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14 March 2011

Mr Les Tree
Deputy Director-General
Law Enforcement Policy Branch
Department of Premier and Cabinet
GPO Box 5341
Sydney NSW 2001

Dear Mr Tree

**Supplementary Submission to Review of the *Police Integrity Commission Act 1996*
Regarding Publication of Complaint Reports by the Inspector of the PIC**

BACKGROUND

As you are aware, I have been Acting Commissioner for the Police Integrity Commission, since January this year. In that short period I have become aware of what I regard to be an unsatisfactory situation concerning the Inspector of the Police Integrity Commission and his practice of publishing on his website all the complaint reports written by him concerning the Commission.

Without exception the reports contain strident criticisms of the practices adopted by the Commission in the conduct of its investigations, particularly in relation to public hearings. In all but one of those matters, (the Briggs complaints) the Commission has informed the Inspector that it does not agree with his conclusions or his application of the law. Nevertheless the Inspector's reports are uploaded to his website and published to the world at large. In my observation the number of such reports published by the Inspector and the uniformly condemnatory nature of each report has resulted in damage to the morale of the Commission and moreover a perception outside the Commission (for example amongst members of the Police Association, with whom I have met) that it is an organisation which routinely exercises its powers in a manner which is unfair, unbalanced and contrary to the requirements of natural justice. In the time I have been Acting Commissioner and prior to that Assistant Commissioner for the purposes of Operation Winjana, I have found the practices of the Commission to be quite to the contrary.

In October 2010 the Inspector issued a report concerning a complaint made by former police officer Bradley Hosemans. Prior to the release of that report the Commission advised the Inspector that it disagreed with the Inspector but that, having regard to the divergence of views between the Inspector and the Commission, the Commission had sought the advice of Senior Counsel before formally responding to the Inspector's report. In December 2010,

before the advice was received by the Commission, the Inspector forwarded copies of his report to your office and the Parliamentary Joint Committee (PJC) and uploaded it to his website, whereupon it immediately received media coverage.

The advice requested by the Commission was received earlier this month and I determined that the advice and an earlier advice provided by the same senior counsel (Mr Peter Hastings QC) in relation to the same Commission investigation (Operation Rani) should be attached to the Commission's website in an attempt to try and restore some balance to the public record, which had been so weighted against the Commission by virtue of the continual publication by the Inspector of his damaging reports. The Inspector has been provided with a copy of the advice and informed that it has been attached to the Commission's website. I enclose a copy of the advice for your information and a copy of a recent letter forwarded by me to the Inspector regarding the publication of the advice.

SUBMISSION

This state of affairs is of course far from satisfactory and the purpose of this letter is to submit that, as part of the review of the *Police Integrity Commission Act, 1996* consideration be given to amending the legislation so that the Inspector is required to deliver his complaint reports to Parliament and wait until they have been made public by Parliament before publishing them on his website. The Commission assumes, of course, that Parliament would take into account any submissions made by the Commission regarding the Inspector's report before making it public.

HISTORICAL CONTEXT

I have been informed by Commission staff that this issue has already been the subject of three recommendations by the PJC and has been referred to the Minister for Police on three occasions. On the third occasion, the Minister advised the PJC that he had referred the matter to the present review of the *Police Integrity Commission Act, 1996* ("the PIC Act").

The three recommendations made by the PJC concern the Inspector's power to publish complaint reports¹, the Inspector publishing the Commission's response to his report as part of his report² and that consideration be given to a presumption that a complaint that is upheld by the Inspector will be published unless to do so is not in the public interest³.

THE ABILITY OF THE INSPECTOR TO PUBLISH

Questions about the ability of the Inspector to publish reports predate the current Inspector. In the PJC's *Report on the Ten Year Review of the Police Oversight System* (November 2006) the then Inspector, the Hon James Wood QC, 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)

¹ Committee on the Office of the Ombudsman and the Police Integrity Commission, 2009, *Report on the Ninth General Meeting with the Inspector of the Police Integrity Commission* p 4.

² Committee on the Office of the Ombudsman and the Police Integrity Commission, 2010, *Report on the Inquiry into the Handling of Complaints Against the Police Integrity Commission* p 15

³ Committee on the Office of the Ombudsman and the Police Integrity Commission, 2011, *Report on the Eleventh General Meeting with the Inspector of the Police Integrity Commission* p 4.

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)⁴

No legislative changes were made to the Act following these recommendations.

Inspector Moss commenced his term in November 2006. In his Annual Report for 2007/2008 (at paragraphs 84-93) the Inspector expressed the view that it was not clear from the legislation that the PIC Act gave the Inspector any power to publish his complaint reports so that they became public reports. Nor, he said, did there appear to be any power in the legislation authorising the Inspector to present such reports to Parliament. At paragraph 93 of his 2007/2008 Annual Report the Inspector concluded:

"If this conclusion is accepted as reasonable, it follows that an amendment to the legislation would appear to be desirable to clarify these issues. I have drawn these perceived problems to the attention of the Joint Parliamentary Committee".

