

**Review by the Minister of the  
*Police Integrity Commission Act 1996***

**New South Wales Government  
November 2011**

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# **1. EXECUTIVE SUMMARY**

## **1.1 Requirement for a statutory review**

Section 146 of the *Police Integrity Commission Act 1996* (the PIC Act) requires that the Minister administering the PIC Act is to conduct a review to determine whether the policy objectives of the PIC Act remain valid, and whether the terms of the PIC Act remain appropriate for securing those objectives.

Since April 2011, the Premier has administered the PIC Act. Previously, the PIC Act was administered by the Minister for Police.

## **1.2 Validity of the policy objectives of the PIC Act**

The Government considers it beyond doubt that the overall objectives of the PIC Act remain valid and reflect important integrity principles critical for ethical police conduct and governance in New South Wales.

While the Police Integrity Commission (PIC) itself notes an improvement in the 'ethical health' of the NSW Police Force under its watch, it does not follow that it is 'mission accomplished' or that the State's police anti-corruption machinery can now be dismantled. The maintenance of integrity and the highest standards of ethical conduct require continuous vigilance.

Moreover, beyond the NSW Police Force, concerns have been raised in relation to the accountability arrangements concerning the performance and integrity of officers of the New South Wales Crime Commission (NSW Crime Commission).<sup>1</sup> Under the PIC Act, functions of the PIC also include the prevention, detection and investigation of misconduct by NSW Crime Commission officers. The conviction of Mark William Standen in August 2011 on charges concerning large-scale drug importation at the time he was a senior officer of the NSW Crime Commission demonstrates that a place remains for institutions and procedures to prevent and detect misconduct by officers of NSW law enforcement bodies.

A role clearly remains for a body, separate from Government and reporting directly to Parliament, to continue to oversee police integrity, as corruption and misconduct risks inherently coexist with the discretionary exercise of significant coercive powers.

## **1.3 The continuation of the PIC**

Careful consideration has, however, been given to whether the PIC Act, and in particular the PIC itself, remain the most appropriate vehicle for effectively and efficiently achieving the objectives. In particular, consideration has been given to whether the functions currently performed by the PIC should continue to be

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<sup>1</sup> On 31 August 2011 the Governor, on the recommendation of the Premier, appointed Mr David Patten as Commissioner of the Special Commission of Inquiry into the New South Wales Crime Commission. The Special Commission was established following the conviction of Mark William Standen of offences concerning large-scale drug importation while Standen was a senior NSW Crime Commission officer. The Special Commission is to examine the structure, procedures, accountability and oversight of the NSW Crime Commission. See Media Statement "Minister Gallacher appointments David Patten to lead inquiry into the Crime Commission", Friday 2 September 2011.

performed by a stand-alone body or whether they would be better performed as part of a specialist division of another independent integrity body such as the Independent Commission Against Corruption (ICAC). That issue is addressed in section 3, below.

Some submissions to this review suggested there may be compelling policy reasons for such a step.<sup>2</sup> These pointed to the potential synergy to be gained from combining expertise in corruption prevention and investigations.

It is important to recall, however, the principles that led to the establishment of the PIC set out by the Royal Commission into the NSW Police Service in 1996 – principally that different approaches and separate organisations are appropriate for the supervision of the complaint system concerning police and for corruption investigation.

Furthermore, even if the PIC were to be brought within the ICAC, there would be sound reasons for maintaining it as a stand-alone division of the ICAC with a specific statutory officer being invested with the relevant police oversight statutory functions.

The Government considers that State's integrity interests are best served at present by the PIC and the ICAC remaining separate entities. The Government considers that it is important to provide certainty and stability to the organisation, through a commitment to its continuation as a body and through the appointment of a permanent commissioner (see section 1.5 below).

#### **1.4 Provisions of the PIC Act and related legislation**

The principal objects of the PIC Act are:

- (a) to establish an independent, accountable body whose principal function is to detect, investigate and prevent police corruption and other serious police misconduct;
- (b) to provide special mechanisms for the detection, investigation and prevention of serious police misconduct and other police misconduct;
- (c) to protect the public interest by preventing and dealing with police misconduct; and
- (d) to provide for the auditing and monitoring of particular aspects of the operations and procedures of the NSW Police Force.<sup>3</sup>

Generally, the Government considers that the terms of the PIC Act remain appropriate for securing its objectives. A number of relatively minor amendments to the legislation are proposed to ensure that the PIC Act is better able to secure its objectives.

