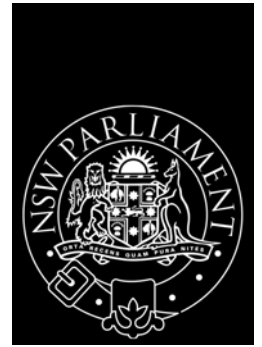


PARLIAMENT OF NEW SOUTH WALES



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

Report on the Tenth 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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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:

- 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.
- 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.
- 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.
- A referral or notification under this section is to be in writing.
- In this section, a reference to the Minister is;
 - in the context of an appointment of Ombudsman, a reference to the Minister administering section 6A of this Act;
 - 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
 - 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*.

The Committee also oversees the Information Commissioner. The Committee's functions are set out in section 44 of the Information Commissioner Act. Under section 5 of that Act the Committee has the power to veto the appointment of the Commissioner.

Chair's foreword

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. 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.

Much of the discussion during this Tenth General Meeting focused on the relationship between the Inspector and the Police Integrity Commission and this provides the basis for the commentary in the report.

Given the recent differences of opinion between the Inspector and the Police Integrity Commission over procedural fairness issues, the Committee was pleased to hear that the Inspector regarded the relationship between the two offices as being a good one. Furthermore, the Inspector did not consider it likely that similar disputes over procedural fairness would occur in future.

The second important matter which was discussed concerned the Inspector's powers to publish certain complaint reports. In its report on the Ninth General Meeting with the Inspector, the Committee recommended that the *Police Integrity Commission Act 1996* be amended in order to clarify that the Inspector is able to report to any party, including Parliament, at his discretion, in relation to any of his statutory functions.

To date there has been no amendment to this effect and the Inspector informed the Committee that the lack of clarity in the legislation remains a pressing matter for his office. Accordingly, the Committee urges the Minister for Police to conclude his consideration of the proposed amendment as expeditiously as possible and will be seeking the Minister's advice in relation to this matter.

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

Chapter One - Commentary

- 1.1 On 26 October 2009, the Committee conducted the Tenth General Meeting with the Inspector of the Police Integrity Commission, the Hon Peter Moss QC (the Inspector). This meeting was the third General Meeting to have taken place between the Committee and the Inspector during the 54th Parliament.
- 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 2009.
- 1.3 The answers to the questions on notice can be found in Chapter Two of this report. It should be noted that the Committee has treated as confidential those responses which relate to aspects of the Inspector's work which are not currently a matter of public record.
- 1.4 Much of the discussion during the General Meeting focused on the relationship between the Police Integrity Commission (the Commission) and the Inspector, and this provides the basis for the commentary in the report.
- 1.5 The report commentary also addresses the matter of the Inspector's capacity to publish complaint reports. This was an issue which the Committee considered in its report on the last General Meeting with the Inspector in November 2008.¹

The Inspector's relationship with the Police Integrity Commission

- 1.6 Differences of opinion between the Inspector and the Commission over the issue of procedural fairness accounted for a significant amount of correspondence between the respective offices during the reporting year.
- 1.7 On 2 April 2009, the Inspector made a special report to Parliament in which he expressed the view that the Commission had failed to accord procedural fairness to three persons whose complaints he had investigated. In the case of the complaint arising from *Operation Whistler*, the Commission did not dispute the Inspector's conclusions. In the cases arising from the *Mallard* and *Rani* operations, the Commission did not accept the Inspector's findings.²
- 1.8 In the light of these disagreements, the Committee was interested to determine the current nature of the relationship between the Inspector and the Commission.
- 1.9 The Inspector informed the Committee that despite there having been some strong differences of opinion 'the relationship between the Inspector and the Commission is a good one'.³
- 1.10 Whilst he considered that the Inspector's role would be 'perhaps not entirely effective' if the Commission rejected his recommendations, the areas of disagreement which had arisen between himself and the Commission had not caused any major problems

¹ Committee on the Office of the Ombudsman and the Police Integrity Committee, [Report on the Ninth General Meeting with the Inspector of the Police Integrity Commission](#), 2009, pp. 2-13.

² Inspector of the Police Integrity Commission, [Special Report of the Inspector of the Police Integrity Commission pursuant to Section 101 of the Police Integrity Commission Act 1996](#), 2009.

See also: Committee on the Office of the Ombudsman and the Police Integrity Committee, [Report on the Eleventh General Meeting with the Police Integrity Commission](#), 2009.

