NEW SOUTH WALES
Crime Commission

BY HAND

10 March 2011

Mr L Tree
Deputy Director General
Law Enforcement and Security Co-Ordination
Department of Premier and Cabinet
Level 39 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Sir

Review of the Police Integrity Commission

At the meeting of the Management Committee of this Commission held on 2 March 2011, I reported that the Commission had commenced litigation against the PIC in relation to its conduct of an investigation and its proposal to hold public hearings. I also reported that two members of staff had commenced proceedings in relation to the same matter, raising some slightly different issues. We had invited the PIC to mediate in accordance with the government's requirements but we did not receive a response.

The members of the Management Committee were concerned that I was not able to discuss with them the substance of the PIC's investigation.

This difficulty has drawn attention to matters relevant to your Review of the PIC. You have already received from me some contributions to your Review but recent developments in the relationship between this Commission and the PIC add to the concerns that I should draw to your attention and reinforce concerns that have already been mentioned.

There is always a difficult balance to be struck between giving public authorities sufficient power to discharge their functions effectively and providing sufficient safeguards to protect legitimate public and private interests against the improper or imprudent use of special powers. The PIC has very significant coercive powers. Those powers are greater than, for example, those conferred on this Commission for the purpose of fighting organized crime. Some aspects of the PIC's approach to the exercise of its special powers have given rise to concerns.

The first concern relates to orders prohibiting publication of evidence given before the PIC. Section 55 (1) of the *Police Integrity Commission Act 1996* empowers the PIC to order that evidence given to the PIC and other material 'must not be published except in such manner, and to such persons, as the Commission specifies.' Subsection (2) provides that such a direction is not to be given unless the PIC is satisfied that it is 'necessary or desirable in the

453-463 Kent Street Sydney, PO Box Q566, QVB Post Office Sydney 1230, Australia.
Telephone: +61 2 9269 3888 Toll Free: 1800 02 3143 Facsimile: +61 2 9269 3809, +61 2 9269 9733 (Confiscation)
Eaglenet: 57022 DX: 13018 Market Street Sydney Email: crimecommission@crimecommission.nsw.gov.au

public interest.' One might think that, at least in the exercise of the PIC's discretion, non-publication orders should be framed so that they only operate to the extent needed to protect the public interest. It appears, however, that the PIC makes blanket non-publication orders without due consideration of exceptions.

Existing non-publication orders require me to be opaque when addressing this issue, but I shall endeavour to be as full as I can be without breaching any order of the PIC.

During the course of certain private hearings held last year by the PIC, it seemed likely to this Commission (in particular, the Assistant Commissioner, who is dealing with these issues for the Commission) that evidence relevant to the running of this Commission would be given to the PIC. As it is the function of the PIC to investigate misconduct, it appeared that this Commission had a material interest in having confidential access to the evidence. The Assistant Commissioner sought confidential access to the evidence for the purpose of properly managing this Commission's affairs. The PIC refused.

This year, both the Assistant Commissioner (acting for the Commission) and I received copies of transcripts of evidence given to the PIC last year. We are able to discuss the contents thereof for the purpose of preparing submissions to the PIC. However, in spite of the fact that we are both apprised of the contents of the evidence, we are precluded from discussing them in our capacities as members of this Commission or for the purposes of managing this Commission.

As noted, I am precluded from discussing the matters with the Management Committee. The Assistant Commissioner and I are precluded from discussing the matters with our staff (except for the purpose of preparing submissions—not for the purpose of running this Commission). This causes substantial problems for those responsible for governance and supervision.

One effect of this situation is that staff have been able to commence proceedings without decision by me.

The power to prevent disclosure of evidence given to the PIC exists in order to protect against prejudice to investigations, including by way of the practice known as the 'scrum down', which occurred during the time of the Police Royal Commission. It was not intended to preclude the NSW Police Force or this Commission from inquiring into and dealing with misconduct or from properly discharging their responsibilities (including governance responsibilities).

It is difficult to see why it is considered by the PIC to be necessary or desirable in the public interest that the Assistant Commissioner and I not be able (except for the purpose of making submissions to the PIC) to discuss material known to both of us.

A second concern is the PIC's willingness to override legal professional privilege.

The PIC has power during a hearing to require a witness to produce a document: PIC Act, s. 38 (2). Privilege over any such document is apparently abrogated by s. 40 (2). However, privilege is preserved in respect of privileged communications made 'for the purpose of providing or receiving legal professional services in relation to the appearance, or reasonably anticipated appearance, of a person at a hearing before the Commission': s. 40 (5).