Many of the proposed amendments seek to bring the provisions relating to the PIC into alignment with corresponding provisions that apply to the ICAC.

These include reform of the provisions in the PIC Act for the Inspector of the PIC to publish reports.

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<sup>2</sup> e.g., Ombudsman, Submission to Review, 3 August 2010, p 3.

<sup>3</sup> section 3, *Police Integrity Commission Act 1996*.

In particular, the Government will introduce legislation to amend the powers concerning Inspector's reports to align them with those that apply to the Inspector of the ICAC in the *Independent Commission Against Corruption Act 1988* (ICAC Act). This amendment will, among other things, authorise the Inspector of the PIC to provide a report or recommendation that he or she has made to the PIC, an officer of the PIC, a person who made a complaint, or to any other affected person.

Other proposals for changes to the PIC Act that draw on current arrangements under the ICAC Act concern:

- the right of a person facing an adverse comment from the PIC to have an opportunity to make a submission to the PIC;
- the factors to be considered by the PIC as to whether to hold a public hearing; and
- the functions of the Inspector to include oversight of potential maladministration.

### **1.5 Appointment of a permanent PIC Commissioner and PIC Inspector**

For much of the period of this review, the permanent office of the Commissioner of the PIC has been vacant and the PIC has been led by an acting Commissioner. This arrangement allowed the review outcomes to be determined before committing to new permanent leadership of the PIC.

With the completion of the review, and the Government's commitment to maintain the PIC as a separate statutory body, a permanent appointment will now be made to the office of the Commissioner of the PIC as soon as practicable.

The Inspector of PIC currently holds that position on a part-time basis, reflecting the work load of his office. The term of the current Inspector of the PIC is due to expire before the end of 2011. The Government intends to appoint a new Inspector.

## **2. OUTCOMES OF THE REVIEW**

- 1:** The Government considers that the policy objectives of the PIC Act remain valid.
- 2:** The Government considers that, for the foreseeable future, those policy objectives are best served by maintaining the ICAC and the PIC as separate bodies.
- 3:** A permanent Commissioner of the PIC should be appointed as soon as practicable.
- 4:** A permanent Inspector of the PIC should be appointed as soon as practicable following the expiry of the current Inspector's term of office.
- 5:** Legislation should be introduced to amend the objects of the PIC Act and functions of the PIC to accord equal priority to the PIC's oversight of NSW Crime Commission officers, NSW Police Force officers, and NSW Police Force administrative officers.
- 6:** The prohibition on the employment by the PIC of serving or former NSW Police Officers should be maintained.
- 7:** Legislation should be introduced to amend the PIC Act to specify additional factors that the PIC must consider when deciding whether to hold a public hearing, as outlined in the corresponding provision applying to the ICAC (Section 31(2) of the ICAC Act).
- 8:** Legislation should be introduced to amend the PIC Act to include a '*persons to be heard*' section in similar terms to the *Ombudsman Act 1974* with regard to PIC investigation reports and Inspector complaint reports.
- 9:** Legislation should be introduced to confer on the Inspector of the PIC the same powers with respect to the disclosure of reports as those available to the Inspector of the ICAC.
- 10:** Legislation should be introduced to amend the principal functions of the Inspector to include oversight of potential maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy), corresponding to similar functions conferred on the ICAC Inspector.
- 11:** The Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission should be asked to make recommendations concerning an audit function for the PIC in relation to the NSW Crime Commission.
- 12:** Legislation should be introduced to require principal officers and officers who constitute a public authority to notify the PIC of possible corrupt conduct of NSW Police Force officers, consistent with the duty that applies to the NSW Crime Commission and administrative officers of the NSW Police Force.

**13:** The Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission should be asked to consider the request of the PIC to allow it to use antipersonnel spray and batons.

**14:** Legislation should be introduced to bring Special Constables in the Security Management Unit within the oversight of the PIC, consistent with all other NSW Police employees.

**15:** Legislation should be introduced to amend the PIC Act to require a further review of the validity of the policy objectives of the PIC Act, and the appropriateness of the terms of the PIC Act for securing those objectives, five years from the commencement of the amending legislation.

