

HSSB



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

19 AUG 2010

Mr Brendan O'Reilly
Director General
Department of Premier and Cabinet
GPO Box 5341
SYDNEY NSW 2001

FN	
LN	2010 40291

OMB122
Your ref: M105537

Dear Mr O'Reilly

REVIEW OF THE POLICE INTEGRITY COMMISSION ACT 1996

Thank you for your letter of 23 June 2010 seeking a submission from the Committee on the Office of the Ombudsman and the Police Integrity Commission to the review.

Please find attached the Committee's submission (Attachment A).

It should be noted that the Inspector does not support the recommendation that the Police Integrity Commission correspondence be included in his reports in full and I have enclosed his correspondence to the Committee on this matter for your information (Attachment B). However, the Police Integrity Commission considers this action would be of benefit to its operations. The Committee still considers that this change should be made as it would enhance and clarify the complaint handling process.

If you have any further questions regarding this matter please contact the Committee Manager, Ms Vicki Buchbach on 9230 2899.

Yours sincerely

The Hon Kerry Hickey MP
Chair
Committee on the Office of the Ombudsman and Police Integrity Commission.

**COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE
INTEGRITY COMMISSION
SUBMISSION TO THE REVIEW OF THE POLICE INTEGRITY COMMISSION ACT**

On the 10 August 2010, the Committee on the Office of the Ombudsman and the Police Integrity Commission resolved to provide a submission to the review of the *Police Integrity Commission Act 1996* (the Act). The Committee supports the review of the Act as a means of reassessing the Act's efficacy and continued relevance.

The Committee was established in 1990 by amendment to the *Ombudsman Act 1974* to monitor and review the functions of the Ombudsman's Office. The Committee's jurisdiction was extended under the *Police Integrity Commission Act 1996* to include oversight of the Police Integrity Commission and the Inspector of the PIC; and under the *Government Information (Information Commissioner) Act 2009* to include oversight of the Information Commissioner.

The functions of the Joint Committee are set out in section 31B of the Ombudsman Act, section 95 of the Police Integrity Commission Act and section 44 of the Government Information (Information Commissioner) Act respectively. It should be noted in particular that none of these sections authorises the Joint Committee:

- 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 Ombudsman, the Police Integrity Commission or the Information Commissioner in relation to a particular investigation, complaint or matter.

With regard to the review of the *Police Integrity Commission Act* (the Act), the Committee has made two recent recommendations regarding possible amendments to the Act. These have been made largely in response to issues brought to its attention by the Inspector of the Police Integrity Commission. The first recommendation is that the legislation be amended to clarify to whom the Inspector is able to make reports to regarding specific issues of complaint.

The second one is that the Act be amended to allow for any disagreement on the part of the Police Integrity Commission over adverse comments made by the Inspector about the Police Integrity Commission be reproduced in full in the Inspector's reports.

Recommendation 1

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.¹

¹ 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, 2009*

ATTACHMENT A

The PIC Inspector is of the opinion that the Act does not authorise him to publish complaint reports. In 2008, he repeatedly raised this issue with the Committee in correspondence as well as at its Ninth General Meeting in November of that year.

Specifically, the Inspector's view is that section 89(1)(b) of the *PIC Act* does not make it clear:

- 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 Committee wrote to the Minister on 26 March 2009 requesting, as a matter of urgency, that the *Police Integrity Commission Act 1996* be amended to clarify that the PIC Inspector can make his complaints reports available to any party he thinks appropriate, including the Committee, and to ensure that his reports can be released into the public domain.

The Minister's reply, which was received on 14 April 2009, outlines a proposal to amend s101 of the Act to make it clear that the PIC Inspector can make and publicly release reports on complaint matters.

The PIC Inspector has previously expressed to the Committee his view that s101 (as currently constructed):

[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. ...I do not see Section 89(1)(b) reports as fitting that description.²

It is therefore possible, that the amendment to the Act as currently proposed by the Minister, might not clarify, to the PIC Inspector's satisfaction, his powers to determine to whom he may furnish reports made pursuant to his function under s.89(1)(b) of the Act.

During the most recent General meeting with the Inspector in 2009, he indicated that it was still an issue with his Office. Despite correspondence between himself and the Minister for Police he had not yet been notified as to whether the proposed amendment had been finalised.³

The Police Integrity Commission supports the changing of the legislation to provide the Inspector with the power to publish complaints reports.⁴

² 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, p.7.