During the Inspector's Ninth General Meeting with the PJC in March 2009 he gave evidence 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 Commissioner of Police and the Director of Public Prosecutions⁵
- Section 101 confines the Inspector to reports "that can only be properly described as "special reports" which I would view as being "one-off" reports delivered by the Inspector from time to time.... I do not see s89(1)(b) reports as fitting that description"⁶
- In relation to the Defamation Act, the Inspector argued that as s89(1)(b) does not provide the Inspector with the power to publish a complaints 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"⁷

The Inspector gave evidence before the Committee that the only way he could make complaint reports public was to provide summaries in his annual reports⁸.

The Committee was not persuaded that the Inspector was unable to report to whomever he thinks was appropriate on any matter relating to his functions. To that end, the Clerk of the Legislative Assembly sought advice on behalf of the Committee from the Crown Solicitor 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

⁴ Committee on the Office of the Ombudsman and the Police Integrity Commission, 2009, *Report on the Ninth General Meeting with the Inspector of the Police Integrity Commission* p 4

⁵ *Ninth General Meeting*, p 6

⁶ *Ninth General Meeting*, p 7

⁷ *Ninth General Meeting*, p 7

⁸ *Ninth General Meeting*, p 11

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 reports⁹.

The Crown Solicitor's advice unequivocally supported the position of the current Inspector (and the former Inspector) that he is unable to make public his complaints reports¹⁰.

The PJC wrote to the Minister requesting that the PIC Act be amended to clarify that the Inspector is able to report to any party, including Parliament, at his discretion in relation to any of his statutory functions¹¹. No legislative changes were made following this recommendation.

REPORTS PUBLISHED BY PREVIOUS INSPECTORS

Apart from Annual Reports, only two other reports have been published by previous Inspectors. These were:

- A report into a November 2001 episode of the 'Four Corners' program and Operation Florida by Inspector Mervyn Finlay QC which was published as an appendix to the PJC's report on the *Sixth General Meeting with the Inspector of the Police Integrity Commission* in June 2002; and
- The *Report on the Practices and Procedures of the Police Integrity Commission* undertaken by Inspector Morris Ireland QC at the request of the then Minister for Police the Hon Michael Costa following Operation Malta and tabled in Parliament in June 2003.

COMPLAINTS REPORTS PUBLISHED BY CURRENT INSPECTOR

Since the Ninth General Meeting with the PJC, the Inspector has published the following complaint reports on his website:

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|--------------------------------|------------------|
| 1. Detective T Briggs (1) | 11 December 2007 |
| 2. Detective T Briggs (2) | 12 March 2008 |
| 3. Sergeant A Brazel | 23 February 2009 |
| 4. Ms S Young | 6 March 2009 |
| 5. NSW Police Association | 28 January 2010 |
| 6. Officer J Philpott | 9 June 2010 |
| 7. Officer A Deissel | 9 June 2010 |
| 8. Officer M Jennings | 9 June 2010 |
| 9. Mr B Hosemans | 22 October 2010 |
| 10. Quenten & Michelle Roberts | 1 February 2011 |

(Please note the dates associated with the first four reports are the dates of those reports, not the dates they were published on the Inspector's website.)

⁹ *Ninth General Meeting*, p 12

¹⁰ *Ninth General Meeting*, p 12

¹¹ *Ninth General Meeting*, p 12

Additionally the Inspector has tabled the Special Report to Parliament – Pursuant to s101 of the PIC Act in April 2009. This was a compilation of the first four complaint reports, namely Briggs (1 and 2), Brazel and Young. The Inspector stated in paragraph 1, page 2 of this report that the PJC urged him to make the report, yet in the letter from the PJC to the Inspector at page 6 the Committee noted ***“that such a report would be generic in nature, dealing with substantive matters and not the details of individual complaints”***.

The Inspector appears to have reversed his previous position on his ability to publish complaint reports and seems to have adopted a practice of publishing a report on any complaint he upholds. This is despite his publicly expressed reservations about the power of the Inspector to publish a complaint report, and the lack of protection provided by the *Defamation Act* as well as unequivocal advice from the Crown Solicitor that the Inspector is unable to make public his complaint reports.

During his Eleventh General Meeting with the PJC in October 2010, the Inspector explained his decision to publish complaint reports on his website in the following way:

I have taken the view, perhaps adopting a broad interpretation of the legislation in the public interest I would hope, that I can at least make these reports part of my Annual Report. That seemed to me to fall squarely within what the Inspector is required to report to Parliament and so I have been adopting that procedure of including all complaint reports upholding complaints in the Annual Report which covers the particular period.

