUESTION EIGHT:

This depends on what is sought to be achieved by such amendment in the light of the three issues referred to in the response to Question 6) above. As part of its statutory functions under Section 95(1)(c) of the legislation, the Committee already has the function in relation to the Inspector's Section 89(1)(b) reports ("other report") of examining such reports and reporting "to both Houses of Parliament on any matter appearing, or arising out of, any such report." If the intention were to accord such reports the status of a "public document" within the meaning of the Defamation Act, then such reports could be presented by the Inspector either to the Parliament, or to the Committee, with the Inspector having the power to recommend that the report be made a public document. The justification for presentation of such Reports to Parliament itself might be difficult to make out, and, in any event, might be seen to give rise to an unwieldy procedure, necessarily lacking the machinery for any real and timely exercise of discretion as to whether the report should or should not be made public. If the legislation, in particular, Section 95(1)(c), was amended so as to provide that the Committee were empowered to receive such a report and to deal with such a recommendation, provision could be made for the Committee to have a discretion to consider submissions, if any, from interested parties, including the Complainant and the PIC, and perhaps representatives of the media, as to whether or not a particular report should be ordered to be made public in whole or in part. Further provision may be desirable to ensure the Committee on the receipt of such a Report acted expeditiously in the exercise of its discretion whether or not to make the Report a public document.

QUESTION NINE:

You have assessed the general procedures of the PIC "to be effective and appropriate relating to the legality and propriety of its activities". (para. 45) However, your report contains summaries of complaints of denial of procedural fairness made in relation to the PIC's reports on Operation Whistler, Operation Rani and Operation Mallard. In relation to the complaints made by Detective Briggs, you concluded that he had been denied procedural fairness.

- a. *Are you satisfied that the PIC's procedures are adequate and that they are being adhered to?*
- b. *What measures, particularly procedural and policy measures, do you regard as necessary to ensure that denials of procedural fairness do not occur in future?*

INSPECTOR'S RESPONSE TO QUESTION NINE:

Paragraph (45) of the Inspector's 2008 Annual report commenced with the proviso: "*Unless indicated to the contrary elsewhere in this Report . . .*" This was intended as a reference to such parts of the Report which obviously represented an exception to the general proposition referred to above. One such obvious exception was the opinion expressed by the Inspector in each of the Briggs' Reports that the Complainant had been denied procedural fairness by the PIC in a number of respects.

As to (a): in the light of the Inspector's findings in respect of Detective Briggs' complaints, clearly the relevant PIC procedures did not ensure that that Complainant was accorded procedural fairness;

As to (b): I am currently investigating a number of complaints concerning the PIC, in which the Complainants allege that they were not accorded procedural fairness when they appeared as witnesses before the PIC (some of these complaints being summarised in the Inspector's 2008 Annual Report). Two of these complaints arise out of the PIC's Rani Report, and one arises out of the PIC's Mallard Report. Once I have completed my Reports in each of those cases I anticipate being in a position to better consider what measures, if any, should be recommended by me to be introduced by the PIC into its procedures to ensure that procedural fairness is accorded to witnesses appearing before the PIC.

QUESTION TEN:

You have received complaints from affected persons in three of the PIC's operations—Whistler, Rani and Mallard—that they were not afforded procedural fairness.

- a. *Is it your view that any recurrent failure by the PIC to provide procedural fairness constitutes "a matter affecting the Commission", which may therefore be the subject of a report to Parliament under s.101 of the Police Integrity Commission Act?*
- b. *Is this a reporting option that you would consider in respect of these matters?*

INSPECTOR'S RESPONSE TO QUESTION TEN:

Please see Responses to Questions 6, and 9 (above), which seem to me to provide an adequate Response to Question 10. However, it is important to note that to date it is only in respect of the two Reports by the Inspector in the complaints by Detective Briggs that the Complainants' allegations concerning the PIC, that they were denied procedural fairness, have been found to have substance. Otherwise the Inspector's inquiry into such allegations has not yet been finalised so that such complaints have not at this stage been upheld.

ANNEXURE "A"

THIS IS THE ANNEXURE MARKED "A", REFERRED TO IN THE INSPECTOR'S RESPONSES TO THE COMMITTEE'S QUESTIONS ON NOTICE DATED 7 NOVEMBER 2008



NEW SOUTH WALES

*Inspector
of the
Police Integrity Commission*

Our Ref: AR2007AK

1 November 2007

Mr John Pritchard
Commissioner
Police Integrity Commission
GPO Box 3880
SYDNEY NSW 2001

Dear Commissioner

RE: ASPECTS OF THE COMMISSIONS 2007 ANNUAL REPORT

In our regular meeting today I raised the matter of seeking clarification in respect of Section 7 of the Commission's Annual Report, and it was agreed that it might be more effective in so doing if I were to direct my inquiries to Mr Kearney, Director Intelligence and Executive Services.

Accordingly, I *enclose* a copy of the letter bearing today's date which has been forwarded to Mr Kearney.

There is one other matter in respect of which I would seek clarification, if I may.

In the 2006 PIC Annual Report (Page 13) the office of Assistant Commissioner is shown as "vacant." Despite that information, in the organisational structure appearing at page 101, "Assistant Commissioner" appears as part of the organisation structure.

My understanding is that at least for some part of the relevant period, Mr Nattress, Director of Operations, has held the position of Assistant Commissioner. However,

Questions on notice and answers

there is no indication of this at Page 18 of the 2007 Annual Report, nor in the organisation structure set out at Appendix 8 of the Report.

I would therefore be grateful for any clarification that might be provided to me in respect of this matter.

Yours sincerely



The Hon P.J. Moss, QC
Inspector of the Police Integrity Commission



ABN 22 870 745 340

5 November 2007

Our ref: 16652/83
Your ref: AR2007AK

The Hon P J Moss QC
Inspector of the Police Integrity Commission
GPO Box 5215
SYDNEY NSW 2001

By hand

Dear Inspector

Re: Aspects of the 2007 Annual Report

I refer to your letter of 1 November 2007 raising two issues about the 2007 Annual report.

Mr Kearney will respond regarding the matters you have raised about section 7 of the Report.

In relation to the clarification of the office or position of Assistant Commissioner, the references in the 2006 Annual Report that you refer relate to an internal organisational full time position of Assistant Commissioner perhaps best understood more in the way of a Deputy Commissioner whose duties include assisting the Commissioner to manage the organisation. This includes exercising the functions and powers of the Commission and, to facilitate this, the holder of the position is also appointed an Assistant Commissioner under section 8 of the PIC Act.

This position of Assistant Commissioner has been vacant since early 2004 but remains on the Commission's staff establishment list as a full time position hence the reference to "vacant" on page 16 of the 2006 Annual Report and the position as part of the organisational structure on page 101.

References to this position were deleted from the 2007 Annual report as the position has not been filled for some time and I do not envisage, on current commitments, it being filled in the foreseeable future. You may be aware there was some discussion by the Parliamentary Joint Committee in the context of its review of the 2005 Annual Report of similar references to the position in that report albeit the position had been vacant since early 2004.

In these circumstances I considered it more appropriate to delete reference to the position in the 2007 Annual Report in order to reflect a more accurate description of the Commission's management and structure.

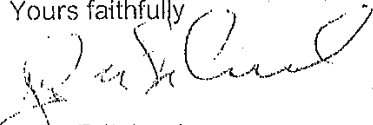
Pursuant to section 8 of the PIC Act the former Commissioner appointed Mr Andy Nattress, the Director Operations as an Assistant Commissioner to operate concurrently with his internal organisational position of Director, Operations and

LEVEL 3 111 ELIZABETH STREET GPO BOX 5215 SYDNEY NSW 2001 AUSTRALIA
TELEPHONE (02) 2337 6200 FACSIMILE (02) 2337 6299 FREECALL 1 800 622 629 www.pic.nsw.gov.au

pursuant to section 11 delegated certain functions and powers to him in that capacity. I have continued that appointment and delegation in order to assist with the discharge of the Commission's functions and exercise of powers. In doing so, Mr Nattress does not however hold or occupy the internal position of Assistant Commissioner.

I trust this information clarifies the matter for you but if not perhaps we could discuss further at our next regular meeting.

Yours faithfully



John Pritchard
Commissioner

6 November 2007

Mr John Pritchard
Commissioner
Police Integrity Commission
GPO Box 3880
SYDNEY NSW 2001

Dear Commissioner,

RE: APPOINTMENT OF ASSISTANT COMMISSIONER

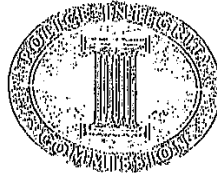
Thank you for your letter dated 5 November 2007, in response to my letter to yourself dated 1 November 2007.

I have noted the information provided in your letter concerning the appointment of Mr Nattress as an Assistant Commissioner to operate concurrently with his internal organisational position of Director, Operations.

If I may, I would like to act on your suggestion that we might discuss this matter further at one of our forthcoming regular meetings.

Yours sincerely

The Hon P.J. Moss, QC
Inspector of the Police Integrity Commission



ABN 22 070 745 340

8 November 2007

Our Ref: 16652/82

The Hon P.J. Moss, QC
Inspector of the Police Integrity Commission
GPO Box 5215
SYDNEY NSW 2001

Dear Inspector

I refer to your letter of 1 November 2007 concerning aspects of the contents of Section 7 of the Annual Report 2006-2007. I trust that the responses following your numbered paragraphs below will assist.

3) *As appears in page 43 of the Report, the total number of complaints received and assessed during the year is stated as being 1201. On the same page, there is then a breakdown as to 656 Category One complaints, 472 Non-Category One complaints, and 83 classified as not containing allegations of misconduct concerning NSWPF. However this breakdown gives a total of 1211. Is there an explanation for the apparent inconsistency between the stated total of 1201, and the apparently different total of 1211?*

This inconsistency arises from an error which occurred in tabulating the complaints data for the 2006-2007 financial year. Complaints are classified and tabulated by category and by source, the results of which appear in the Annual Report on pages 43 and 44 respectively. The discrepancy of ten complaints – the difference between the 1201 complaints classified by source and the 1211 classified by category – was not detected prior to publication of the Annual Report. Seven of the ten complaints have since been identified as not being included in the source count. The seven complaints are made up of six complaints from NSWPF (the total on p. 44 is therefore 650 not 644) and one complaint from a member of the public (372 rather than 371) which results in a total of 1208 complaints identified by source. I have been advised that it is most likely that the remaining three complaints have been mis-categorised. However, without duplicating the tabulation exercise – which is a laborious manual process – this cannot be confirmed. It is most likely that the Commission assessed 1208 complaints during the 2006-2007 financial year.

The Annual Report on the Commission's website will be adjusted to correct this error. The Secretariat of the Parliamentary Committee for the Ombudsman and the Police Integrity Commission will be advised of the error and of the update to the report.

4) *The statement appears on page 42 that complaints assessed as Non-Category One "are generally referred to the NSWPF." However, I can find no indication of what actually happened to the 472 Non-Category One complaints. There is information provided on page 45, but this is confined to Category One complaints. Can you therefore advise as to whether the whole of the 472 Non-Category One complaints were referred to NSWPF, or in any event what was the ultimate destination in respect of those complaints?*

I am not in a position to advise on the ultimate destination of Non-Category One complaints as they are not tracked by the Commission. However, it is likely that the majority, if not all, will have been referred to NSWPF.