Where a witness claims privilege in accordance with s. 40 (5) it is (at least in the opinion of the PIC) open to the PIC simply to serve a notice to produce pursuant to s. 26. Although

there are contrary arguments about whether or not a notice to produce overrides the legal professional privilege of a public authority (see s. 37 (3) (b)), the PIC takes the view that a notice does abrogate privilege and that there is no exception even in respect of privilege over communications made for the purposes of a PIC hearing.

The conferring of this significant power undermines the public interest that underpins legal professional privilege. As the High Court has repeatedly observed, legal professional privilege is a fundamental common law doctrine that exists to serve the public interest in having people obtain legal advice when it is needed and in having them be candid with their lawyers. Where, as may well be the case with the PIC Act, legislation abrogates privilege, that great power should be used sparingly and reluctantly. This Commission does not have information that allows it to conclude that the PIC uses its powers sparingly, reluctantly, or carefully.

A third concern arises from the fact that the PIC can also override public interest immunity and it has been willing to do so, even to the extent of obtaining information that discloses the identities of Commission human sources covered by the discussion of informers in many cases (*e.g., Cain v. Glass (No. 2)* (1985) 3 NSWLR 230 at 246–248). There are other concerning aspects of the PIC's behaviour in this area which I am precluded from disclosing to you.

In breach of agreements previously reached with this Commission, the PIC has been making approaches to this Commission's human sources. Important relationships—and therefore important sources of intelligence—have been damaged. A continuation of this practice will put lives at risk.

The above-mentioned concerns arising from the PIC's use of its statutory powers have been heightened by recent evidence that clearly shows that a person or persons within the PIC has or have unlawfully disclosed information.

These matters combine to affect this Commission's operations and the public interest adversely.

The combination of the PIC and its staff unnecessarily compelling this Commission to disclose highly sensitive material and unlawfully disclosing information to news media have made it necessary for this Commission to consider carefully what, and how, confidential intelligence and contacts with human sources are documented. For the most sensitive information, this Commission has now had to depart from routine record keeping and has had to resort to special and unsatisfactory measures. It is far from ideal that this situation has been reached.

Similarly, this Commission can no longer obtain written legal advice with confidence.

Another consequence of the PIC's conduct—undertaken in part with statutory authority—is that this Commission has been significantly diverted from the discharge of its functions. It seems that the PIC is applying a disproportionate amount of it investigative and other resources to examining this Commission. On the other hand, this Commission, with its limited staff and limited budget cannot cope with the demands and distractions that the PIC impose upon it. The simple exercise for the PIC of preparing and serving a notice to produce can create hours or more work for several people at this Commission. This Commission's fight against organized crime is being significantly weakened by the conduct of the PIC.

Mr L Tree
Deputy Director General
Department of Premier and Cabinet

10 March 2011

In the context of your current review, my single biggest issue remains public hearings. Incompetent investigators who do not follow the rules should make their mistakes in private without unnecessarily destroying the reputations of good people and damaging public confidence in institutions. Public hearings may have a place in Royal Commissions—but they will always be exceptional. It has been so often the case that the initial allegation has been given undue prominence and the individual is irreparably harmed. When allegations are found to be groundless, there is no publicity which adequately restores the balance. Public hearings are not criminal prosecutions, but the effect of an allegation can be equivalent to a conviction due to the sensational way in which they are published, sometimes with orchestrated media briefings to ensure maximum impact. The recent leaks were timed to coincide with planned public hearings which would have been held but for our injunctions.

On the PIC website there is some reference to avoiding the 'unnecessary harm' of public hearings. The balancing that needs to occur when deciding whether to hold public hearings gives undue weight to 'the public's right to know'. This is sometimes referred to as 'naming and shaming'. The expression 'named in the Police Royal Commission' or 'named in a PIC investigation' is now common. The report by Inspector Moss in relation to the *Whistler* matter gives examples of this. There are others.

It is also suspected that the PIC is more concerned with promoting itself through such publicity than discovering, preventing and deterring corruption. Its recent escalation of activity may also have an element of self-preservation in the context of your review—attempting to use its powers in a public way for the political purpose of continuing its independent existence.

It appears that the PIC has been concerned with self-adulation for some time. Many of its 'successful' operations have been the product of police work—though insufficient credit is given to this in the published reports. PIC Operations *Jade* and *Florida* are amongst those that come to mind. The Leigh Leigh matter and Laycock matter are also significant. In many of these cases the PIC has done little more than publish the work of Police and the Crime Commission (both of which the PIC now oversees). This has added nothing to the outcome other than:

- Cost;
- delay; and
- publicity which could affect the ultimate trial.

In matters where the 'investigation' has been mainly the work of the PIC itself, such as the Shaw matter, there has been undue publicity and in many cases breaches of the rules of fairness. Many of these matters are referred to in the Inspector's reports.

I hope this assists your deliberations.

Yours sincerely

P Bradley
Commissioner