³ Committee on the Office of the Ombudsman and the Police Integrity Committee, *Report on the Tenth General Meeting with the Inspector of the Police Integrity Commission*, p. 2, 2010

⁴ Committee on the Office of the Ombudsman and the Police Integrity Committee, *Report on an inquiry into the handling of complaints against the Police Integrity Commission*, April 2010

Recommendation 2

Recommendation 2: That the Minister for Police amend the Police Integrity Commission Act 1996 so that, should the PIC Inspector make adverse comment in regard to the Police Integrity Commission and the Commission disagree with the Inspector's position, the Commission's response to that adverse comment be reproduced in full in the Inspector's complaint report.⁵

The second recommendation from the Committee's *Report on an inquiry into the handling of complaints against the Police Integrity Commission*, is that the Act be amended to allow for any difference of opinion on the part of the Police Integrity Commission over opposing comments made by the Inspector about the Police Integrity Commission be reproduced in full in the Inspector's reports.

The Committee considers that it would be beneficial to put these disagreements on record in the one report as opposed to having the differing opinions appear in separate reports by both parties. The Committee referred to the research that the West Australian Joint Standing Parliamentary Committee on the Corruption and Crime Commission into a similar case with their comparable authorities. The WA Committee considered it beneficial that both comments were made public but that to avoid confusion they be published in the same report.

This matter was raised in the Committee's inquiry into the handling of complaints against the Police Integrity Commission. During this inquiry the Police Integrity Commission supported the recommendation to include in the Inspector's final report any submissions from them that expressed conflicting views. In response to the Committee's questions on notice, the Commission stated:

...given the important relationship between the Commission and the Inspector it is in the public interest for the basis of any disagreement to be made known and it would also assist in maintaining public confidence in the effective operation of that relationship.⁶

This would ensure that complainants and members of the public are aware of the Police Integrity Commission's views on the Inspector's findings. This is particularly important if the first amendment is made.

It should be noted that the Inspector does not support the recommendation that the Police Integrity Commission correspondence be included in his reports in full. His reasons are provided in his correspondence to the Committee of 21 May and 16 June appended to this submission at Attachment B.

The Committee still considers that this change would be beneficial in developing a greater understanding of the complaint handling process to the public.

⁵ Committee on the Office of the Ombudsman and the Police Integrity Committee, *Report on an inquiry into the handling of complaints against the Police Integrity Commission*, April 2010

⁶ Committee on the Office of the Ombudsman and the Police Integrity Committee, *Report on an inquiry into the handling of complaints against the Police Integrity Commission*, p.22, April 2010

ATTACHMENT A

Both of the suggested amendments to the Act would enhance and clarify the complaint handling processes undertaken by the Inspector of the Police Integrity Commission and the Police Integrity Commission and to ensure the objectives of the Act continue to be met.

e10/653



*Inspector
of the
Police Integrity Commission*

Our Ref: CR-02 AA

Your Ref: OMB 443; OMB 28

21 May 2010

The Hon Kerry Hickey, MP
Chairman
Committee on the Office of the Ombudsman and
Police Integrity Commission
Parliament of New South Wales
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Hickey,

Re: i) Your letter dated 5 May 2010
ii) Your letter dated 20 May 2010

- 1) Thank you for your letter dated 5 May 2010 referring to the Committee's complaint handling enquiry, and the Report which accompanied your letter.
- 2) I have noted, too, the terms of the Committee's recommendation. I have also discussed that recommendation with the Police Integrity Commission.
- 3) As I have advised the Commission, I have no objection in principle, in cases where the Commission disagrees with the Inspector's Report upholding a complaint concerning the Commission, in publishing on the Inspector's website, the relevant correspondence between the Inspector and the Commission which has come into existence as a result of the Inspector's investigation of the particular complaint.
- 4) Such a step would obviously provide access to the complete responses by the Commission to the Inspector's correspondence in the course of such an

investigation, thereby making available the reasons provided to the Inspector by the Commission as seeking to explain the Commission's relevant differences with the opinions of the Inspector.

- 5) I would not wish to append such voluminous correspondence to the Inspector's Report but rather, when such a Report is published on the Inspector's website, to indicate that the relevant correspondence is also available on the website for the purposes stated above.
- 6) It seems to me that there is no other practical way of putting this information in the public domain. To publish only the Commission's correspondence would not be appropriate, in my opinion, first because it would not be readily intelligible without also publishing the correspondence to which it is responding, and, second, it would mean that the Inspector's refutation of the various positions taken by the Commission in the correspondence, would go unnoticed.
- 7) As I have mentioned, I have advised the Commission that this is my position, but I have not yet had a formal response from the Commission in relation to this matter.
- 8) In the light of what I have written here, your Committee might take the view that it should consider bringing this correspondence to the attention of the Minister of Police on the basis that if such an arrangement is entered into between myself and the Commission, the proposed amendment might be seen as unnecessary.