5) *As to the 656 complaints classified as Category One complaints, the table on page 45 indicates that 505 were referred to NSWPF for investigation leaving 151 to be accounted for. Only 11 complaints were investigated by PIC, and 3 of those were Non-Category One. Thus it appears that only 8 of the Category One complaints were investigated by the PIC.*

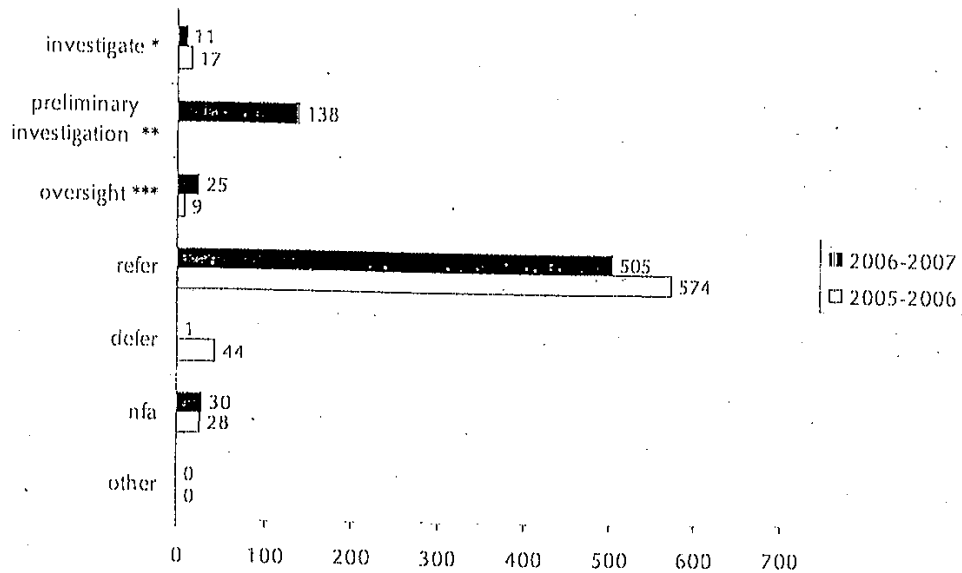
This is correct. The Commission commonly investigates only a small proportion of the Category One complaints received each year. However, this does not provide an accurate reflection of the operational activity of the Commission. There were 55 full investigations open during the year. A proportion of those investigations arose from complaints identified in the reporting year, or in previous years. The remainder arose from information obtained from sources other than complaints including informants and other agencies or were derived from an existing investigation or an internal target identification and development process.

6) *44 of these complaints are simply referred to as "defer", without further explanation. This classification does not appear to have been used in the 2006 Annual Report. Could you please advise whether in fact "defer" means that 44 Category One complaints were deferred? If so, what was the purpose in deferring such complaints and what is the current position concerning those complaints?*

Deferred complaints are those complaints assessed during the year where a final decision remains pending. They are usually complaints that have been made towards the end of the reporting period.

This classification is used each year, including 2005-06. The 44 Category One complaints identified as deferred in 2006-2007 were actually deferred in 2005-2006. There was only one Category One Complaint deferred in 2006-2007. Unfortunately it appears that during the report design process, and following editing and proofing, the graph has been adjusted with the figure '1' removed and the colour of the graph bar changed. The table supplied to the designer, which appeared in all drafts but not in the final version passed to the printer, follows.

Decisions Made Regarding Category 1 Complaints



* The 11 matters investigated included three complaints that were determined to be non-Category 1.

** The 138 matters the subject of preliminary investigation included 38 complaints that were determined to be non-Category 1.

*** The 25 matters oversighted included 17 complaints that were determined to be non-Category 1.

The Annual Report on the Commission's website will be adjusted to correct this error. The Secretariat of the Parliamentary Committee for the Ombudsman and the Police Integrity Commission will be advised of the error and of the update to the report.

7) A further 30 Category One complaints are referred to as "NFA", without further explanation, but I assume that those letters stand for "No Further Action"? Would you please confirm that this reading is correct?

This is correct. These are complaints that have also been made by the complainant to the NSWPF and therefore do not need to be referred by the Commission.

8) Thus, it appears that of the 151 Category One complaints which are not included in the 505 referred, 8 were the subject of investigation by the PIC, 44 were deferred, and 30 were subject to no further action, making a total of 82, leaving 69 of the 151 Category One complaints apparently unaccounted for. Could you please advise whether this is a correct reading of the information and if not, what is the correct position regarding these complaints?

As noted in response to item 6) above, there was only one complaint where a decision was deferred, not 44. There were 100 preliminary and eight full investigations of Category One complaints. Therefore of the 151 Category One complaints not included in the 505 that were referred, eight were investigated, 100 were the subject of a preliminary investigation, 8 were referred and oversighted, 1 was deferred and 30 were subject to no further action. This leaves four unaccounted for. I suspect that this discrepancy is associated with the possible mis-categorisation of complaints referred to in response to item 3) above. Unfortunately,

without duplicating the tabulation exercise, the nature of the discrepancy cannot be confirmed.

Yours sincerely



Allan Kearney
Director Intelligence & Executive Services

14 November 2007

Mr John Pritchard
Commissioner
Police Integrity Commission
GPO Box 3880
SYDNEY NSW 2001

Dear Commissioner,

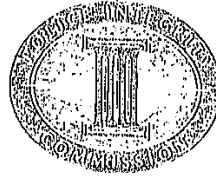
RE: APPOINTMENT OF MR NATTRESS AS AN ACTING COMMISSIONER

- 1) I refer to my letter to you dated 1 November 2007 and to your letter in reply dated 5 November 2007, in each of which this matter was adverted to.
- 2) We also discussed the matter on an informal basis today during our regular weekly meeting. During that discussion I said that I would write further to you and attempt to set out the position as I see it.
- 3) The question seems to be: Would it have been relevant to include as part of the 2006 and the 2007 PIC Annual Reports, as forming part of the operations of the Commission (Section 99), the fact that during part of the 2006 financial year, and during the whole of the 2007 financial year, Mr Nattress had been appointed as an Acting Commissioner as from 6 March 2006?
- 4) In my opinion, given the significance of such an appointment, and the fact that it has been in place since 6 March 2006, it would have been a relevant matter to have been included in each of the relevant Annual Reports.
- 5) At this stage, I have only limited knowledge of the terms of Mr Nattress's appointment. I note from today's discussion that he does not possess legal qualifications. I note from your letter that he has had functions delegated to him as an Assistant Commissioner pursuant to Section 11 of the PIC Act, but I have no knowledge of the nature of the functions so delegated.
- 6) I accept, of course, that it is only from time to time that Mr Nattress wears his hat as an Assistant Commissioner, but I have no information as to how often or in what circumstances he has exercised his relevant powers.

- 7) I have noted on occasions during my regular audits of the Commission's operations via Matrix, that he has signed correspondence to third parties in his capacity as an Assistant Commissioner.
- 8) To summarise: Given the fact of the appointment and its duration, together with the fact that on occasions Mr Nattress has entered the public arena in his capacity as an Assistant Commissioner (eg, by reason of the signing of third party correspondence), it seems to me it would have been appropriate to have included the fact of the appointment with some reference to the circumstances in which the powers had been exercised, in the relevant Annual Reports.
- 9) I accept, of course, that you did not and do not see the position in this way and, neither, apparently, did the previous Commissioner.
- 10) I note also from today's meeting that the PJC has raised a related topic for discussion vis a vis your appearance before the Committee later this year, and it may be that you would be minded to place this aspect of the matter before the PJC on that occasion.

Yours sincerely

The Hon P.J. Moss, QC
Inspector of the Police Integrity Commission



ABN 22 870 745 340

Our ref: 16652/86

16 November 2007

The Hon P.J. Moss, QC
Inspector of the Police Integrity Commission
GPO Box 5215
SYDNEY NSW 2001

Dear Inspector

RE: APPOINTMENT OF MR NATTRESS AS AN ACTING COMMISSION

I acknowledge receipt of your letter dated 14 November in relation to the above matter.

The Commission is currently giving consideration to the matters you raised and will contact you again in due course.

Yours faithfully

A handwritten signature in cursive script, appearing to read "Cathy Healy".

Cathy Healy
Executive Assistant
Police Integrity Commission



ABN 22 870 745 340

Our ref: 16652/85
Your ref: AK121107

16 November 2007

The Hon P.J. Moss, QC
Inspector of the Police Integrity Commission
GPO Box 5215
SYDNEY NSW 2001

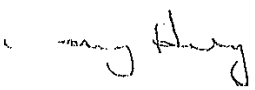
Dear Inspector

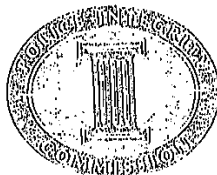
RE: 2007 PIC ANNUAL REPORT: SECTION 7 COMPLAINTS ACTIVITY

I acknowledge receipt of your letter dated 13 November in relation to the above matter.

The Commission is currently giving consideration to the matters you raised and will contact you again in due course.

Yours faithfully


Cathy Healy
Executive Assistant
Police Integrity Commission



ABN 22 870 745 340

HEALTHY
6-12-07

Our ref: 16805/18

Your ref: AK051207

20 November 2007

The Hon P.J. Moss, QC
Inspector of the Police Integrity Commission
GPO Box 5215
SYDNEY NSW 2001

Dear Inspector

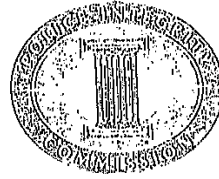
RE: 2007 PIC ANNUAL REPORT: SECTION 7 COMPLAINTS ACTIVITY

I acknowledge receipt of your letter dated 5 December 2007 in relation to the above matter and will contact your Executive Assistant, Nikki Healey, to confirm arrangements for you to meet with Mr Allan Kearney.

Yours faithfully

A handwritten signature in cursive script, appearing to read "Cathy Healy".

Cathy Healy
Executive Assistant
Police Integrity Commission



ABN 22 870 745 340

23 November 2007

Our ref: 16652/83
Your ref: AR2007AK

The Hon P J Moss QC
Inspector of the Police Integrity Commission
GPO Box 5215
SYDNEY NSW 2001

Dear Inspector

Re: Appointment of Mr Nattress as an Assistant Commissioner

I refer to your letter of 14 November 2007 regarding Mr Nattress's appointment as an Assistant Commissioner under the PIC Act.

For your information I enclose a copy of the instrument of appointment, delegation and instrument signed by former Commissioner Terry Griffin dated 6 March 2006 in relation to Mr Nattress. As previously indicated I have not revoked or varied this appointment.

I have previously indicated that in my view the questions you previously raised about the reference to Assistant Commissioner in 2007 Annual report go to the internal organisational position of Assistant Commissioner as opposed to an appointment of Assistant Commissioner under the PIC Act. Having said that I agree that it would be entirely appropriate to note Mr Nattress's appointment in the Annual Report when reporting on the Commission's operations and I will ensure this is referred to in the 2007-08 Annual Report.

As also indicated in preparation for the Commission's appearance before the PJC to consider the 2005-06 and the 2006-07 Annual reports the PJC has asked a question on notice regarding the position of Assistant Commissioner in the following terms;

The previous Committee raised a number of concerns with the previous PIC Commissioner regarding the position of Assistant Commissioner. The previous Commissioner described the ongoing status of the vacant Assistant Commissioner position as a matter for the next Commissioner. What is the opinion of the new Commissioner regarding the position of Assistant Commissioner?

The Commission is finalising its answers to these questions and when it has done so I will forward you a copy of the answer to this question.

Yours faithfully

A handwritten signature in black ink, appearing to read 'John Pritchard'.