### 3. INTRODUCTION

#### ***Background to the PIC Act and Recent Amendments***

The *Police Integrity Commission Act 1996* (the PIC Act) was enacted in response to recommendations in the Interim Report of the Royal Commission into the New South Wales Police Service published in February 1996 (Wood Interim Report).

At that time, the ICAC had been operating for some eight years.

The Wood Interim Report provided reasons why the PIC was proposed as a stand-alone independent agency, rather than operate as a division of the ICAC. These reasons included:

- the public perception that the ICAC had failed to tackle police corruption or to use its coercive and other powers with sufficient determination and initiative;
- the risk that the police anti-corruption budget would be drawn into other ICAC activities;
- the potential for internal conflict over resources;
- the need for divisional separation for confidentiality and security; and
- the greater level of confidence in a small, specialist agency from other agencies such as the Australian Federal Police, the National Crime Authority and the NSW Crime Commission concerning information-sharing.

The Wood Interim Report concluded that there would not be any significant financial cost in establishing the PIC, as opposed to a new division of the ICAC. It said the PIC would provide a fresh approach to the problem of serious police misconduct and corruption with purpose-built organisational structure and facilities.

The recommendation became Government policy and, today, the PIC Act provides that the PIC has broad-ranging powers to detect, investigate and prevent serious misconduct and corruption involving NSW Police Force officers, administrative officers of the NSW Police Force, and officers of the NSW Crime Commission.

The PIC is one of several organisations that oversee integrity of officers of the NSW Police Force. The NSW Police Force itself handles complaints about officers and may investigate misconduct of officers by way of its Professional Standards Command. The NSW Ombudsman independently oversees and reviews the way in which the NSW Police Force deals with the more serious of these complaints. The PIC is concerned with serious misconduct and corruption. This statutory review, however, concerns only the structures and procedures of the PIC.

The previous statutory review of the PIC Act occurred in 2003. Since then the PIC Act has been amended a number of times. The most significant amendments have included:

- *Transfer of Unsworn Officers to Police Integrity Commission jurisdiction*  
The PIC Act was amended in 2006 to expand the PIC's oversight functions to include administrative officers of the NSW Police Force. Responsibility for these officers had previously rested with the ICAC.
- *Expansion of oversight to include the NSW Crime Commission*



The PIC Act was amended in 2008 to expand the oversight functions of the PIC to include the New South Wales Crime Commission. Responsibility for these officers had previously rested with the ICAC.

In the period following the introduction of amendments from the 2003 review, the PIC has received and assessed some 6,000 complaints alleging misconduct and undertaken 192 investigations.

### ***Terms of reference***

Section 146(2A) of the PIC Act requires the Minister to review the PIC Act to determine whether its policy objectives remain valid, and whether the terms of the PIC Act remain appropriate for securing those objectives.

The principal objects of the PIC Act are to:

- establish an independent, accountable body whose principal function is to detect, investigate and prevent police corruption and other serious police misconduct; and
- provide special mechanisms for the detection, investigation and prevention of serious police misconduct and other police misconduct; and
- protect the public interest by preventing and dealing with police misconduct; and
- to provide for the auditing and monitoring of particular aspects of the operations and procedures of the NSW Police Force.

The Act specifies that the review is to be undertaken as soon as practicable after the period of 5 years from the date of assent to the *Police Integrity Commission Amendment Act 2005*, that is, after 10 March 2010.

In March 2010, the then Minister for Police (who at the time was the Minister administering the PIC Act) commenced the review and determined that it would also specifically consider:

1. recent recommendations or issues raised by the Parliamentary Joint Committee on the Ombudsman and the Police Integrity Commission (PJC); and
2. the adequacy of the powers, including the reporting powers, of the Inspector of the PIC.

In December 2010, the then Chair of the PJC requested that the review also consider the following recommendation:

*That, as part of the current review of the Police Integrity Commission Act 1996, the Department of Premier and Cabinet consider there being a presumption that the Inspector's reports on upheld complaints are to be published unless to do so would be against the public interest.*<sup>4</sup>

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<sup>4</sup> Committee on the Office of the Ombudsman and the Police Integrity Commission Report No. 14/54, November 2010

### ***Recent recommendations of the PJC***

As noted above, the former Minister for Police determined that the review would consider recommendations made by the PJC arising from its General Meetings with the Inspector of the PIC, the PIC and by its own inquiries.