Your letter dated 20 May 2010

- 9) I have also noted the content of the abovementioned letter, and in particular, have noted that your Committee resolved on 20 May 2010 to write to the Commission concerning this matter.

Yours sincerely,



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



*Inspector
of the
Police Integrity Commission*

Our Ref: CR-02 AB

16 June 2010

The Hon Kerry Hickey, MP
Chairman
Committee on the Office of the Ombudsman and
Police Integrity Commission
Parliament of New South Wales
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Hickey,

**Re: The Committee's Recommendation (Report 9/54) re PIC Inspector's
Complaint Reports**

- (1) On 11 May 2010, I received your letter dated 5 May 2010, and I responded thereto by letter dated 21 May 2010. The effect of that letter, so far as relevant, was to indicate that I had no objection, in the case of a complaint being upheld by the Inspector, on grounds with which the Commission disagreed, to publishing the relevant correspondence on the Inspector's website if the Commission so requested, providing that material formed no part of the Inspector's report. As indicated in that letter I had also conveyed that to the Commission.
- (2) However, recent events have caused me to reflect more deeply on the effect of your Committee's recommendation and my initial response thereto, and this in turn has caused me to re-consider my initial response on the basis that I may not have given sufficient consideration to the issues involved.

- (3) The Committee's recommendation was in the following terms: "That the Minister for Police amend the *Police Integrity Act 1996* so that should the PIC Inspector make adverse comment in regard to the Police Integrity Commission and the Commission disagree with the Inspector's position the Commission's response to that adverse comment be reproduced in full in the Inspector's complaint report." I will offer comment below on the width of this terminology, and problems with it, as I see it
- (4) On receipt of your letter, and the Committee's Report that accompanied it, which for the first time made me aware of the recommendation, the thought occurred to me that I did not recall that matter being raised by the Committee with me, nor my opinion being sought prior to the receipt of your letter.
- (5) In re-considering my initial response, I have had regard to the Committee's Report (9/54/April 2010) and it might be helpful if I were to offer the following comments thereon.
- (6) First, there is included a transcript of the evidence I gave on 26 October 2009. I note from that transcript that it does not appear that the matter the subject of the recommendation was raised with me on that occasion. Nor does it appear to have been adverted to in my responses on notice in Appendix 1 pp. 16-19.
- (7) Nor had I previously seen a copy of the Police Integrity Commission's submission as reproduced at 1.6-1.13 of the Committee's Report, in particular 1.13 thereof; nor the Commission's responses on notice at pp.19-23.
- (8) Thus I do not appear to have had any relevant input into the Committee's deliberations which apparently resulted in the opinions expressed at 4.7-4.8. At 4.7 the Committee appears to express the opinion that a principal concern in making the recommendation was *for the information of the Complainant in particular*. However, as the evidence before the Committee made clear, the Inspector's practice has always been, in my time as Inspector, to make copies of all significant correspondence from the Commission available to the Complainant and the latter's solicitor, except on those few occasions in which the Commission has raised an objection to that course being followed: see pp. 50 and 52 of the Committee's Report (third question to me and my response thereto on p. 50, and further relevant questions and responses on p.52).
- (9) I have never received any complaint from a relevant Complainant or the latter's solicitor as to my practice in this regard. The Legal Representation Office has represented all the Complainants whose complaints have been upheld in my Reports.

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- (10) Thus, if it is accepted that the Inspector's current practice adequately accommodates the interests of the Complainant in this regard, this leaves the other ground stated at 4.7 as being *for the information of the report's wider audience*. At 4.8 the Committee appears to have expressed the opinion, in effect, that the full text of the Commission's response to the Inspector would help clarify why the Commission has not taken action on a particular recommendation of the Inspector. It is these propositions that I would like to address below.
- (11) It appears that the subject matter of the recommendation was not raised with the ICAC Inspector by the Committee: 3.10-3-15; and pp. 24-25.
- (12) At the outset, may I attempt to make it clear beyond doubt that if I were persuaded that it was relevant and appropriate for the Commission to have, in effect, a right of reply to Reports of the Inspector upholding complaints against the Commission and its procedures, I would certainly have no objection in principle.
- (13) Although not mentioned at all in the Committee's Report, as far as I can see, I have in every Report where the Commission did not accept my opinions made it abundantly clear in the Report that that was the position.
- (14) Thus this is not a situation where the Inspector's Report fails to put the reader on notice that the Inspector's opinions are not accepted by the Commission.
- (15) Nor does there seem to have been any acknowledgment of the fact that in respect of each of my relevant Reports there has passed between the Inspector and the Commission voluminous correspondence over a lengthy period in which the contentions of the Commission have been expressed in considerable detail, usually more than once, and been responded to in detail by the Inspector. In addition to this extensive correspondence in which every issue relating to the complaint is raised in detail, in every case the Commission is thereafter provided with a draft Report thereby giving advance notice of what the Report contains. Any comment on the draft Report is then taken into account before the final form of the Report is settled.
- (16) Thus what is in issue here seems to be the contention that in these particular circumstances, and despite the fact the Report puts the reader on clear notice that the Inspector's opinions are not accepted by the Commission, fairness requires that in addition the Commission should have a detailed right of reply.
- (17) As mentioned above the issue seems to be is it appropriate and right that such a contention should be accepted. In what follows I will attempt to suggest there