John Pritchard
Commissioner



ABN 22 070 745 340



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INSTRUMENT OF APPOINTMENT, DELEGATION AND DIRECTION

WHEREAS:

- (i) Pursuant to subsection 8(1) of the *Police Integrity Commission Act 1996* ('PIC Act'), the staff of the Commission may include one or more Assistant Commissioners for the Police Integrity Commission;
- (ii) Pursuant to section 9 of the PIC Act an Assistant Commissioner may, to the extent to which he or she is directed by the Commissioner to do so, exercise any function of the Commissioner (other than such function as may be prescribed by the regulation for the purpose of section 9);
- (iii) Pursuant to subsection 11(1) of the PIC Act the Commission may delegate to an officer of the Commission any of its functions, other than the power of delegation under the said section 11(1);
- (iv) Pursuant to subsection 11(2) of the PIC Act the Commissioner may delegate to an officer of the Commission any of his or her functions except those functions set out in subsection 11(4) which may be delegated only to an Assistant Commissioner, and those functions set out in subsection 11(5) which, pursuant to subsection 11(6), may be delegated only to an Assistant Commissioner who has 'special legal qualifications' as that term is defined in subsection 4(2);
- (v) Andy Nattress is an officer of the Commission and currently holds the position of Director, Operations;
- (vi) It is intended to appoint Andy Nattress as an Assistant Commissioner for the Police Integrity Commission, which appointment is to operate concurrently with his position as Director, Operations for the Police Integrity Commission.

Appointment, Delegation and Direction

I, Terence Peter Griffin, being Commissioner and Chief Executive Officer of the Police Integrity Commission hereby:


- (a) Pursuant to subsection 8(1) of the PIC Act, appoint Andy Nattress as an Assistant Commissioner for the Police Integrity Commission;



- (b) Pursuant to subsections 11(1) and 11(2) of the PIC Act, delegate to Andy Nattress all functions of the Commission and of the Commissioner which may be delegated to an officer of the Commission, and including those functions referred to in subsection 11(4) of the PIC Act which may be delegated only to an Assistant Commissioner, but not including those functions referred to in subsection 11(5) of the PIC Act which functions may be delegated only to an Assistant Commissioner who has special legal qualifications;
- (c) Pursuant to section 9 of the PIC Act, direct Andy Nattress, as Assistant Commissioner for the Police Integrity Commission, to exercise any function of the Commissioner for the Police Integrity Commission that is appropriate and desirable for the performance of his duty, other than those functions referred to in subsection 11(5) of the PIC Act and any other such functions as may be prescribed by the regulations for the purpose of section 9 of the PIC Act;
- (d) Pursuant to subsection 29(2) of the *Law Enforcement (Controlled Operations) Act 1997* and subsection 13(c) of the *Law Enforcement (Controlled Operations) Regulation 1998*, delegate to Andy Nattress, as Assistant Commissioner for the Police Integrity Commission, all of the functions of the Chief Executive Officer under that Act which may be so delegated pursuant to section 29(2) of that Act.

Term of Appointment, Delegation and Direction

This instrument shall remain in force until such time as it is revoked by the Commissioner for the Police Integrity Commission or Andy Nattress ceases to be an officer of the Police Integrity Commission, whichever occurs sooner.



T P Griffin
Commissioner

Dated: 6 March 2006

Our Ref: AR2007AK
Your Ref: 16652/83

23 November 2007

Mr John Pritchard
Commissioner
Police Integrity Commission
GPO Box 3880
SYDNEY NSW 2001

Dear Commissioner,

RE: APPOINTMENT OF MR NATTRESS AS AN ACTING COMMISSIONER

- 1) Thank you for your letter dated 23 November 2007 in respect of this matter, which I received today.
- 2) I note, in particular, that you now consider it "entirely appropriate to note Mr Nattress' appointment in the Annual Report" 2007-2008.
- 3) Clearly, your letter dated 5 November 2007, and paragraph (9) of my letter to you dated 14 November 2007, must now be read in the light of your decision referred to in the preceding paragraph hereof.
- 4) I note from the terms of the delegation that the powers delegated include those referred to in Section 11(4), which include the powers of the Commissioner under Part 3, Division 4 or 5, otherwise then as excepted in respect of Section 39.
- 5) I should be grateful if I could be provided at your convenience with details of the extent to which the Assistant Commissioner has exercised the powers

delegated to him, in particular, with regard to the matters referred to in Part 3, Division 4 or 5.

- 6) I have also noted that you intend to provide me with a copy of the relevant responses to the PJC, when those responses are finalised, and I thank you for that.

Yours sincerely

The Hon P.J. Moss, QC
Inspector of the Police Integrity Commission



ABN 22 870 745 340

Our Ref: 16652/88

26 November 2007

The Hon P.J. Moss, QC
Inspector of the Police Integrity Commission
GPO Box 5215
SYDNEY NSW 2001

Dear Inspector

I refer to your letter of 13 November 2007 seeking further clarification on aspects of the contents of Section 7 of the Annual Report 2006-2007 and my letter of 8 November 2007 (ref. 16652/82). I trust that the responses following your numbered paragraphs below will assist:

3) *First, it appears from your letter that the correct total of assessed complaints should be seen as 1211 (rather than 1201 as stated on page 43). This alteration, in turn, requires that the figure 644 on Page 44 be amended to 650, and on the same page the figure 371, be amended to 372. This results in a total of 1208, and on this basis, it follows, 3 complaints are unaccounted for. ... 4) In respect of these additional ten complaints, is it possible, at this stage, to state the number that fell into the Category One assessment, and those that were assessed as being Non-Category One?*

It is not possible to state the number of Category One and Non-Category One complaints in respect of the "additional ten complaints" as three remain unaccounted for. However, of the seven that have been accounted for, one was a Category One complaint, five were Non-Category One complaints, and one did not contain allegations of misconduct by members of the NSWPF.

5) *As to the 472 Non-Category One complaints, you state that you are not in a position to advise as to the ultimate destination of these complaints. Could you please advise as to what records, if any, existed at any time in respect of these complaints which would have identified the date of the receipt of the complaint, the nature of the complaint, and how many were categorised as PSEMA complaints?*

Records for all complaints received by the Commission are maintained in the document management system, Matrix. The Matrix record includes the date of receipt, the nature of the complaint, all documentation associated with the complaint and all decisions made in respect of it. While detailed records are maintained for PSEMA and other Non-Category One

complaints, data about these complaints (beyond the number of complaints received) is not extracted from Matrix and collated for Annual Reporting purposes. Given the Commission's focus on serious police misconduct, detailed data is only extracted and collated for Category One complaints.

There were 25 PSEMA complaints referred to the Commission during 2006-2007.

6) In attempting to track what became of the 151 Category One complaints, not referred to NSWPF, you impliedly refer to a total of 147 as having been accounted for. This total seems to have been arrived at by adding 8 + 100 + 8 + 30 + 1. ... 7) ...

Please see the response to your paragraph numbered 8) below concerning the number of complaints referred.

6) cont. ... I would infer from this that the 100 Category One complaints the subject of preliminary investigation, were not referred to NSWPF, and that the Complainants were advised accordingly?

Without further research it is not possible to advise, in respect of the 100 Category One complaints that became the subject of a preliminary investigation, whether each of the complaints were also referred to NSWPF, or not, and whether the complainant was advised accordingly.

Unless there is a case, in the public interest, for not doing so, most Category One complaints that become the subject of a preliminary investigation are also referred to NSWPF at some stage. Complaints are referred when the Commission has concluded its preliminary investigation and a decision is made that the allegations do not stand up to scrutiny, are not of a kind which are capable of being investigated, or, the conduct alleged is not appropriate for full investigation by the Commission. In the case of non-referred complaints, the complainant is generally advised of the referral to NSWPF – the exceptions being anonymous complainants or those who cannot be contacted. In the case of referred complaints, complainants are usually not advised as they are generally not aware that the Commission has conducted a preliminary investigation.

Generally, it is the case that some complainants will be advised that the Commission is conducting a preliminary investigation and others will not. Whether they are advised or not will depend on whether the complaint is referred or non-referred, whether the complainant is identifiable and able to be contacted, and, whether it is appropriate to expose the Commission's involvement.

8) However I do not understand the reference to "8 were referred and overlooked," because such complaints would have been, as you say, referred to NSWPF.

I can confirm that eight Category One complaints were referred to NSWPF and overlooked by the Commission. These complaints are counted separately and not included within the 505 complaints which are referred, but not overlooked. Please see the table below following your paragraph numbered 9).

9) *It seems to me that the Category One complaints, not referred, which can be accounted for total 139 (8 + 100 + 30 + 1), leaving 12 unaccounted for.*

To clarify, the 656 complaints classified as Category One complaints were dealt with as follows:

Referred to NSWPF – not oversighted:	505
Referred to NSWPF – oversighted:	8
Investigated by the Commission:	8
Preliminary Investigation:	100
Deferred:	1
No further action	30
Unaccounted for:	4
<hr/> Total Category One Complaints:	656

As noted in my earlier letter, I suspect that the discrepancy (of four complaints) is associated with the possible mis-categorisation of complaints as no errors have been detected in the tabulation of complaints by source. Unfortunately, without duplicating the tabulation by category exercise, the nature of the discrepancy cannot be confirmed.

Should there be further queries, there may be some value in a more detailed discussion around the Commission's complaint handling practices. I would be happy to discuss further should you wish to do so.

Yours sincerely

Allan Kearney
Director Intelligence & Executive Services



ABN 22 870 745 340

Our ref: 16805/1716805/12

4 December 2007

The Hon P.J. Moss, QC
Inspector of the Police Integrity Commission
GPO Box 5215
SYDNEY NSW 2001

Dear Inspector

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

I acknowledge receipt of your letter dated 9 October in relation to the above matter.

The Commission is currently giving consideration to the matters you raised and will contact you again in due course.

Yours faithfully

Cathy Healy
Executive Assistant
Police Integrity Commission

Our Ref: AK051207

5 December 2007

Mr Alan Kearney
Director Intelligence and Executive Services,
Police Integrity Commission
PO Box 3880
SYDNEY NSW 2001

Dear Mr Kearney

RE: 2007 PIC ANNUAL REPORT: SECTION 7 COMPLAINTS ACTIVITY

- 1) Thank you for your letter dated 26 November 2007.
- 2) At today's regular meeting with the PIC Commissioner, I raised this matter and, in particular, your suggestion contained in your letter that any further exploration of this area might be more effectively carried on in the context of a discussion concerning the Commission's complaint handling practices. The Commissioner indicated that he would have no objection if I dealt directly with you in exploring the area further, and you have indicated in your letter that you have no objection to discussing the matter with me in the event that I should wish to do so. Accordingly I would like to take up your suggestion that this area be further discussed, and that that discussion take place between us at some time convenient to yourself, and of course you may invite to that discussion any other officer of the Commission whose views you consider should be taken into account.
- 3) Essentially, on the evidence referred to as reflected in the correspondence passing between us on this subject, it seems to me that there should be an examination of how the errors in the Report tabled in the Parliament at Pages

(43) – (45), could have occurred. And further, to ensure as far as possible, that there will be no repetition of such errors in future Annual Reports of the Commission.

- 4) Apart from the erroneous statistics appearing in the Report as originally printed, at Pages (43) – (45), of further concern to me is the position to which you refer in your letter dated 8 November 2007, namely,

“I am not in a position to advise on the ultimate destination of Non-Category One complaints as they are not tracked by the Commission. However, it is likely that the majority, if not all, will have been referred to NSWPF.”