³ See Chapter Three of this report: Transcript of proceedings.

to date and this was because the Commission had taken his views into account, whether they agreed with them or not.

- 1.11 The Inspector explained that his functions are concerned with how the Commission exercises its powers under the Act and not what opinions and conclusions it reaches. An assessment of the Commission's methodology, processes and manner of investigation might involve consideration of particular conclusions reached by the Commission, he said, but it is not his function to conduct a merits review of the outcomes of the Commission's investigations. The Inspector would never seek to 'override the opinions of the Police Integrity Commission and have them substitute my opinions in place of their own'.⁴
- 1.12 The Inspector's annual report stated that three draft reports were currently before the Commission concerning complaints, about procedural fairness to witnesses during the course of the Commission's *Operation Whistler*.⁵
- 1.13 It was, however, the Inspector's view that he had seen 'what I regard as a distinct improvement in some procedures of the Commission'. The Inspector did not believe that the procedural fairness problems which had been highlighted in his complaint reports would occur now, stating that '[e]ven if they do not agree with me I think none of those situations would arise again'.⁶
- 1.14 On the broader issue of procedural fairness, it was the Inspector's view that this was an area of jurisprudence which had developed comparatively recently but that with the passage of time it would become better laid down in terms of precedent.

PIC Inspector's capacity to publish complaint reports

- 1.15 In his answer to a question on notice regarding an own motion investigation, the Inspector noted that his ability to publish a report on any such matter had already been the subject of much correspondence between himself and the Committee.⁷
- 1.16 The Inspector's ability to publish a report as a public document was indeed a matter to which the Committee gave its consideration during 2008 and consequently the Committee's report on the Ninth General Meeting with the Inspector made the following recommendation:
- 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.⁸
- 1.17 When asked by the Committee, whether the amendment to the legislation was still a pressing matter for his office, the Inspector confirmed that it was. The Inspector informed the Committee that in respect to a number of draft complaint reports which he had prepared, the status of the reports once finalised was still unclear.
- 1.18 Whilst the Inspector had corresponded with the Minister for Police six months ago in relation to the proposed amendment, he had not yet been notified as to whether the amendment had been finalised:

⁴ Ibid. See also Chapter Two of this report: Questions on notice and answers, Question 1.

⁵ Office of the Inspector of the Police Integrity Commission, [Annual Report for the Year ended 30 June 2009](#), p.22, 2009.

⁶ See Chapter Three of this report: Transcript of proceedings.

⁷ See Chapter Two of this report: Questions on notice and answers, Question 2.

⁸ Ninth General Meeting Report p.13.

Really, the position remains much the same as it was when I last appeared before this Committee.⁹

- 1.19 The Committee has made its position clear with regard to the need to place beyond doubt the Inspector's capacity to report on complaints. This issue is of considerable importance to the Committee in performing its oversight role, as it is one which affects the capacity of the Inspector to report, at his discretion, in relation to his statutory functions.
- 1.20 Accordingly, the Committee urges the Minister for Police to conclude his consideration of the proposed amendment as expeditiously as possible and will be seeking the Minister's advice in relation to this matter.

⁹ See Chapter Three of this report: Transcript of proceedings.

Chapter Two - Questions on notice and answers

QUESTION ONE:

On pages 8 and 9 of your Annual Report at paragraph 23, you interpret your principal functions as being concerned primarily with how the Commission exercises its powers not what opinions and conclusion it may form. However you conclude by noting that a systemic failure by the Commission may have a bearing on the outcome of its investigations: "Such a case would fall within Section 89(1)(a)(c) and also within Section 89(1)(b)."

Are you of the opinion that such circumstances could then provide for you to conduct a merits review of the opinions and conclusions reached the Commission in the exercise of its investigative powers?

INSPECTOR'S RESPONSE TO QUESTION ONE:

The passage from page 9 of my 2009 Annual Report which is referred to above, was in the following terms –

*"From this it seems to follow that the relevant functions of the Inspector are concerned primarily with *how* the Commission exercises its powers under the Act rather than *what* opinions and conclusions the Commission forms or reaches in the exercise of those powers.*

However, a failure to consider relevant evidence by the Commission, or a failure to accord procedural fairness to a witness, may have a bearing as to the opinions formed by the Commission which may not have been so formed had the omission not occurred. Such a case would fall within Section 89(1)(c) and also within Section 89(1)(b)."

The question asked of me is whether it is my opinion that in circumstances such as referred to in the passage quoted above, the Inspector could be seen to have a merits review function in respect of the opinions and conclusions of the Commission.