Issues raised in the Reports of these meetings include:

- The practices and procedures for examining complaints made against the PIC (9/54 April 2010)
- Procedural fairness issues raised in Inspector of the Police Integrity Commission reports (14/54 November 2010, 7/54 September 2009) and the impact of these findings on the relationship between the PIC and the Inspector of the Police Integrity Commission (Report 12/54 March 2010)
- The Inspector's legislative capacity to publish complaint reports (14/54 November 2010, 6/54 March 2009)
- Suitability of employment arrangements of the Inspector of the Police Integrity Commission following expansion of PIC oversight arrangements (6/54 – March 2009)

Many of these issues were also raised by stakeholders in submissions to the review, and during subsequent consultations.

### ***Conduct of the statutory review***

Written submissions to the Review were invited from stakeholder organisations in June 2010 and discussions were held with the key stakeholders following receipt of the submissions. A list of submissions received and consultations is at **section 5**.

Written submissions, including supplementary submissions, were received from stakeholder organisations until the end of March 2011.

## 4. ISSUES RAISED

### ***Threshold issue: Objects of the PIC Act and whether its terms remain appropriate***

#### *A separate integrity agency to address police corruption and serious misconduct*

The first principal object of the PIC Act is to establish an independent, accountable body whose principal function is to detect, investigate and prevent police corruption and other serious police misconduct.

The PIC operates as a key integrity organisation in NSW. The PIC is independent of the Government by virtue of arrangements under the PIC Act and is accountable to the Inspector,<sup>5</sup> to the PJC<sup>6</sup> and to the NSW Parliament by way of annual and other reports.<sup>7</sup>

In terms of its functions, the PIC continues to detect, investigate and prevent police corruption. The PIC submits that the conduct of the NSW Police Force has fundamentally improved over the past decade. Its annual report of 2008-09 states:

*This Annual Report marks some fifteen years since the Royal Commission into the NSW Police was established and out of which came the proposal for the establishment of the Commission. The intervening period has seen a dramatic improvement in the ethical health of the New South Wales Police Force (NSWPF) due in part to the efforts of the Commission . . .*

Despite this improvement in ethical health of the NSW Police Force, the underlying rationale for the PIC has not diminished. A role remains for an independent body to oversee police integrity, as corruption and misconduct risks inherently coexist with the discretionary exercise of significant powers. The NSW Ombudsman states that these risks have not been eradicated in any police force anywhere in the world.<sup>8</sup>

Furthermore, beyond the NSW Police Force, concerns have been raised in relation to the accountability arrangements concerning the performance and integrity of officers of the NSW Crime Commission. Under the PIC Act, functions of the PIC also include the prevention, detection and investigation of misconduct by NSW Crime Commission officers. The conviction of Mark William Standen in August 2011 on charges concerning large-scale drug importation at the time he was a senior officer of the NSW Crime Commission indicates the ongoing need to prevent and detect misconduct by officers of NSW law enforcement bodies.

This review concludes that the objectives of the PIC Act are valid and reflect important integrity principles critical for ethical police conduct and governance in New South Wales.

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<sup>5</sup> *Police Integrity Commission Act 1996*, Part 6.

<sup>6</sup> *Police Integrity Commission Act 1996*, Part 7.

<sup>7</sup> *Police Integrity Commission Act 1996*, Part 8.

<sup>8</sup> Ombudsman, Submission to Review, 3 August 2010, p 2.

The review is also required to consider a more practical and forward-facing question: whether the terms of the PIC Act remain appropriate for securing the objectives of the PIC Act. In effect, the review is required to establish whether the institutional settings for the independent detection, investigation and prevention of police corruption and serious misconduct in NSW are appropriate for the future.

The accountability framework for police and crime agencies currently is spread across several agencies: the PIC, the ICAC, the Professional Standards Command of the NSW Police Force and the Ombudsman, as well as the PJC, the Inspector of the PIC and the Inspector of the ICAC.

In respect of the different roles of the ICAC and the PIC, the Wood Interim Report concluded that different approaches and separate organisations were required for the supervision of the complaint system concerning police and for corruption investigation. However, there is a question as to whether, in light of all that has happened since 1996, the policy of maintaining separate agencies should be revisited.