- 5) Bearing in mind that the number of Non-Category One complaints is given, at Page (43), as 472, it seems unsatisfactory, to say the least, that the Commission’s relevant records do not enable a categorical statement to be made as to the ultimate destination of the Non-Category One complaints. It would seem to me that this should be rectified so that in future there will be no doubt as to the ultimate destination of all relevant complaints received by the Commission.

- 6) Also a matter for concern, it seems to me, is the position regarding the 100 Category One complaints which were the subject of a preliminary investigation, as to which you have said in your letter dated 26 November 2007—

“Without further research it is not possible to advise, in respect of the 100 Category One complaints that became the subject of a preliminary investigation, whether each of the complaints were also referred to NSWPF, or not, and whether the Complainant was advised accordingly.”

- 7) Once again, I would have thought it was essential that the Commission’s records provide a categorical and readily accessible account of what became of each of those 100 Category One complaints, and that a system should be put in place, if that has not already been done, which will overcome this problem in the future.
- 8) I have today looked at the Commission’s website in respect of the 2007 Annual Report, in particular Pages (43) – (45). First, I note that the reader of those online pages is not put on notice that amendments have been necessary due to the printed Report containing erroneous data. Unless the Commission intends to mail out an addendum of some kind to the recipients of the printed Report, it follows that those recipients are likely to remain ignorant of the changes that have been made in the online pages.
- 9) I have not at this stage seen a copy of the letter or letters apparently sent by the Commission to the Chair of the Parliamentary Joint Committee, in respect of the amendments to these pages of the Report. Accordingly, I am not aware of whether or not the Chair of the PJC has been made aware that in fact,

according to your letter dated 26 November 2007, 4 Category One complaints are regarded as unaccounted for.

- 10) If convenient, perhaps all these matters might be covered in the proposed meeting to which I have referred above? I am next scheduled to be at the Commission's premises on the morning of Wednesday 12 December 2007, and would make myself available during that time, if that is convenient to yourself.

Yours sincerely

The Hon P.J. Moss, QC
Inspector of the Police Integrity Commission

ANNEXURE "B"

THIS IS THE ANNEXURE MARKED "B", REFERRED TO IN THE INSPECTOR'S RESPONSES TO THE COMMITTEE'S QUESTIONS ON NOTICE DATED 7 NOVEMBER 2008

11 February 2008

Ms Angela D'Amore MP
Chair
Parliament of New South Wales
Committee on the Office of the Ombudsman
and the Police Integrity Commission
Macquarie Street
SYDNEY NSW 2000

Dear Madam Chair,

- 1) I acknowledge receipt of your letter dated 7 February 2008, the subject matter being the status of my Report in relation to the complaint concerning the Police Integrity Commission by Detective Briggs. In particular I note your comment therein that—

“I note that you have not included in your Report a recommendation that it be made public, nor have you circulated that Report to the presiding officers of Parliament in order that it may be tabled...”

- 2) In my opinion there is a problem concerning the publications of such reports, and the problem arises because of difficulties with the relevant legislation.
- 3) As you are aware, the principal functions of the Inspector are provided for in Section 89 of the Police Integrity Act. So far as relevant, Section 89(1)(b) provides that the Inspector's functions include dealing with complaints of

abuse of power, impropriety and other forms of misconduct on the part of the Commission, by reports and recommendations.

- 4) Included in Section 90 of the Act (the powers of Inspector) is the power to investigate and assess complaints about the Commission or officers of the Commission.
- 5) When one goes to Part 8 of the Act (Reports to Parliament) Section 101 and 102 are of some relevance to the present subject matter. Section 101 provides for special reports by the Inspector to the presiding officer of each House of Parliament on the type of matters specified in the Section, and Section 102 deals with Annual Reports.
- 6) The problems that I see arising in the present context when one has regard to these provisions in the legislation are as follows.
- 7) First, the persons to whom reports are to be published are not specified in any way. The Inspector is not provided expressly with any power to do otherwise than to deal with relevant complaints by way of reports and recommendations. I do not read Section 89 as necessarily implying that the Inspector has power to publish his reports as to complaints against the Commission to the general public.
- 8) Nor do I think the provisions of Section 101 and 102 of the legislation, referred to above, could be construed as covering the Inspector's reports dealing with complaints concerning the Commission.
- 9) Thus, it seems to me, the legislation gives no guidance, expressly, as to who should be seen as the recipients of such reports. Nor any guidance as to the status that should be accorded to such reports. As I have said, in my opinion it is not clear that the Inspector has any power to publish the reports so that they become public reports. Nor does there appear to be any power in the legislation authorising the Inspector to present such reports to Parliament.

- 10) If this conclusion is accepted as reasonable, it follows that an amendment to the legislation would appear to be desirable to clarify these issues.
- 11) In the case of the Briggs' Report, I took the view that the recipients should be seen as comprising the Complainant, the Police Integrity Commission, your Committee, and the Commissioner of Police, and a copy of the Report was delivered more or less simultaneously by electronic transmission to each of those recipients.
- 12) I included the Commissioner of Police as a recipient, in view of the still pending proceedings by the Commissioner concerning Detective Briggs under Section 173 of the Police Act. Clearly, it seemed to me, the Briggs' Report could have a bearing on the outcome of the Section 173 proceedings.
- 13) I should add, that before I published my report in the Briggs matter, I obtained the express written consent of the Complainant to revealing his identity in the report.
- 14) In the event the problem I have attempted to clarify above is not overcome, by amendment of the legislation or otherwise, it is likely that the problem will get worse rather than go away. This is because there are a number of other complaints to the Inspector concerning the Commission in the pipeline, and each of these may in due course be the subject of such a report.
- 15) I should specifically inform you that I am currently investigating a further complaint by Detective Briggs in relation to material concerning him published in the Whistler Report, and I have brought these further complaints to the attention of the Commission in writing, and I am awaiting a response from the Commission before proceedings further to deal with these complaints.
- 16) I should also add that I have recently received a complaint concerning the Commission from another officer who complains of material published

concerning herself in the Whistler Report. At this stage I have written to that Complainant seeking further and better particulars of her complaint.

17) This seems to me to clarify, as far as I am able, the issues raised in your letter. However, if I can be of any further assistance I should be pleased to offer that assistance forthwith.

Yours sincerely

The Hon P.J. Moss, QC
Inspector of the Police Integrity Commission



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

28 FEB 2008

The Hon Peter Moss, QC
Inspector of the Police Integrity Commission
GPO Box 5215
Sydney NSW 2001

Dear Inspector

I am writing in response to your correspondence of 11 February 2008, where you raise a number of issues concerning your ability to report on and publish complaints investigations.

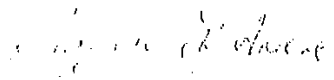
The Committee notes your concerns regarding these important aspects of your functions, but is concerned that mandating to whom you should report the results of complaints investigations will stifle your discretion in reporting to whomever you believe is most appropriate.

This is not to say that changes to the legislation are not merited, but that they may require further consideration. Perhaps you may care to develop some guidelines around Special Reports and reporting on complaints investigations in consultation with comparable agencies such as the Inspector of the Independent Commission Against Corruption and the NSW Ombudsman. As part of this process you may also care to note what particular legislative amendments you feel are necessary.

Once these guidelines and proposed amendments have been developed, the Committee would be in a more informed position to assess if legislation is necessary.

Thank you for your advice and assistance in this matter.

Yours sincerely


Angela D'Amore, MP
Chair



NEW SOUTH WALES

*Inspector
of the
Police Integrity Commission*

19 May 2008

Ms Angela D'Armour MP
Chair, Committee on the Office of the Ombudsman
and the Police Integrity Commission
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Madam Chair,

- 1) I refer to your letter dated 28 February 2008, and apologise for the delay in responding thereto. However, I felt it desirable to consider the issues that appear to be involved with considerable care, and also to review the relevant reports of my predecessors.
- 2) The matters that appear to need clarification are those matters adverted to in my letter to you dated 11 February 2008, which might be summarized as follows: the determination of the persons/entities to whom the Inspector's Reports dealing with complaints concerning the PIC may be published by the Inspector; whether legislation is desirable expressly authorising such Reports by the Inspector to be sent to and received by the relevant recipients and the status of such Reports once published to the authorised recipients. Further in what circumstances, if any, are such reports to be in the public domain as public documents open to public discussion?

- 3) Your letter makes reference to comparable agencies, such as the ICAC Inspector and the NSW Ombudsman. Accordingly, in what follows I have had regard to the relevant statutory provisions relating to those entities.
- 4) The relevant provisions of the Police Integrity Act relating to the Inspector, are Sections 89(1)(b) (dealing with complaints by reports and recommendation); 101 and 102 (Reports to Parliament); 103 (protection of Reports by attachment of Parliamentary privileges and immunities); 137 (protection of Inspector from liability).
- 5) The equivalent provisions relating to the ICAC Inspector under the ICAC Act are Sections 57(1)(b) and (cc), 57F, 77A and 77B, 78 and 109.
- 6) In the present context, each of the PIC Inspector and the ICAC Inspector are in the same statutory position vis a vis dealing with relevant complaints by Reports and recommendations. That is to say, the statutory provisions are, so far as relevant, identical.
- 7) In the case of the PIC, all Reports are required to be presented to Parliament: Part 8, Sections 96 to 102. Similarly, in the case of the ICAC, all its Reports must be presented to Parliament: Sections 74, 75 and 76.
- 8) Under the terms of the Ombudsman's Act, there is no provision for the appointment of an Inspector. However, it may be relevant in the present context, to note that unlike the PIC and the ICAC, in addition to presenting its Reports to Parliament (Sections 30 and 31) there is also provision made for the giving of Reports to the recipients identified in those provisions: Sections 26 (3) (mandatory), 26 (4) (discretionary), Section 28 (mandatory), Section 29 (1) (discretionary or mandatory, depending on the circumstances) and 29 (2) (discretionary).
- 9) It might also be relevant to mention, in relation to both the PIC Inspector and the ICAC Inspector, that each is specifically referred to in Schedule 1 of the Defamation Act 2005. Section 27 of that Act dealing with the defence of

absolute privilege, provides, so far as relevant, that an occasion of absolute privilege arises where (d) a matter is published by a person or body in any circumstances specified in Schedule 1. The ICAC Inspector is referred to in Clause 19 of Schedule 1, and the PIC Inspector in Clause 28 thereof.

- 10) For the sake of completeness, I should also mention that Section 28 of that Act dealing with defence for publication of "public documents" defines the meaning of that expression in subsection 4.
- 11) As mentioned above, in order to respond more fully to your letter, I have conducted a review of all reports compiled by my predecessors, dealing with complaints concerning the Police Integrity Commission.
- 12) There appear to have been eleven of such Reports, nine of those having been compiled by Mr Findlay, QC, one by Mr Ireland, QC, and one by my immediate predecessor, Mr Wood, QC. Apart from one of those complaints which was upheld in part, none of the complaints the subject of those reports was upheld. However, in some of the reports there is contained some criticism of the Commission, for example, lack of timeliness. In the majority of the reports issued by Mr Findlay there is no reference to the identity of the recipients. However, in those cases I would assume a copy of the Report was provided to each of the Complainant and the Commission. In the case of one of Mr. Findlay's Reports (29 April 2002) the named recipients were the Commission, the Minister for Police, the Director-General of the Police Ministry, the NSW Crimes Commission and the Acting Police Commissioner. Mr. Ireland's report was expressly confined to the Complainant and the Commission. Mr. Wood's Report is silent as to the identity of the recipients, but I would infer they were confined to the Complainant and Commission.
- 13) It may be important to make it clear that none of these earlier reports appear to have raised the type of substantial complaints which I upheld in the Briggs' Reports, copies of which your Committee has been provided with.