are problems with accepting this contention, and that the matter is more complex than might at first glance be seen to be the case.

- (18) The starting point might be to note that a principal function of the Inspector is 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. The Inspector is not subject to the Commission in any respect: S. 89(1)(b) and (3).
- (19) Thus it is the Inspector's opinions and recommendations that are authorised and required by the Statute to deal with relevant complaints. It could not be implied from the statutory provisions referred to above, in my opinion, that the Inspector should be obliged to include as part of his/her Report contrary opinions of the Commission which the Inspector has considered in the course of dealing with the particular complaint and rejected for reasons provided in correspondence with the Commission. To allow a situation where there is to be permitted an examination on a comparative basis of the Inspector's opinion vis a vis the Commission's would be to set at nought the statutory scheme apparent in the legislation. It is the Inspector's view of the facts and understanding of the law that must prevail and be acted upon, not because the Inspector's opinions are infallible, but on the basis that that is what the statute requires, and the statutory scheme will not work otherwise.
- (20) It seems to me therefore it would be a grave mistake to approach the matter on the basis that the Inspector's relevant opinions are just opinions and should have no greater weight than the opposing opinions of the Commission. That would not only be a mistake but one that would lead, in my opinion, to a serious weakening and undermining of the Inspector's authority and effectiveness.
- (21) The Inspector's principal function referred to above is a most important one, which is intended to put in place the proverbial "watchdog" (an express recommendation of the Royal Commission) to deal with complaints from ordinary, and usually vulnerable, citizens, with no redress against the Commission whatsoever, in situations where the Commission has relevantly misconducted itself vis a vis such citizens.
- (22) Unless the Inspector's relevant opinions and criticisms expressed when upholding such complaints are accepted and respected by the Parliament and the general public, rather than being watered-down by suggestions that they should be regarded of no more effect than the Commission's opposing opinions, then the position and authority of the Inspector would be undermined with the result that his/her criticisms of the Commission and its procedures would count for little.

- (23) A further effect of such an undermining of the Inspector's position, in my opinion, is that it would be likely to give the impression to would-be Complainants that there is little to be achieved in subjecting themselves to the Inspector's complaints process if the result of such a complaint being upheld is not to be perceived as a indictment of the Commission and its procedures, but nothing more than an opinion that can be ignored and shrugged off by the Commission on the basis of a statement that it does not accept the Inspector's opinion and intends to disregard it.
- (24) If such a situation were to evolve it would, in my opinion, emasculate the Inspector as "watchdog", and diminish the Inspector's effective jurisdiction directed to the prevention of the abuse of power and other misconduct on the part of the Commission.
- (25) Indeed, in my opinion, such a situation would be an indication to the Commission that it could disregard such opinions of the Inspector with impunity, as being of no consequence, and as having no bearing or influence on the Commission's public persona or standing. It might be argued, of course, that the Commission's present policy as reflected in its negative responses to the upholding by the Inspector of the complaints in each of the *Young, Brazel, Philpott, Deissel, Jennings* and *Police Association* complaints already evince such an attitude on the part of the Commission, but that is another matter.
- (26) I have referred above to the interests of the ordinary citizens, in the main police officers, who have constituted the relevant Complainants. They have no redress at all against the Commission when the Commission publicly identifies them in ways that lower their reputations and esteem in the opinion of their communities, and in some instances ruin their careers. Their only avenue for limited redress where they take the view they have been unjustly dealt with by the Commission in this regard to complain to the Inspector. On my reading of the Committee's Report, their legitimate expectations, in this context, may have been overlooked in the procedures adopted by the Committee.
- (27) I have also referred above to problems arising from the width of the terminology in the recommendation. In effect, the recommendation seems to envisage that the situation ought to be that the existence an "adverse comment" in a relevant Inspector's Report with which the Commission disagrees automatically provides the Commission with a statutory entitlement to have "reproduced in full" in the Report the Commission's response. If regard is had to the Inspector's relevant Reports published to date, in my opinion, such a concept, quite apart from the objections raised above, would seem quite

impracticable, and could if taken literally double the size of the Report. If the inspector had already dealt with the Commission's response in the relevant correspondence, as is invariably the case in the current procedures, is the Inspector to be entitled to point that out and add his response? Is this to be followed by a further response, and so on? Not only would such a system be unworkable, but the statutory purpose of the Inspector's Report, and the authorised voice of the Inspector, to deal in a proper case with relevant misconduct by the Commission, would be lost in such a process.