Submissions to this review suggest there may be strong policy reasons for such a step. The NSW Ombudsman states:

*A larger question arises as to whether it continues to be in the state's best interest to fund a separate agency to function as the police anti-corruption agency or whether these functions could just as effectively be prosecuted by a combined PIC/ICAC. Certainly, there are potential savings to be made from the duplication of expensive infrastructure operated by both agencies such as covert surveillance teams, telecommunication interception and other covert technical resources. There is also potential synergy to be gained from combining expertise in corruption prevention and investigations. This is a matter of government policy, however, and probably beyond the scope of the current review.<sup>9</sup>*

The two organisations currently are equally balanced in terms of the cost of services and Government contributions to them. In 2009-2010, the ICAC's cost of services was \$19.5m of which the Government contributed \$18.9m, while in the same period the PIC's cost of services was \$18.5m, of which the Government contributed \$17.9m.<sup>10</sup>

When contemplating any rationalisation of integrity bodies in New South Wales, however, it is important to recall why the ICAC and the PIC were set apart in the first place. The Interim Report of the Royal Commission into the NSW Police Service (1996) concluded that different approaches and separate organisations were required for the supervision of the complaint system concerning police and for corruption investigation. Some of the reasons for the conclusion are set out above in section 3.

In recent times, the PIC has been the subject of a number of adverse findings by the Inspector of the PIC.

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<sup>9</sup> Ombudsman, Submission to Review, 3 August 2010, p 3.

<sup>10</sup> Independent Commission Against Corruption, Annual Report 2009-2010, p. 15 and Police Integrity Commission, Annual Report 2009-2010, p 92.

It is critical that the body that is responsible for overseeing the integrity of police itself maintain the highest standards of professional conduct, and that it have the absolute trust of the police and the public. The power of the Inspector of the PIC to oversight the PIC is an important element of this.

Importantly, for present purposes, it cannot be concluded that recent issues necessarily suggest a structural problem or call for a structural solution. Nor is it self-evident that the same issues would not have arisen even if the PIC had been a division of the ICAC.

What is more important is to bring about an end to the speculation concerning the future of the PIC and to provide stability of leadership to bring about any necessary cultural changes.

Although the potential synergies from amalgamating the ICAC and the PIC are clear, the Government is not convinced that the reasons which led Justice Wood to recommend establishing the PIC in the first place have entirely fallen away in the last 15 years.

It is also noted that any amalgamation would not be straightforward, given the difference between the functions of the PIC and the ICAC and the myriad of technical, but important, issues that would need to be resolved (e.g. the ICAC may employ former NSW Police Officers but the PIC may not).

The Government also notes that the amalgamation of the PIC into the ICAC would itself involve further instability and upheaval, particularly for the PIC, at a time when what is required is leadership and certainty.

Since the beginning of this year, the permanent office of the Commissioner of the PIC has been vacant and the organisation has been led by an acting Commissioner, the Hon. Jerrold Cripps QC. This acting arrangement has allowed the review outcomes to be settled before committing to a decision for a permanent Commissioner of the PIC.

With the completion of the review, a permanent appointment should be made to the office of the Commissioner as soon as practicable.

The term of the current Inspector of PIC is shortly due to expire. Again to ensure stability and certainty, the Government proposes to move quickly to fill that position.

**Outcome 1:** The Government considers that the policy objectives of the PIC Act remain valid.

**Outcome 2:** The Government considers that, for the foreseeable future, those policy objectives are best served by maintaining the ICAC and the PIC as separate bodies.

**Outcome 3:** A permanent Commissioner of the PIC should be appointed as soon as practicable.

**Outcome 4:** A permanent Inspector of the PIC should be appointed as soon as practicable following the expiry of the current Inspector's term of office.

### **Objects of the PIC Act concerning 'other' functions of the Commission**

#### Officers from Police Force administration and the NSW Crime Commission

The functions set out in the PIC Act do not give equivalent emphasis to Police Force officers, Police Force administrative officers and NSW Crime Commission Staff. Greater detail and weight is given to arrangements for Police Force officers, who were the principal class of employees subject to provisions under the PIC Act when it was enacted in 1996.