- 14) I am also in the course of investigating complaints arising out of Operation Rani and Operation Mallard. These complaints which, as I say, are currently under investigation by me, each alleges a substantial denial of procedural fairness on the part of the Commission. I have, of course, at this stage, reached no conclusion in relation to these complaints.
- 15) I think it might also be helpful to make clear that, to date, since my appointment as Inspector, the vast majority of matters complained of were not within my jurisdiction, or, alternatively were comparatively simple matters and not upheld by me. In those cases the matter can be dealt with by way of letters sent to the Complainant, and if desirable to the Commission as well, explaining why the complaint was not within jurisdiction, or alternatively the grounds on which it was dismissed. These outcomes, of course, do not give rise to what I see as the present problem.
- 16) What I have described as the present problem, may be illustrated by reference again to the complaints by Detective Briggs, and the two reports issued in respect of those complaints by me upholding those substantial complaints. Essentially, the question is how should the Inspector "deal with" such complaints under Section 89 (1) (b)? At the very least, it seems to me, clarification is desirable in the legislation as to whether the Inspector has a complete discretion in nominating the recipients of reports dealing with such complaints, and if not, how is the identity of such recipients to be determined? The further question that arises, it seems to me, is that in relation to such substantial complaints being upheld, or though not upheld, where the Report includes material raising significant criticisms of the Commission or its officers, should there be a provision whereby such Reports can be submitted by the Inspector, in effect, to Parliament? Does the relevant principle of accountability attaching to entities such as the Police Integrity Commission, require that such reports be available for public discussion and dissemination?
- 17) Of course, reference can and should be made in the Inspector's Annual Report to any substantial complaints which have been upheld by the Inspector, but such a reference would be no more than a summary of the Report itself, and

such publication may occur well after the publication of the Report itself.

- 18) Might I suggest that consideration be given by your Committee to liaising on these issues with the Joint Parliamentary Committee which oversees the ICAC Inspector, who, as mentioned above, is in the same position, so far as the legislation is concerned, as the PIC Inspector, thereby providing an opportunity for the views of the ICAC Inspector to be added to the views expressed herein?

Yours sincerely



The Hon P.J. Moss, QC
Inspector of the Police Integrity Commission



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

19 June 2008

The Hon Peter Moss QC
Inspector of the Police Integrity Commission
GPO Box 5215
Sydney NSW 2001

File ref: OMB379

Dear Inspector

I am writing in response to your correspondence of 19 May 2008, where you raise a number of issues concerning your ability to report on and publish complaints investigations.

In paragraph 16 of your letter, with reference to the complaints by Detective Briggs, you identify a need for clarification in the legislation as to how the Inspector should "deal with" complaints under s.89(1)(b) of the *Police Integrity Commission Act 1996*. Particular questions that you have identified for clarification concern the extent of the Inspector's discretion to nominate the recipients of reports and, in the case of a report by the Inspector criticising the Commission or its officers, the need for a specific provision to enable the Inspector to submit such reports to the Parliament.

I note that you are of the view that there is merit in the Committee examining these issues but it is not entirely clear from your letter as to your own position on each question. I would be grateful if you could confirm whether or not you are seeking amendments to the legislation to explicitly provide the Inspector with complete discretion in nominating the recipients of complaint reports and the power to submit such reports to Parliament.

Your advice on these points would be appreciated in order that the Committee is in a position to fully consider the matters you have raised at the next available opportunity, which is likely to be at its next deliberative meeting in September.

Thank you for your advice and assistance.

Yours sincerely

A handwritten signature in cursive script that reads 'Angela D'Amore'.

Angela D'Amore MP
Chair



*Inspector
of the
Police Integrity Commission*

Your Ref: OMB379

27 June 2008

Ms Angela D'Armour MP
Chair, Committee on the Office of the Ombudsman
and the Police Integrity Commission
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

"Confidential"

Dear Madam Chair,

- 1) Thank you for your letter dated 19 June 2008.
- 2) I was somewhat hesitant to burden your Committee with my "own position" on the issues raised by me in my letter dated 19 May 2008, preferring to point out what the perceived difficulties are and leaving it to the Committee, if it so determines, to formulate amendments to overcome these difficulties.
- 3) However, as you have expressly sought my position on these issues, I have, of course, no objection in stating what that position is.
- 4) First, the present uncertainty as identified in my letter of 19 May 2008, is quite unsatisfactory, and this in itself, in my opinion, requires the issues I have identified to be clarified by amendment of the legislation.
- 5) Second, there seems sound reasons why those Inspector's Reports which uphold substantial complaints concerning the Commission, for example, in the

case of a denial of procedural fairness, such as in the case of Detective Briggs, should be in the public domain and available for public scrutiny, because of the clear public interest involved in such a Report, and also as a means of ensuring that the Commission is seen to be publicly accountable where the Inspector has upheld a substantial complaint concerning the Commission.

- 6) I trust this does make my own position clear, but in the event that you feel it does not, please do not hesitate to advise me to that effect, in which case I will respond as best I can.

Yours sincerely

The Hon P.J. Moss, QC
Inspector of the Police Integrity Commission

Chapter Three - Follow-up questions and answers

Following the General Meeting, the Committee wrote to the Inspector with a number of follow-up questions arising from his evidence. The Committee's questions are set out below; each question is followed by the Inspector's answer.

1. THE INSPECTOR'S CAPACITY TO PUBLISH REPORTS

Former PIC Inspector Finlay's report

In 2002, the previous Committee on the Office of the Ombudsman and the PIC corresponded with PIC Inspector Mervyn Finlay about the public status of his preliminary report on the *Four Corners* program in November 2001 concerning Operation Florida. Inspector Finlay had provided the report to the following parties, having certified, pursuant to section 56(4)(c)²⁷ of the PIC Act, that it was necessary in the public interest:

- firstly to the Director General of the Ministry for Police, who had drawn the matter to his attention;
- secondly that any relevant part of the report be provided to Mr Malcolm Kerr MP, who had requested information from the PIC;
- then to all Members of Parliament and to the Committee on the Office of the Ombudsman and the PIC;
- finally to the Parliamentary Library and to the Library of the Attorney General.

In these circumstances, Inspector Finlay did not consider that the tabling of his report in Parliament was called for. However, in June 2002, in response to a request for clarification from the Committee, he certified that, pursuant to section 56(4)(c) of the Act, it was necessary in the public interest that the contents of his report be divulged to the public at large. The Committee subsequently attached the report as an appendix to its report on the *Sixth General Meeting with the Commissioner of the Police Integrity Commission* (June 2002).

Former PIC Inspector Wood's recommendation

In November 2006 the Joint Parliamentary Committee of the last Parliament tabled its *Report on the Ten Year Review of the Police Oversight System in New South Wales*. In evidence before that inquiry the previous PIC Inspector, the Hon James Wood QC, suggested amendments to the PIC Act to clarify and make express provision for the Inspector to report to Parliament. The JPC consequently recommended amendments to the Act in line with Inspector Wood's suggestions. (See Attachment A)

There have subsequently been no amendments to the Act to give effect to the Committee's recommendations.

ICAC Inspector's report on a complaint from Mr Breen

In September 2008, the ICAC Inspector tabled a special report on issues relating to ICAC's investigation of allegations against the Hon Peter Breen MLC. Mr Breen had complained about ICAC's investigation to the ICAC Committee, which had then referred the complaint to

²⁷ Section 56(4)(c) of the PIC Act provides that, despite the secrecy provisions of the Act, a person may divulge information in accordance with a direction of the Commissioner or Inspector, if the Commissioner or Inspector certifies that it is necessary to do so in the public interest.

the Inspector. The ICAC Inspector provided the report to the Presiding Officer of each House of Parliament and recommended that it be made public, pursuant to sections 77A and 78(1A) of the ICAC Act. Sections 101 and 103 of the Police Integrity Commission Act make the same provisions for the PIC Inspector.

Your suggested amendment to the Police Integrity Commission Act 1996

In your answer to question on notice number 8, you suggest amending section 95(1)(c) of the PIC Act to provide for the Committee:

- to receive a report from the Inspector and deal with a recommendation to publish it;
- to have a discretion to consider submissions, if any, from interested parties, including the complainant and the PIC, and perhaps representatives of the media, as to whether or not a particular report should be ordered to be made public in whole or in part.

However, the Committee's general monitoring and review role is subject to the statutory limitations found at section 95(2) of the PIC Act, which 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, 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.

INSPECTOR'S COMMENTS

Inspector's capacity to publish reports

As to the material relating to Inspector Finlay QC: I note from the material referred to that on the last day of his term in office as Inspector, he wrote a letter dated 3 June 2002 to the then Chairman of the Joint Parliamentary Committee.

From the content of that letter, it would appear that Inspector Finlay released copies of that report to Members of the NSW Parliament after certifying "pursuant to Section 56(4)(c) of the Act that it is necessary in the public interest. "

His letter concluded by further certifying pursuant to the same provision and on the same basis that "the report be divulged to the public at large ... "

It is not entirely clear to me why Inspector Finlay followed the course to which I have referred above. First, I am not entirely clear as to why he chose Section 56(4) as a vehicle for the release of the report, apparently to Members of Parliament, and second how the second release under that provision could result in the report being available to members of the public, given the effect of subsection (5) of Section 56, which provision clearly applies to releases under subsection (4).

However, it would appear, by clear implication, that Inspector Finlay took the view that he had no power to release the report generally under Section 89(1)(b) of the Police Integrity Commission Act. As I have had cause to observe previously, in correspondence between myself and the Parliamentary Joint Committee, each of my predecessors appears to have taken the view that Section 89(1)(b) did not empower the Inspector to release complaint reports other than to the Complainant and the Commission, with the exception of a limited number of others, such as the relevant Minister and the Commissioner of Police, and so on.

As to Inspector Wood's Recommendation

The opinion of Mr Wood QC as set out in the material to which you have referred me, seems to be consistent with my own position in this regard. I note that despite the recommendations of the P JC that the Act should be relevantly amended to overcome the problem as perceived by Mr Wood, and myself, that no amendment has been put forward. This may be because there is opposition in some quarters to making the Inspector's complaint reports a public document. No doubt members of the Committee would be better informed than myself as to whether there is any evidence of such opposition.

As to the ICAC Inspector's Report on the Breen Complaint

I have read only part of that lengthy report at this stage. As I understand that situation, the allegation by My Breen was that the ICAC had breached parliamentary privilege. It may be that such an unusual situation, involving such an important subject matter, may have justified regarding the resultant report as a "special report" within the meaning of the legislation.

I note from the ICAC Inspector's Annual Report 2007-08, at page 3, that there is a reference to my 2007-08 Annual Report and my suggestion therein that there is a lack of clarity as to how and to whom complaint reports of the Inspector can be published. The Inspector then comments as follows---

If such an uncertainty is thought to exist, I concur with Inspector Moss that it is in the public interest to amend the relevant legislation so that any uncertainty is removed. The legislation should make it clear that Inspector has a discretion as to how and to whom reports concerning the complaints can be published.

My "suggested amendments to the Police Integrity Commission Act 1996"

I would not have thought the possible amendment as suggested by me could conceivably cause the PJC to be in breach of Section 95(2) of the legislation. The Committee would be simply receiving the Inspector's complaint report with a view to publishing it as a public document. Please see my comments above. As I have stated, I have some difficulty in comprehending how that particular statutory provision is a suitable vehicle for the release of the Inspector's complaint reports.