In these days when the Inspector has a website, I have also taken the course of publishing each Annual Report on the website and including the complaint reports which, as I say, I see as part of the Annual Report, including those on the website as well as the Annual Report itself.¹²

It should be noted that the Inspector's current practice is to publish his complaint reports on his website shortly after they are finalised, and not merely as part of his Annual Report. Accordingly this means that the complaint reports are not first presented to Parliament but are published at a time of the Inspector's choosing and then, if they are subsequently incorporated in the Inspector's Annual Report for the relevant year they are presented to Parliament at that time, ie after they have already been placed in the public domain by the Inspector.

THE ABILITY OF THE INSPECTOR TO PUBLISH THE COMMISSION'S RESPONSE TO HIS REPORT WITHIN HIS REPORT

In April 2010, the PJC published the *Report on the Inquiry into the Handling of Complaints Against the Police Integrity Commission*. This inquiry took evidence from the Commission, the Inspector and other comparable bodies including the Inspector of the ICAC, the Parliamentary Inspector of the Corruption and Crime Commission and the Commissioner of the Corruption and Crime Commission.

This report suggested guidelines for the handling of complaints against the Commission by the Inspector. These were:

1. ***As soon as is practicable after receipt of a complaint, or formulation of a complaint by the Inspector, a written copy of that complaint should be given to the PIC as formal notification of the complaint.***

¹² Committee on the Office of the Ombudsman and the Police Integrity Commission, 2011, *Report on the Eleventh General Meeting with the Inspector of the Police Integrity Commission* p 3

2. *As a general rule, responses to the complaint should be sought from all relevant parties before the preparation of any draft report or recommendations.*¹³

Additionally the PJC recommended:

*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 disagrees with the Inspector's position, the Commission's response to that adverse comment be reproduced in full in the Inspector's complaint report.*¹⁴

THE INSPECTOR'S RESPONSE TO THE PJC'S RECOMMENDATION

The report was tabled in Parliament in April 2010, and on 21 May 2010 and 16 June 2010 the Inspector wrote to the Committee regarding the recommendation. In his letter of May 2010, he stated that the inclusion of the Commission's response was impractical given the volume of the correspondence during drafting of complaint reports. In his second letter he argued that:

- the Inspector indicates in his reports where the Commission disagrees with his opinions;
- the complainant receives copies of significant correspondence from the Commission (unless the Commission objects to it being made available);
- the Commission's response to the issues raised by the complaint and to the Inspector's draft report is taken into account in the final form of the report;
- the Inspector's opinions and recommendations are authorised and required by the Statute to deal with relevant complaints. To consider that the Inspector's:
 - ...relevant opinions are just opinions and should have no greater weight than the opposing opinions of the Commission... 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.

This could lead to a situation where prospective complainants are discouraged from complaining because the Inspector's reports are perceived as ineffective.

If such a situation were to evolve it would emasculate the Inspector as a 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.

- the Commission can have recourse to the Supreme Court if it believes the Inspector has exceeded his complaints jurisdiction.¹⁵

At the General Meeting on 27 October 2010, the Inspector was asked whether he thought that excluding the PIC's response to adverse comment in a complaint report published by the PIC Inspector could be seen as denying the Commission the opportunity to make its viewpoint public. The Inspector replied that, for the reasons he had provided in his correspondence to the Committee:

¹³ Committee on the Office of the Ombudsman and the Police Integrity Commission, 2010, *Report on the Inquiry into the Handling of Complaints Against the Police Integrity Commission* p 14

¹⁴ Committee on the Office of the Ombudsman and the Police Integrity Commission, 2010, *Report on the Inquiry into the Handling of Complaints Against the Police Integrity Commission* p 15

¹⁵ Committee on the Office of the Ombudsman and the Police Integrity Commission, 2011, *Report on the Eleventh General Meeting with the Inspector of the Police Integrity Commission* p 5

...I do not consider that there is any unfairness to the Commission or in the public interest in not including the Commission's response in the Inspector's report.¹⁶

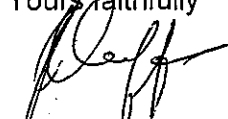
CONSIDERATION OF A PRESUMPTION THAT A COMPLAINT THAT IS UPHELD BY THE INSPECTOR WILL BE PUBLISHED UNLESS TO DO SO IS NOT IN THE PUBLIC INTEREST

The Committee made this recommendation in its report on its Eleventh General Meeting with the Inspector of the Police Integrity Commission. Apart from generally noting the importance of oversight for agencies with extraordinary powers, and that it should be for the Inspector to decide when publishing a report is in the public interest, no discussion of the reasons for this recommendation appears in the report.

CONCLUSION

Given the amount of time and resources which have already been expended on this issue, it is submitted that the opportunity presented by the current review should be taken to amend the PIC Act in order to clarify the situation and redress the unsatisfactory situation which has developed regarding the publication by the Inspector of his complaint reports.

Yours faithfully



**The Hon. Jerrold Cripps QC
Acting Commissioner**

¹⁶ Committee on the Office of the Ombudsman and the Police Integrity Commission, 2011, *Report on the Eleventh General Meeting with the Inspector of the Police Integrity Commission* p 5