Section 3 provides that the principal objects of the PIC Act are:

- (a) to establish an independent, accountable body whose principal function is to detect, investigate and prevent police corruption and other serious police misconduct; and*
- (b) to provide special mechanisms for the detection, investigation and prevention of serious police misconduct and other police misconduct; and*
- (c) to protect the public interest by preventing and dealing with police misconduct; and*
- (d) to provide for the auditing and monitoring of particular aspects of the operations and procedures of the NSW Police Force.*

Section 13 of the PIC Act provides that the principal functions of the PIC are:

- (a) to prevent police misconduct,*
- (b) to detect or investigate, or manage or oversee other agencies in the detection of investigation of, police misconduct,*
- (c) (Repealed)*
- (d) to receive and assess all matters not completed by the Police Royal Commission, to treat any investigations or assessments of the Police Royal Commission as its own, to initiate or continue the investigation of any such matters where appropriate, and otherwise to deal with those matters under this Act, and to deal with records of the Police Royal Commission as provided by this Act.*

Sections 13A and 13B provide for the 'other functions' of the PIC relating to preventing, detecting or investigating corrupt conduct of Police Force administrative officers and NSW Crime Commission officers.

The current drafting of these provisions reflects the fact that these additional functions have arisen from amendments to the principal Act.

Corrupt or other misconduct of NSW Police administrative officers or NSW Crime Commission officers should not be a secondary or lesser concern of the PIC.

Accordingly, it is recommended that the PIC Act be amended to provide that the principal objects of the PIC Act and functions of the PIC includes the detection, investigation and prevention of corruption and other serious misconduct by all NSW Police Force and NSW Crime Commission employees.

**Outcome 5:** Legislation should be introduced to amend the objects of the PIC Act and functions of the PIC to accord equal priority to the PIC's oversight of NSW Crime Commission officers, NSW Police Force officers, and NSW Police Force administrative officers.

## ***Employment and Staffing Arrangements***

### ***Qualifications of the Commissioner of the Police Integrity Commission***

To be eligible for appointment as Commissioner of the PIC, a person is required to be an Australian lawyer of at least 7 years' standing or either a current or former judge of the Commonwealth or an Australian State or Territory.

These criteria are referred to in the PIC Act as 'special legal qualifications' and are set out under Section 4(2) and Clause 1 of Schedule 1 of the PIC Act.

The requirements for special legal qualifications are equivalent to those for the appointment of both the Inspector of the Police Integrity Commission and Commissioner of the ICAC.

In submissions to the review, the Police Association of NSW (the Police Association) and the Commissioned Police Officers Branch proposed that the Commissioner of the PIC be employed from the ranks of serving or retired judges of the Supreme Court of a State of Australia.<sup>11</sup>

This proposal arose from criticism of PIC investigations by the Inspector of the Police Integrity Commission, who concluded that police officers had not been afforded procedural fairness by the PIC.<sup>12</sup>

<sup>11</sup> Police Association of NSW, Submission to Review, 2010, p 14; and Commissioned Police Officers Branch of the Police Association of NSW, Submission to Review, 31 August 2010, p 4.

<sup>12</sup> 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*, 2 April 2009.

The New South Wales Commissioned Officers Branch submitted that a former Supreme Court Judge would bring to the position “a deep appreciation of judicial and procedural fairness and readily and consistently apply those principles within the framework of the Police Integrity Commission Act”.<sup>13</sup>

The provision of procedural fairness is a fundamental issue, and is further addressed later in this review. It is suggested that amending the requirements for appointment to the position of Commissioner will not by itself create an organisation immune from criticisms relating to procedural fairness.

It is also noted that employment provisions should, generally speaking, be as flexible as possible to provide the broadest field of appropriate candidates, which can include a judge or former judge, and to the extent that this is necessary the capacity to deliver procedural fairness can be addressed through the selection process.

Of the three former permanent PIC Commissioners, only one, the Honourable Paul Urquhart QC, was a judge. It is noted that the current Acting Police Integrity Commissioner, the Hon. Jerrold Cripps QC, is a former judge of the NSW Supreme Court and Court of Appeal, Chief Judge of the NSW Land and Environment Court and a Judge of the District Court of NSW.

The proposal to amend the qualifications of the Commissioner is not supported at this time.

#### *Ban on NSW Police Force officers working for the Commission*

Submissions from the NSW Police Force, the Police Association and the NSW Crime Commission have proposed that the current ban on the employment of current or former police officers by the PIC be removed.