Question

- a. *What is your view of Inspector Finlay's interpretation of his certification power under the secrecy provisions as providing for the dissemination, in the public interest, of information gained in the performance of the Inspector's functions?*

ANSWER

Please see my comments above. As I have stated, I have some difficulty in comprehending how that particular statutory provision is a suitable vehicle for the release of the Inspector's complaint reports.

Question

- b. *Do you think that, having made his report available to Members of Parliament and a number of other individuals and agencies, he could have tabled the report with the Presiding Officers?*

Follow-up questions and answers

ANSWER

What I do not understand, is why if each Member of Parliament had a copy of the report, one of those Members did not simply table it. As I have observed above, it seems clear enough, that Inspector Finlay did not consider he had power to present his report to Parliament under Section 89(l)(b).

Question

c. *Can you advise the Committee on your view of the approach adopted by the ICAC Inspector in relation to reporting on the Peter Breen complaint investigation cited above?*

ANSWER

Please see my response to this matter above.

Question

d. *If the Police Integrity Commission Act 1996 is silent on the issue of who should receive a complaints report, then by implication this decision is left to the discretion of the Inspector on a case-by-case basis. Would you agree that the Inspector is the person best placed to make these decisions?*

ANSWER

It is not simply that the Act "is silent on the issue of who should receive a complaints report." As I stated in my response to the PJC's Questions on Notice, the most important issue is whether the Inspector's complaint reports should be made public. Given that the reports of the PIC giving rise to the complaint is itself a public document, what is the argument against a provision that the Inspector's complaint reports themselves also be public documents? Where the Inspector finds that an "affected person" in one of the PIC public reports has been denied procedural fairness, involving the publication of unauthorised material by the PIC damaging that persons reputation, why should not the Inspector's report pointing out this situation be made public? The other issues relating to the release of these reports, in my opinion, are subsidiary to this issue of whether the Inspector's complaint reports should be made public.

Question

e. *What mechanisms can you employ to ensure a report's confidentiality when the report is provided to a complainant or third party?*

ANSWER

If the Inspector's complaint reports when issued by the Inspector to the limited audience referred to above, is not protected by being a public document, then clearly the Defamation Act would apply to the further publication of the document and thus inhibit such further publication and discussion of the Inspector's complaint report. I think I have made it clear that I do not consider Section 56(4) to be a suitable vehicle for the release of an Inspector's complaint report. If the release by the Inspector, as currently happens, of a complaint report to the limited parties referred to above meant that each of those parties individually was restricted to access to the content of the report, this could give rise to practical difficulties. For example, if the Commissioner of Police is a recipient, as happened in the Briggs case, the Commissioner would want to be in a position to disseminate the material to various organs of NSW Police. If the DPP were a recipient, there would be little point in releasing the report on an individual basis to the DPP, if the latter could not disseminate the information within the DPP's office.

Similarly, if the Complainant were compelled to receive a copy of the Inspector's complaint report on an individual basis, this, in my opinion, would unduly inhibit the reasonable dissemination that the Complainant may want to undertake in respect of the content of the Report, for example among members of his family and colleagues, and, perhaps, to seek legal advice in respect of the report.

Question

f. In your Response to Questions on Notice, Question 6(c), you describe "special reports" as "one-off" reports delivered by the Inspector from time to time, and otherwise coming within the terms of that Section [101]" and that you do "not see Section 89(1)(b) reports as fitting that description". Given that s.101 makes provision for reports to the Presiding Officers on "any matters affecting the Commission" could you expand on your reasons why "special reports" do not fit Section 89(1)(b), including your interpretation of the expression "any matters affecting the Commission"?

ANSWER

I do not think I can take this aspect of the matter much further than I have taken it in correspondence between myself and the Committee and in the relevant response to the PJC's Questions on Notice. Under Part 6 of the Police Integrity Commission Act, appears Section 89(1)(b) which provides in effect that the Inspector is to deal with complaints by reports and recommendations. It follows, it would seem to me, by implication, that if the Inspector is "to deal" with such complaints by reports and recommendations, then the reports must be published to someone by the Inspector. But apart from what might arise by implication, there is no guidance whatsoever as to whether the Inspector has a discretion to publish as the Inspector sees fit, and more importantly, as I have said above, there is no provision giving the document the status of a public document so that it may freely be discussed by members of the public.

Question

g. The Briggs matter highlights a situation where the Inspector can become aware of substantial matters relating to the PIC through a complaint investigation and you have observed to the Committee that such cases "should be in the public domain and available for public scrutiny, because of the clear public interest involved in such a Report..."²⁸ Furthermore, you have alerted the Committee to the fact that there are a number of complaints investigations in the pipeline that may be the subject of reports. It is likely then "that the problem will get worse rather than go away".²⁹

The previous PIC Inspector raised concerns similar to yours and the JPC recommended amendments to the PIC Act accordingly. Yet, after two years, these amendments have not been forthcoming.

- i. Could you advise the Committee on your view of the previous JPC's recommendations in response to Justice Wood's suggestions?*
- ii. Pending the introduction of any legislative amendments as recommended by the Committee, how do you propose to make public any substantive matters relating to PIC that you might uncover in complaints investigations in the meantime?*

²⁸ Inspector's correspondence to the Committee 27 June 2008

²⁹ Inspector's correspondence to the Committee 11 February 2008, point 14

Follow-up questions and answers

iii. For example, if the "Special Report" provision of s.101 is interpreted widely, particularly when considered with the "Incidental Powers" set out in s.93, are you unable to make a special report on such matters to the Presiding Officers?

iv. In the absence of a challenge, what is the impediment to you reporting publicly?

ANSWER

So far as the PJC's recommendation to Parliament is concerned, that is certainly one way of overcoming the problem. However, if the Inspector produces a number of complaint reports each year, let it be assumed finding a failure on the part of the PIC to accord procedural fairness to the Complainant, is it the best avenue in order that such reports be made public for them to be presented to the Parliament, rather than to the PJC, or is there some other method of giving the Reports the status of a document tabled in the Parliament?

Pending the introduction of a relevant legislative amendment, it appears to me that the only way the Inspector can make the complaint reports public is by summarising the same in the Inspector's Annual Report, a course I followed in my 2008 Annual Report as the Committee would be aware. However that has a number of drawbacks, for example, the Annual Report may appear many months after the release of the Inspector's particular complaint report, and a summary is not to be equated with a full report. However, the publication of such summaries in the Inspector's Annual Report, in my opinion, certainly provides a very important vehicle for the release to the public of the nature of the complaints upheld by the Inspector. The importance of there being a public document containing details of complaints upheld by the Inspector, was graphically exemplified by the content of written submissions in the matter -of *Alford* addressed to the PIC in confidential proceedings last Monday afternoon. Those submissions, in effect, relied on my 2008 Annual Report, in which a summary of the Briggs' complaints appeared, in order to provide a basis for an important aspect of the submissions. But for the Annual Report being a public document, the Police officer, on whose behalf the submissions were made, would have been denied access to the content of the Briggs' complaint reports.

As to what is the impediment in the Inspector reporting a complaint report in the absence of challenge, I cannot take this matter further, or make my position clearer, than as in the recent responses to the Questions on Notice to the PIC (response to Question 7).

Question

h. In your December 2007 report on the complaint by Detective Briggs you found that there had been "a denial of procedural fairness on the part of the Commission". You also found, however, that this denial of procedural fairness had been inadvertent and this opinion "is intended to be wholly dissociated from any moral overtones either in respect of the presiding Commissioner or the Commission".³⁰ S.89(1)(b) of the PIC Act sets out the function of the Inspector "to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or Officers of the Commission...". Are your findings (of inadvertent denial of procedural fairness with no moral overtones) deemed to be abuse of power, impropriety or misconduct on the part of the PIC and as such fall within the ambit of S.89(1)(b)? If not, can they by default then be dealt with under s.101?

³⁰ Report by the Inspector of the Police Integrity Commission re: Complaint by T.S.Briggs of the NSW Police, 11/12/07, p.10

ANSWER

The quotation referred to I took from a leading Privy Council decision (*Mahon v Air New Zealand* [1984] AC 808) on what must be done by a Tribunal such as the PIC to accord the particular witness procedural fairness. However, there is no doubt that a breach of procedural fairness by the PIC, where the PIC is under a duty to accord procedural fairness amounts to an abuse of power, impropriety and misconduct on the part of the PIC.

Question

- i. *Making an amendment to s. 95 along the lines you have suggested³¹ would involve a fundamental change to the jurisdiction of the Committee as intended by Parliament³², as it would involve the Committee weighing up decisions on particular matters investigated by the Inspector and the PIC (matters the Crown Solicitor has advised as being clearly outside the Committee's jurisdiction).*
- i. *Do you consider it appropriate for a parliamentary oversight committee to have such responsibilities when the Inspector is meant to be accountable to the Committee for decisions on the exercise of his or her functions?*
- ii. *Would this proposal have the potential to undermine the independence of both the PIC and the Inspector and lead to allegations of political interference in the exercise of each body's respective functions?*

ANSWER

The suggestion that Section 95 of the legislation might be relevantly amended to enable the PJC to publish the Inspector's complaint reports, is merely a suggestion which would give such reports the status of a document published in Parliament, and the suggestion is put forward only on the basis that it might provide an alternative to the Inspector actually presenting complaints reports to Parliament. If, on this hypothesis, the Parliamentary Joint Committee were also given a discretion as to whether to make the document public, all that would involve, it would seem to me in a proper case, was for the public interest to be taken into account.

2. OTHER MATTERS ARISING FROM THE ICAC INSPECTOR'S REPORT

In the ICAC Inspector's report on the Breen matter, Mr Kelly was critical of the lack of clear lines of responsibility and accountability in an investigation team, which the Inspector attributed to the matrix-style management operating at ICAC. Matrix management was favoured by the previous PIC Commissioner.

Question

- j. *Do you consider that there are clear lines of responsibility and accountability for decisions and actions that are taken in current PIC operations?*

³¹ Response to Question on Notice No. 8

³² In his second reading speech on the *Ombudsman (Amendment) Bill 1990*, which established the Committee, the then Attorney General said that:

The joint committee is not intended to operate as an appeal body or tribunal. It will not review or enforce the Ombudsman's recommendations. That would be clearly inappropriate. Rather, it is intended that the committee will look at general operational and policy matters.

Follow-up questions and answers

ANSWER

Ultimately, as I see the position, the Commissioner takes the responsibility for, and must be accountable for, decisions and actions taken in current PIC operations;

Question

k. Do you consider that a lack of clear lines of responsibility and accountability within the PIC, particularly in the team working on Operation Whistler, may have contributed to the failure to provide procedural fairness to Briggs?

ANSWER

As you will note from my recent response to PIC Questions on Notice, no explanation has ever been forthcoming from the Commission to explain the publication of the unauthorised material concerning Detective Briggs in the Whistler Report. Given the lack of any explanation, I have inferred that an explanation cannot be uncovered by the Commission, given the time that has passed since the publication of the Whistler Report, the change in Commissioner, and so on.

The ICAC Inspector's report was critical of the lack of consideration given to the issue of parliamentary privilege when executing a search warrant on a parliamentary office.

Question

l. Do you consider that current PIC procedures in relation to the application for and execution of search warrants pay adequate attention to the issue of parliamentary privilege?

ANSWER

I have never seen any evidence that would allow me to form a view on this subject matter, and certainly I have seen no evidence to suggest that the PIC does not pay adequate attention to the issue of parliamentary privilege.