- (28) A further objectionable feature, in my opinion, with the suggestion that the correspondence between the Inspector and the Commission should be published in the Report (if that is what is intended) would mean that correspondence presently regarded as private and confined to the parties (and the Complainant) and on that basis often containing comment not intended by either party to be made public, would, on this hypothesis, be made public in the Report. This would be likely to mean that the correspondence would then be couched in terms for public consumption, and thus invite endless point-scoring, probably leading to even more voluminous correspondence than at present, which is already a serious drain on the Inspector's part-time role. No doubt it is also a drain on the Commission's resources, but there is no comparison between the two in terms of resources.
- (29) Nor in my opinion would access to the whole of such correspondence (let alone one side's only) in any particular case be likely to enlighten "the wider audience" if by that expression is meant the general reader. An understanding of the rules of procedural fairness requires an understanding of a considerable body of case-law, especially decisions of the High Court which has developed significantly and progressively the law relating to procedural fairness in the last 10 years or so, and continues to do so (each of my Reports cites a considerable list of such cases). Also required is an understanding of relevant differences between the application of the rules of procedural fairness in Courts, on the one hand, and Tribunals, such as the Commission, on the other, and also between various Tribunals, depending on their statutory framework and functions, and whether they operate on an adversarial basis as distinct from inquisitorial.
- (30) To give some idea of the enormous body of relevant correspondence generated in the production of my three most recent Reports, I provide the following details:

As to the Philpott Report, the correspondence from the Commission comprised 44 pages (166 paragraphs); and from the Inspector 34 pages (134 paragraphs).

As to the Deissel Report, the correspondence from the Commission comprised 46 pages (180 paragraphs); from the Inspector 47 pages (140 paragraphs).

As to the Jennings Report, the correspondence from the Commission comprised 73 pages (271 paragraphs); from the Inspector 58 pages (231 paragraphs).

Should the Commission wish to view these correspondence, please advise and it will be made available.

(31) There is nothing unique in the fact that an Inspector's opinion, such as the PIC Inspector's, that there has been a denial of procedural by a Tribunal, such as the Commission, might not be universally accepted. That is not a condition which must exist before the Inspector's opinion has the full force of Statute, because such certainty may not be attainable in any particular case. This is readily illustrated by pointing out that there are several recent decisions of the High Court overruling decisions, some unanimous, of the Full Federal Court, as to whether or not there has occurred a denial of procedural fairness in respect of proceedings in a particular Tribunal.

(32) It might also be relevant to remind the Committee that the present state of affairs should not, in my opinion, be viewed as one of any permanence. The terms of the present Commissioner and Inspector will have lapsed, respectively, by the end of November next year. In due course, a new Commissioner and Inspector will be appointed. I think it highly unlikely, for a number of reasons, that the present impasse will continue. As the Committee will have noted, it was not there previously.

(33) To sum up: it is the Inspector's relevant opinions that must prevail and be acted upon so far as the Commission is concerned, not because of any notion of infallibility attaching to the Inspector's Reports, but because that is the intention of the Statute. The Inspector must be able to deal effectively with relevant complaints concerning the misuse of power etc., by the Commission, not only in those cases where the Commission concedes the validity of the complaint, but equally in cases where the Commission claims not to accept the Inspector's conclusion that such a misuse of power has occurred. This is not to suggest the Commission cannot take a different view in such a case; merely that the Commission's different view is irrelevant.

- (34) Finally, it should not go unnoticed that, in my opinion, the Commission is not without recourse against the opinions of the Inspector in a proper case. If the Commission were to hold a strong view that the Inspector was exceeding his complaints' jurisdiction in a particular case, for example, by producing untenable and damaging opinions in relation to the Commission's procedures and practices, unsupported by the case-law, it would be open to the Commission to approach the Attorney-General to institute proceedings in the Supreme Court, seeking binding Declarations to that effect, and setting aside the Inspector's opinions.
- (35) I will today forward a copy of this letter to the Commission for their interest, and comment, should the Commission wish to do so.

Yours sincerely,



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