Serving or former NSW Police officers are restricted from being employed or seconded to the PIC under Section 10(5) of the PIC Act:

*Police officers and former police officers cannot be appointed to, employed or engaged by, or seconded to the service of, the Commission, nor (without limiting the foregoing provisions of this subsection) can arrangements be made under subsection (4) for the use of their services.*

The arrangements preventing serving or former NSW officers from serving in an anti-police corruption role are grounded in the operational framework of the Royal Commission into the NSW Police Service, where teams comprised police investigators drawn from police services other than NSW. The Wood Interim Report expressly supported the continuation of these arrangements for the PIC, stating:

*Parliament decreed that no current or former NSW Police officers should be employed by this [Royal] Commission. That decision was correct, but, as events have shown, no screening process is infallible, nor can it be said that*

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<sup>13</sup> Commissioned Police Officers Branch of the Police Association of NSW, Submission to Review, 31 August 2010, p 4.



*any Service is totally free from corruption. However, to ensure public confidence in the independence and integrity of the PCC (now PIC), no members or former members of the NSW Police Service should be employed by it.*<sup>14</sup>

The Wood Interim Report foreshadowed that it may be 'necessary or desirable' in the future to review the restriction.<sup>15</sup> Submissions to this review have not made a compelling case that it is either necessary or desirable to review the exclusion of NSW Police Officers from working at the PIC. Nonetheless, the review has considered the issue by drawing on information in the submissions.

Stakeholders consulted for the review have taken differing positions on this issue, with the PIC itself supporting the existing exclusion of NSW Police officers. The Police Force and employee organisations seek removal of the exclusion.

In its submission to the review, the Police Association noted with regard to the restriction on employment that:

*at the time the PIC Act was passed, this was understandable - the NSW police were under a significant cloud, the [Wood] Royal Commission was still exposing corruption and there was little public confidence in the ability of the police to investigate themselves. This is no longer the case.*<sup>16</sup>

Submissions from the NSW Police Force in support of this proposal noted that PIC investigations could be enhanced by the contemporary knowledge of the NSW Police Force that current or former officers would bring with them.<sup>17</sup>

Moreover, the PIC Act does not place any restriction on current or former NSW Crime Commission staff working for the PIC. Section 10(6) also allows for the PIC to work with NSW Police officers on joint operations. The proposal to remove the ban is not supported by the PIC. The PIC notes that the ban on employing former NSW Police officers is crucial to retaining the independence and credibility of the organisation.<sup>18</sup>

The PIC also submits that the current employment arrangements are not causing any recruitment issues for the organisation.<sup>19</sup>

This legislative restriction on the employment of police officers or former police officers was the subject of a specific inquiry by the PJC in 2005, which endorsed the retention of the employment prohibition.<sup>20</sup>

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<sup>14</sup> *Royal Commission into the New South Wales Police Service*, Interim Report, February 1996, paragraph 5.48, p 97.

<sup>15</sup> *Royal Commission into the New South Wales Police Service*, Interim Report, February 1996, paragraph 5.48, p 97.

<sup>16</sup> Police Association of NSW, Submission to Review, 3 August 2010, p 5.

<sup>17</sup> NSW Police Force, Submission to Review, 31 August 2010, p 12.

<sup>18</sup> Review meeting with Police Integrity Commission, 1 October 2010.

<sup>19</sup> Review meeting with Police Integrity Commission, 1 October 2010.

<sup>20</sup> Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission, *Interim Report on an Inquiry into Section 10(5) of the Police Integrity Commission Act 1996*, Report 7/53, 22 March 2005.

This employment issue hinges on two factors:

- the operational needs of the PIC; and
- whether public confidence in the integrity of the PIC would be compromised by employing serving or former police officers.

Concerning the latter point, it is noted that the public's confidence in policing in NSW is increasing. The latest figures available from the National Survey of Community Satisfaction with Policing shows that confidence in policing in NSW has increased between June 2010 and March 2011 from between 79.3%-82.3% to 83.0-86.45% (this survey expresses its survey results as a range to account for sample error).<sup>21</sup>

Nonetheless, the PIC currently is in the best position of any agency to judge the integrity of potential employees – and its ongoing support for drawing Police officers from outside NSW deserves greater weight than the views of the organisations which the PIC is required to oversee.

**Outcome 6:** The prohibition on the employment by the PIC of serving or former NSW Police Officers should be maintained.