APPENDIX A

Extract from *Report on the Ten Year Review of the Police Oversight System in New South Wales*, Committee on the Office of the Ombudsman and the Police Integrity Commission, November 2006, pages 123-5

- 6.1.9 Another issue raised by the Inspector related to his view that the legislation lacked clarity in respect of where he was to submit his reports. Section 89(1)(b) of the Police Integrity Commission Act provides that it is one of the Inspector's principal functions to:
- to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission.
- 6.1.10 However, this section does not specify to whom the Inspector is to make such reports about complaints concerning the PIC or the conduct of Commission officers.
- 6.1.11 The Inspector explained that:
- Mr WOOD:** . . . the Inspector has the power to issue a report but it is by no means clear to whom the report should go. I know that Mr Finlay, when he was the Inspector, did provide a report in relation to Operation Florida and the exposure of the proposed investigation through a television program, but the legislation does not make it entirely clear to whom the Inspector should report. My understanding in the past is really if there have been reports they have primarily gone to the PIC itself and in each case, where necessary, there has been a follow-up and a change in procedures. I think probably the Inspector can report to either Parliament or to this Committee.
- CHAIR:** I must say I had thought that the legislation allowed you to report to the Parliament.
- Mr WOOD:** It just says "report", as I understand. The legislation is not clear. If it said, "Report to Parliament", that would be clear.³³
- 6.1.12 The reporting provisions at ss.101 and 102 related to Special Reports and Annual Reports made by the Inspector and do not seem to provide for the situation in which the Inspector may wish to make a report in relation to a complaint that was not classed as a Special Report. These sections provide:
- 101 Special reports**
- The Inspector may, at any time, make a special report to the Presiding Officer of each House of Parliament on:
- (a) any matters affecting the Commission, including, for example, its operational effectiveness or needs,
 - (b) any administrative or general policy matter relating to the functions of the Inspector.

³³ Transcript 24/8/06 p.29.

102 Annual reports

The Inspector is required to prepare, within the period of 4 months after each 30 June, a report of the Inspector's operations during the year ended on that 30 June and furnish the report to the Presiding Officer of each House of Parliament.

6.1.13 The Committee tried to clarify the matter further:

Mr GEOFF CORRIGAN: I was just looking at section 101 of the Act, which says, "Reports by Inspectors: Special reports. The Inspector may at any time make a special report to the presiding officer of each House of Parliament". Is that not clear?

Mr WOOD: That is probably clear enough in that respect. . . . That is not included in part 6, it is a separate matter. . . . It is a report on the matters referred to, A and B, it is not actually a report on investigation of a complaint. Obviously, of course, the annual report is a separate matter. I fully understand that is to be provided to the presiding officer of each House. In fact, I have completed that report and it will be available as soon as it is printed. But section 101 does not deal with the problem I had in mind.³⁴

6.1.14 Formal reports by the Inspector are confined to complaints where an inquiry is conducted or where a major matter requires attention. However, the majority of complaints to the Inspector expressed dissatisfaction with the PIC's decision as to whether or not to investigate a complaint and did not usually result in a report:

Mr WOOD: . . . for a large number of the actual complaints that come in—in fact, the vast bulk of them—the complaint is really misguided or not of that kind that would require the Inspector to intervene, because a decision, for example, by the PIC not to investigate a matter has to really be unreasonable before the Inspector can make a recommendation that the PIC relook at it. So in those cases the practice has been followed that where the complaint is dismissed both the PIC and the complainant are informed of that fact and of the reasons for it; it has not led to any formal report. . . .³⁵

6.1.15 The Committee considers that the *Police Integrity Commission Act 1996* should be amended to make express provision for the Inspector to be able to report to Parliament at his discretion in relation to any of his statutory functions. This proposal would ensure that there is no doubt that the Inspector can report to Parliament, where he considers this to be appropriate, on any matter that is connected with his oversight of the PIC but which may not be captured by the current reporting provisions contained in the Act. The proposed amendment should extend to the Inspector's capacity to report to Parliament as necessary on issues of misconduct, impropriety or abuse of power on the part of the PIC or its officers, including matters the Inspector becomes aware of other than by way of a complaint. While the Committee interprets the Special Report provision found at s.101 of the Act widely, it is not specific to the Inspector's functions at s.89(1)(b), which state that he is to deal with complaints by way of reports and recommendations.

6.1.16 It is relevant to note that the example provided by the Inspector gives a concrete demonstration of the need for such amendment: this matter did not stem from a complaint and there was a public interest to report. The report in question was compiled by one of his predecessors, the Hon. M. D. Finlay QC, concerning the broadcast by ABC's *Four Corners* program of evidence obtained in relation to

³⁴ Transcript 24/8/06 p.30.

³⁵ Transcript 24/8/06 p.29.

Operation Florida, prior to the introduction of the material at a hearing of the PIC. The incident was revealed in a censure motion made in the NSW Legislative Assembly on 16 October 2001 by Mr Andrew Tink, after which Inspector Finlay wrote to the Commissioner of the PIC to advise that he was exercising his functions as Inspector, on his own initiative, to investigate the incident. Inspector Finlay's report was published by the Committee as part of its report on the sixth General Meeting with the Inspector.³⁶

- 6.1.17 Therefore, the Committee recommends that the *Police Integrity Commission Act 1996* should be amended to clarify that the Inspector is able to report to Parliament at his discretion in relation to any of his statutory functions. It is further recommended that the Act be amended to make express provision for the Inspector to report to Parliament, as he considers necessary, on any abuse of power, impropriety and other forms of misconduct on the part of the PIC or its officers, regardless of whether or not these matters arose from the making of a complaint to the Inspector.

Recommendations (p 145):

RECOMMENDATION 16: The Committee recommends that the *Police Integrity Commission Act 1996* should be amended to clarify that the Inspector is able to report to Parliament at his discretion in relation to any of his statutory functions.

RECOMMENDATION 17: It is further recommended that the Act be amended to make express provision for the Inspector to report to Parliament, as he considers necessary, on any abuse of power, impropriety and other forms of misconduct on the part of the PIC or its officers, regardless of whether or not these matters arise from the making of a complaint to the Inspector.

³⁶ 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.

Chapter Four - Transcript of proceedings

REPORT OF PROCEEDINGS BEFORE

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

NINTH GENERAL MEETING WITH THE INSPECTOR OF THE POLICE INTEGRITY COMMISSION

—

At Sydney on Wednesday 19 November 2008

—

The Committee met at 3.10 p.m.

—

PRESENT

The Hon. K. A. Hickey (Chair)

Legislative Council

Ms S. P. Hale

The Hon. C. J. S. Lynn

The Hon. L. J. Voltz

Legislative Assembly

Mr M. J. Kerr

Mr P. R. Pearce

PETER JAMES MOSS Q.C., Inspector of the Police Integrity Commission, 105 Pitt Street, Sydney, affirmed and examined:

CHAIR: Thank you Inspector Moss for appearing before the Committee. Your appearance before the Committee is to provide information regarding the Ninth General Meeting with the PIC Inspector. The Committee is pleased to hear your evidence.

CHAIR: We have received your answers to questions on notice. Would you like your answers to questions 1 to 10 to be made public and included as part of our sworn evidence?

The Hon. PETER MOSS: Thank you Mr Chairman.

CHAIR: Do you wish to make an opening statement?

The Hon. PETER MOSS: Not unless the Committee wishes me to, but I think most of the members here today were here when I appeared on the last occasion.

CHAIR: I will start by throwing it open to the Committee for questions.

Mr PEARCE: We have got confidential material here, is it appropriate to discuss that at this point?

CHAIR: Can we do the general part first.

Mr KERR: I think you work two days a week, is that right?

The Hon. PETER MOSS: When I was offered the position or role, Mr Kerr, it was made plain to me that it was anticipated that typically I would work two days a week and that has been the case, except on a few occasions, when I might have worked three days a week.

Mr KERR: What about the workload, do you think that the two days is sufficient to discharge the workload?

The Hon. PETER MOSS: Well, I have been rather surprised at the number of complaints that I have received and am currently dealing with. Perhaps I have been more surprised, rather than as to the number, as to the content of the complaints which have required considerable investigation on my part, not only of the parties, but on occasions of the Director of Public Prosecutions, of Professional Standards Command and of other third parties. To some extent, of course, I am in the hands of these third parties as to when they respond to my correspondence. So at the moment there is a fairly heavy workload, particularly in terms of dealing with complaints.

Mr KERR: Are you able to do any more than two days a week?

The Hon. PETER MOSS: Yes, I do not think that would be a problem so far as the Ministry is concerned. In other words, I would not expect any problems there but nevertheless, I have tried typically to confine it to two days a week.

Mr KERR: Have you ever had to explain to a complainant that you only have two days a week available?

The Hon. PETER MOSS: Yes I have, I have occasionally in responding to a complainant in the first instance and perhaps seeking further and better particulars, I have pointed out that it is a part time position. I do not know that I have gone into how many days a week, but I certainly have stressed that it is a part time position.

CHAIR: Inspector, are you aware of when Operation Alford is likely to conclude and will all outstanding matters be finalised?

The Hon. PETER MOSS: I am sorry Mr Chairman?

CHAIR: Are you aware of when Operation Alford is likely to conclude and will all of the outstanding matters be finalised?

The Hon. PETER MOSS: You mean in relation to Briggs and other complaints, well, I could not say that for one moment, Mr Chairman, not only because it is not my operation, I am not the Commission of course and I cannot and do not speak on their behalf, but given the history of the matter to date, I am afraid that I take the view that one will just have to wait and see what happens there.

I am comforted by the fact that they have, I understand, briefed Mr Robberds QC and I would think therefore they are in good hands. He will be Counsel Assisting as I understand it, but nevertheless, to some extent I think that there is new ground being broken here, in that an administrative decision making body such as the Police Integrity Commission having dealt with a particular investigation, is now purporting to enter upon the same investigation for a second time and there is High Court authority about that. Whether they can bring themselves within that authority I suppose one day will have to be determined.

As I say, my attitude is I think one will just have to wait and see what happens. I do hope it is not going to be another Whistler, but we will just have to wait and see.

Mr PEARCE: Chair, I have actually got a number of questions in relation to that but I will hold back until we go into the confidential section, because I do not see how we can deal with this thoroughly while we are sort of skimming over the surface.

Mr KERR: I would be interested to know the effect of that High Court authority though.

The Hon. PETER MOSS: It is an immigration case, Mr Kerr. It is about 2002. I do not know if it is reported but I have got a copy of it and because it is an immigration case, it follows that the legislation does not bear any detailed resemblance to the PIC legislation, but basically an applicant for a student's visa or some such thing went before that Tribunal and was given a hearing date, and on the eve of the hearing date became ill.

The migration agent faxed or sent a letter to the Tribunal asking for an adjournment because of the illness, the Tribunal did not get the letter, held some sort of a proceeding – this is very much subject to reading the High Court decision as to what you make of the procedure – and in the absence of any evidence from the student, revoked or cancelled the visa.

The next day the Tribunal discovered its error and revoked the previous day's decision and then made a new decision. The Minister appealed saying that he could not have a second decision, it had already made its decision, it was *functus officio*.

It got all the way to the High Court and the High Court decided that there had been a jurisdictional error, a denial of natural justice and in the circumstances of that case, the Tribunal did have jurisdiction to revoke and to enter into the second decision.

I think the important factual situation there was that it was a very simple slip, as the High Court used the word 'slip', a very simple slip and it was rectified the next day.

Just how far that particular principle extends remains to be seen.

Mr PEARCE: That differs very significantly to Operation Whistler and the subsequent proposals I would have thought.