On page 9 of my Annual Report following appears –

"It is also important to notice limitations within the Inspector's functions in respect of the formation of opinions and recommendations by the Commission contained in the reports of the Commission published pursuant to Section 96 of the Act.

*For example, it seems clear that the Inspector's function does not extend to reviewing an investigation conducted by the Commission, including the evidence relevant to that investigation, with a view to reaching a conclusion as to whether the opinions formed by the Commission were justified. *In other words, the functions of the Inspector do not include a "merits review" of the opinions and assessments of the Commission come to as a result of an investigation by the Commission.**

As I think the italicised words quoted above make clear, it is not my view, nor, I think, has it been the view of any of my predecessors, that the Inspector has a "merits review" function in respect of the opinions and assessments of the Commission.

This approach conforms with the law as explained by the High Court: administrative decisions may be reviewed by a Court for failure to observe the rules of natural justice, including where apprehended bias is established. However, the principles of procedural fairness are not concerned with the merits of a particular exercise of power but with the procedure that must be observed in the exercise of that power. The focus is on procedures rather than outcomes. In such a case the Court may make a declaration that a Report, in so far as it was damaging to a relevant reputation, was made in breach of the rules of natural justice, but cannot assert that the decision was erroneous, because the Court is not concerned with the merits of the Report.

However, the lawfulness and appropriateness of the Commission's methodology, processes and manner of investigation, are all within the inspector's functions, so that should the manner in which the Commission exercises its powers result in a failure to consider relevant evidence or to accord procedural fairness to a person, which may have affected the opinion come to, the Inspector's powers would extend to an assessment of procedures which might involve a consideration of particular conclusions reached by the Commission. It seems to me that aspects of the Inspector's Reports in the Young and Brazel matters fell into this category, and thus permitted certain opinions of the Commission to be closely audited by the Inspector.

QUESTION TWO:

On page 20 of your Annual Report, you mention an own motion investigation into the publication of intercepted telephone conversations. At what stage is this investigation? Will you publicly reporting on this investigation?

INSPECTOR'S RESPONSE TO QUESTION TWO:

On page 20 of my Annual Report the following material, relevant to this question, appears

In fact, in addition to investigating the Police Association complaints, I have of my own initiative also commenced an investigation of the reasons for the publication in the Mallard Report in respect of other persons' telephone conversations, or the publication of the identity of persons, simply because their names came up in a relevant lawfully intercepted conversation.

The investigation referred to, arises primarily from the material published by the Commission in its Mallard Report at pages 57-59. As reference to that material will disclose, a deal of publicity is given to two persons identified as Quenten Roberts and Michelle Roberts. (It also appears that to the extent they are described as husband and wife, that is factually incorrect as there was evidence before the Commission from Mr Purcell that they were divorced at the relevant time.)

It would appear that the sole reason these people have been made the subject of public exposure in the Mallard Report is because in two lawfully intercepted telephone conversations had by Mr Purcell, each of these persons was the other party, respectively, in respect of those telephone conversations.

Given the restrictions on publication of lawfully intercepted material contained in the Telecommunications (Interception and Access) Act 1979, and reinforced in the case law on the subject, the question that seems to arise is on what basis did the Commission publish in

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the public domain details of these telephone calls involving Quenten and Michelle Roberts, and on what basis were these persons identified by name?

Prima facie the position would seem to be that these persons were protected by the legislation in respect of their private telephone calls being made public, or being made use of by the Commission, as a result of the lawfully intercepted intervention, except in accordance with the strict exceptions laid down in the legislation.

What is more, the context in which their names and telephone conversations are published in the Mallard Report, is such as would be likely to cause embarrassment to persons named in such context and to damage their reputations.

Suffice to say at this stage, that I recently wrote to each of Quenten and Michelle Roberts, in effect, notifying them that I am currently looking at this particular publication involving them, and enquiring as to whether they wish to be heard in relation to the matter. To date, I have not received a response from either. I have also entered into detailed correspondence with the Commission in the course of this investigation, and this correspondence is ongoing.

I have also noted at paragraph 3.23 of the Mallard Report the reference to "Purcell's ex-wife", again, apparently referred to in a lawfully intercepted telephone call, as distinct from being a party to such a conversation. The Report also publishes the information that the latter was apparently at one time a member of NSW Police, so that it could be expected that such a reference to her would be sufficient to identify her in respect of anyone who was aware of her background in NSW Police, or anyone aware of the domestic circumstances of Mr Purcell. Again, it seems to me that the context in which she is identified is not a salubrious one and such publication would be likely to cause embarrassment and damage to reputation. I have also brought this matter to the attention of the Commission in the course of the abovementioned correspondence.