The Hon. PETER MOSS: As I say, Mr Pearce, I think there were different views about it and I do not know when it will be tested.

CHAIR: If I may, before we go any further, are there any general questions? If we can get those general questions unrelated to the Briggs matter out of the way, then we can go into confidentiality and probably get down to where we want to be.

Mr KERR: I think in your annual report Inspector at page 15, there is a complaint 16/06. This complainant was an informant in the Wood Royal Commission.

The Hon. PETER MOSS: I have not got a copy of my report with me.

Mr KERR: It says this complainant was an informant with the Wood Royal Commission and through his lawyers he complained to the Inspector alleging breaches by the Commission.

The Hon. PETER MOSS: I am with you, sorry.

Mr KERR: I was just wondering in relation to the Wood Royal Commission and matters before the PIC, are there still outstanding matters where people have made complaints in relation to that?

The Hon. PETER MOSS: Funny you should mention that. I do not want to identify the complainants, and I hope I do not, but shall I say three former police officers who appeared before the Wood Royal Commission, about four or five months ago made a complaint to me concerning the Police Integrity Commission, so in that sense, yes, the Wood Royal Commission still has some legs, if you like, and in that particular complaint I have just delivered, a couple of days ago, a draft report to both the complainants and the PIC.

As you know, it is my practice before publishing a report, to deliver a draft to the complainant and the Commission, await their response, take their response into account and then publish.

Ms SYLVIA HALE: Mr Moss, as you know, the High Court has ruled that the conduct of the Crime Commission was illegal in relation to Operation Mocha.

The Hon. PETER MOSS: Yes.

Ms SYLVIA HALE: How extensive an investigation will you be conducting into the Commission in relation to that?

The Hon. PETER MOSS: Ms Hale, I do not think I have any jurisdiction at all in relation to that matter.

The first question in the questions on notice dealt with that and as I said in that response, the amendments to the PIC Act concerning the Crime Commission are very limited and in effect, those amendments empower and require the PIC to detect and investigate misconduct of Crime Commission officers and prevent such conduct.

But as I attempted to say in that response of mine, the only way that I see the Inspector's jurisdiction could be affected, is (a) by having the audit duties enlarged and (b) by enlarging the class of people who is a proper case could make a complaint to the Inspector.

Ms SYLVIA HALE: Presumably you have made those suggestions to the Government?

Transcript of proceedings

The Hon. PETER MOSS: No, this is what I think follows from the amending legislation.

Ms SYLVIA HALE: What concerns me is we have a case where Hugh Macken described the Crime Commission as acting like a pack of cowboys, acted contrary to both State and Federal legislation and then there is subsequently the behaviour of Mark Standen.

The Hon. PETER MOSS: That has to be proved yet.

Ms SYLVIA HALE: Yes, alleged behaviour, but there seems to be no mechanism whereby, other than the appointment of yourself as the Inspector, this behaviour can be examined and looked at in terms of the connections between the Crime Commission and the Ombudsman, the relationships between State and Federal Police and the use of telephone intercept powers.

There seems to be no mechanism whereby this can be subsequently examined.

The Hon. PETER MOSS: As I said also in that answer, an Assistant Commissioner has been appointed to the PIC and his specific brief is to assess the capacity of the Crime Commission to identify and manage risks of serious misconduct involving Crime Commission officers.

I think until we have his report – which I think is due in a couple of months – it is difficult to know what the problem is, if any, and it is difficult to know what will be the involvement of the Police Integrity Commission and the depth of that involvement, at least until we get this Assistant Commissioner's report.

Ms SYLVIA HALE: That report will presumably go to yourself.

The Hon. PETER MOSS: No, as I understand it, it will go to the Police Integrity Commission and presumably they will then present it before Parliament, but it will not go to me. I may get a copy, but it will be out of courtesy.

Ms SYLVIA HALE: We are depending upon the PIC making some recommendations arising out of that report.

The Hon. PETER MOSS: I think the Assistant Commissioner will make the recommendations. He is a very experienced senior counsel and he has been much involved in crime fighting bodies, Mr Clarke SC from Victoria. He was on the National Crime Authority and various other bodies. He is very experienced.

Mr KERR: You mentioned in relation to your draft reports that you forward a copy of the draft report to the complainant and to the Police Integrity Commission. How long do you give them to respond to those reports? Is there a set time?

The Hon. PETER MOSS: No, I have never set a time Mr Kerr. Obviously, I would not wait for an undue length of time, but generally speaking they have responded within a reasonable time.

Mr KERR: You do not set a deadline for them?

The Hon. PETER MOSS: No. As a matter of fact, the complainants emailed me today I see asking could they have fourteen days or something and I have not responded, but of course I will. I think that is perfectly reasonable that they have fourteen days or longer for that matter.

I have not had any problem in that regard, not from the parties, Mr Kerr, but from third parties sometimes it takes a while to get a response.

CHAIR: No further general business? We can go in camera now.

(Evidence continued in camera)

(Public hearing resumed)

CHAIR: Inspector, can you advise the Committee whether you are considering making the investigative reports you compiled in relation to Briggs into a special report to Parliament?

The Hon. PETER MOSS: I had not thought to do that, Mr Chairman. Once again, as you know, I take the view of my powers in that regard as somewhat limited and indeed, I have responded to one of the questions about that.

No, I thought all I could do there, apart from having delivered the reports to the limited number of people who received them, was to summarise it in my annual report, as I attempted to do, although, of course, a summary does not replace the full report.

CHAIR: What considerations would you weigh up in deciding whether or not a complaint investigation should be reported to Parliament?

The Hon. PETER MOSS: For the reasons set out in that response that I made, I think to question six, and annexed in annexure B, I think, the previous correspondence between myself and the previous Chair of this Committee, I simply take the view for the reasons set out in the correspondence and briefly in the answer to question six, that I do not have the power to do other than publish such reports to a very limited audience, sometimes confined to the complainant and the Commission and this Committee. I was asked what I thought about an amendment and I have also responded to that in the response to question eight.

CHAIR: That comes down to a fundamental change of the Committee's operations though, does not it, the amended functions?

The Hon. PETER MOSS: Are you speaking about my reports into complaints, Mr Chairman?

CHAIR: Yes.

The Hon. PETER MOSS: No, they deal precisely with reports into complaints received by the inspector concerning the Police Integrity Commission.

CHAIR: But the amendments you were proposing would be a change to the functions?

The Hon. PETER MOSS: Well, as I have said, yes. I have suggested that what is needed is to deal with three issues. This is the answer to question six. First, who, if anyone, is entitled to receive a copy of the report? This is on page eight. Second, what discretion, if any, does the inspector possess to distribute copies of the report to particular persons? Third, what status is to be accorded to the report once it has been provided by the inspector to a particular person? If those three issues are desired to be covered in an amendment, then obviously the amendment would have to take those three issues into account.

I might say, as I have pointed out before, the ICAC inspector is governed by almost identical legislation and his latest report also refers to this and I think to the effect that if the

problem that I have identified is seen as being correct, then that inspector agrees that an amendment is necessary. That appears in his latest report, his 2008 annual report.

CHAIR: It is something we are going to come back to the Committee with and we will go into finite detail with the Committee to see where we actually move forward on this. That is something that the Committee really needs to get its head around. I think doing it right now may not be the best time for any of us.

The Hon. PETER MOSS: I do not know, Mr Chairman, whether the counterpart committee for the ICAC inspector is also taking an interest in this.

CHAIR: We probably need to have a chat to the Chairman of the ICAC Committee too.

Mr KERR: Having mentioned the Inspector for the ICAC have you read all of his reports?

The Hon. PETER MOSS: I have not read all of his reports, Mr Kerr.

Mr KERR: There was a report in relation to the inquiry into Peter Breen.

The Hon. PETER MOSS: I have not seen that report. I have not been provided with a copy of that. Once again, that is the problem. He feels that he is limited into the recipients that may see a copy of that and I am not one of them.

Mr KERR: This is a report that was tabled in Parliament, so it is on the public record. Perhaps that might be supplied to the Inspector.

The Hon. PETER MOSS: I appreciate that, Mr Kerr. I had not seen that and I had not realised it had been tabled.

Mr KERR: Mr Pritchard gets a mention in it.

The Hon. PETER MOSS: I had heard that on the grapevine that that might be so.

The Hon. LYNDA VOLTZ: Maybe we should make sure that the Inspector gets any copies of the ICAC reports tabled in the House.

CHAIR: If there are any questions that come out of our deliberations can we put them on notice to you?

The Hon. PETER MOSS: Of course, Mr Chairman. I would be only too pleased to answer any further questions that come up.

(The witness withdrew)

(The Committee adjourned at 3.43 p.m.)

Appendix 1- Minutes of meetings

Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission (No. 12)

10.30 am Thursday 23 October 2008
Room 1102, Parliament House

Members Present

Mr Draper MP	Ms Hale MLC	Mr Hickey MP	Mr Kerr MP
Mr Lynn MLC	Mr Pearce MP		

Apologies

Ms Voltz

Also Present

Jonathan Elliott, Hilary Parker, Ian Thackeray

The Acting Chair opened the meeting at 10.35am.

...

5. PIC Inspector

- (a) Correspondence from the PIC Inspector, dated 27 June 2008, in relation to his ability to report on and publish complaints investigations. The Committee noted that a question on notice for the upcoming General Meeting with the Inspector had raised the issue and that the Committee had the opportunity to resolve the matter in discussions with the Inspector at the hearing.

The Committee noted that the General Meeting with the PIC Inspector would take place on 19 November 2008 at 3:15pm.

...

Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission (No. 13)

10:45am Wednesday 19 November 2008
Waratah Room, Parliament House

Members Present

Ms Hale MLC	Mr Hickey MP	Mr Kerr MP
Mr Lynn MLC	Mr Pearce MP	Ms Voltz MLC

Apologies

Mr Draper

Appendix 1- Minutes of meetings

Also Present

Jonathan Elliott, Victoria Maigre, Hilary Parker, Ian Thackeray

...

The Committee adjourned at 3.00pm and resumed at 3.10pm.

Ninth General Meeting with the PIC Inspector

The Hon Peter Moss QC, Inspector of the Police Integrity Commission, GPO Box 5215, Sydney, affirmed. The Inspector tabled his answers to questions on notice 1-10. Committee members questioned the witnesses.

At 3.20pm the hearing went *in camera*. The public hearing resumed at 3.40pm

Evidence concluded, the Chair thanked the witnesses and the witnesses withdrew.

The Committee adjourned at 3.43pm.

Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission (No. 13)

10.30 am Thursday 26 March 2009
Room 1102, Parliament House

Members Present

Mr Draper MP	Ms Hale MLC	Mr Hickey MP	Mr Kerr MP
Mr Lynn MLC	Mr Pearce MP	Ms Voltz MLC	

Also Present

Les Gönye, Hilary Parker, Indira Rosenthal

The meeting commenced at 10.40am.

...

5. PIC Inspector

(a) Ninth General Meeting

...

(ii) Consideration of draft report

The Committee considered the draft report and schedule of amendments circulated at the meeting.

Resolved on the motion of Ms Volt, seconded by Mr Pearce that the amendments to paragraphs 1.13; 1.14; 1.49; and 1.59 and the deletion of footnote 26 be agreed to in globo.

Resolved on the motion of Mr Pearce, seconded by Mr Kerr, that the draft report, as amended, be the Report of the Committee, that it be signed by the Chair and presented to the House, together with the minutes of evidence and that the Chair, Committee Manager and Senior Committee Officer be permitted to correct stylistic, typographical and grammatical errors.

...