As to whether any Report produced by me to deal with these matters could be published as a public document, that seems to fall into a context that has been the subject of much correspondence between myself and the Committee. As noted in my Annual Report, at (117), the then Minister for Police advised me in correspondence that an amendment to the legislation was being considered to overcome the problem

...

QUESTION FOUR:

On pages 25 to 27 of your Annual Report you review the use of suppression orders by the Commission noting that these orders must only be made when the decision to do so is in the public interest.

Should the practice of the Commission be to provide grounds for making such decisions and if so, how might this be done?

INSPECTOR'S RESPONSE TO QUESTION FOUR:

On the evidence before me, it could not be concluded that there is any general misuse of the relevant provisions of the legislation the relevant provisions by the Police Integrity Commission. In the instant case, to which I have referred, no objection was taken to the

imposition of the relevant restrictions. Accordingly, I do not think there is basis to justify requiring a change in the Commission's procedures in this regard. Needless to say, however, I intend to continue to examine the imposition of such restrictions whenever it seems desirable to do so.

QUESTION FIVE:

Should the report of previous PIC Inspector Morris Ireland, Report on the Practices and Procedures of the Police Integrity Commission (tabled in June 2003), be placed on your website?

INSPECTOR'S RESPONSE TO QUESTION FIVE:

I can now report that that material has been placed on the Inspector's website, and I thank the Committee for drawing the matter to my attention.

Chapter Three - Transcript of proceedings

Note : The Tenth General Meeting with the Inspector of the Police Integrity Commission met on Monday 26 October 2009 at Parliament House.

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

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

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

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

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

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

Mr MOSS: Yes.

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

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

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

Mr MOSS: It is, because all those problems that I have raised in private correspondence with the Committee still remain extant. Of course, I was able to overcome

those problems in respect of what I would call some major reports by the Inspector to date by including those in my special report to Parliament and by that means those particular reports became public. For example, the ones that I am working on at the moment I have mentioned in the current correspondence to the Committee. There are three draft reports with the Commission at the moment arising out of the malfunctions in the Whistler report. Since I wrote the last of the correspondence to the Committee I have delivered a draft report on the Police Association complaint; I delivered a draft report to the parties. In respect of all those reports, the problem arises as to the status of the report when finalised. Apart from the letter that I mentioned from the then Minister I have not heard any more about the progress of the proposed amendment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms SYLVIA HALE: I have seen the relationship between the two offices referred to as "liveable differences", and from what you have just said it would suggest that by dint of your representations to the Commission they have modified their practices. But it is a concern that such a critical issue as procedural fairness should be so dependent upon the personalities of the major protagonists, as it were. Is there any process that should or could

be put in place to ensure that after your departure or Mr Pritchard's departure we do not get a return to the previous situation?

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

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

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

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

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

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

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

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

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

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

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

Mr MALCOLM KERR: That is complimentary, though.

Mr MOSS: Indeed, a worthy opponent.

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

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

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

Mr MOSS: It goes back a long way.

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

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

Mr MALCOLM KERR: It was most unsatisfactory.

Mr MOSS: Most.

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

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

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

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

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

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

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

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

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

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

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

Mr MOSS: Yes.

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

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

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

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

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

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

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

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

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

The Hon. CHARLIE LYNN: Operation Bax.

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

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

CHAIR: Perhaps we could leave it till then.

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

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

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

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

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

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

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

CHAIR: Thank you, Mr Moss.

(The witness withdrew)

(The Committee adjourned at 11.25 a.m.)

Appendix 1- Minutes of meetings

Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission (No. 21)

11:00 am Monday 26 October 2009
Rooms 814-815, 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 MP

Also Present

Nina Barrett, Jonathan Elliott, Hilary Parker, Pru Sheaves

The meeting commenced at 11:00am.

GENERAL MEETING WITH THE INSPECTOR OF THE POLICE INTEGRITY COMMISSION

The Hon Peter Moss QC, Inspector of the Police Integrity Commission, affirmed.

The Committee questioned the Inspector. Questioning concluded, the Committee commenced proceedings into its inquiry into procedures for examining complaints against the Police Integrity Commission at 11.25am.

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