## **Hearings**

### Public Hearings of the PIC

The NSW Crime Commission has recommended that public hearings by the PIC should be held only in exceptional circumstances. The NSW Crime Commission notes the negative impacts of hearings on individuals as a consequence of publicity generated by a public hearing.<sup>22</sup>

Currently, the PIC may conduct public hearings for the purpose of an investigation, depending on the circumstances of each individual case. The decision to hold a public hearing is at the discretion of the PIC.

Part 3 Division 4 of the PIC Act outlines the provisions regarding hearings. Section 33 allows for public and private hearings:

- (1) A hearing may be held in public or in private, or partly in public and partly in private, as decided by the Commission.*
- (2) Without limiting the above, the Commission may decide to hear closing submissions in private. This extends to a closing submission by a person appearing before the Commission or by an Australian legal practitioner representing such a person, as well as to a closing submission by an Australian legal practitioner assisting the Commission as counsel.*

<sup>21</sup> Australia New Zealand Policing Advisory Agency (ANZPAA), *National Community Satisfaction with Police Survey*, April 2010 to March 2011 (unpublished)

<sup>22</sup> NSW Crime Commission, *Submission to Review*, 26 October 2010, p 2.

*(3) In reaching these decisions, the Commission is obliged to have regard to any matters that it considers to be related to the public interest.*

The Inspector of the Police Integrity Commission outlined the potential impacts of public hearings on witnesses in a recent complaint report<sup>23</sup> noting:

*'Adverse publicity generated by public inquiries can cause more damage to a person's reputation and peace of mind than any formal judgement, and even a recommendation to take legal action subjects the potential defendant to personal and financial detriment. Those risks are exacerbated by the common tendency to confuse commissions of inquiry with Courts' (Forbes, Justice in Tribunals (3rd Edition)*

Public hearings play an important role in the transparency and accountability of the PIC. However, in permitting the public to observe its investigative activities through the hearing process, due consideration of public interest is required when deciding to hold a public hearing in the first instance.

The *Independent Commission Against Corruption Act 1988* was amended in 2005 to specify additional factors when considering whether or not it is in the public interest to hold a public inquiry.

These are outlined in section 31(2) of the *Independent Commission Against Corruption Act 1988*:

- (2) Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the following:*
- (a) the benefit of exposing to the public, and making it aware, of corrupt conduct,*
  - (b) the seriousness of the allegation or complaint being investigated,*
  - (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),*
  - (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.*

The review considers that public hearings should not be limited to exceptional circumstances. However, further legislative guidance as already applies in the ICAC Act would be of assistance in balancing the consideration of the public interest and benefits of public exposure against the potential for undue prejudice to a person's reputation when deciding to hold a public inquiry.

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<sup>23</sup> Inspector of the Police Integrity Commission, Inspector's Report Mr Hosemans, 22 October 2010, p 49

**Outcome 7:** Legislation should be introduced to amend the PIC Act to specify additional factors that the PIC must consider when deciding whether to hold a public hearing, as outlined in the corresponding provision apply to the ICAC (Section 31(2) of the ICAC Act).

### Authorisation of persons to examine witnesses

The PIC submitted to the review that the PIC Act should be amended to authorise persons, other than an Australian legal practitioner appointed by the PIC, to examine and cross-examine witnesses.<sup>24</sup>

The PIC noted in its submission that hearings can be conducted at short notice and in such circumstances, an investigator with thorough knowledge of the evidence and details of the investigation should be able to conduct the examination and cross examination of witnesses.

Section 37 of the PIC Act states:

- (1) A person authorised or required to appear at a hearing, or a person's Australian legal practitioner authorised to appear at a hearing, may, with the leave of the Commission, examine or cross-examine any witness on any matter that the Commission considers relevant.*
- (2) An Australian legal practitioner appointed by the Commission to assist it may examine or cross-examine any witness on any matter that the Commission considers relevant.*
- (3) Any witness examined or cross-examined under this section has the same protection and is subject to the same liabilities as if examined by the Commissioner or an Assistant Commissioner.*

The PIC sought advice from the Crown Solicitor as to the power of the PIC under section 37(1) of the PIC Act to authorise persons who are not legally qualified to appear and cross-examine witnesses on behalf of the PIC at a PIC hearing.

In summary, the Crown Solicitor's Office advised that:

- Section 37(1) of the PIC Act does not permit the PIC to authorise an officer of the PIC who is not an Australian legal practitioner to appear on behalf of the PIC and examine or cross examine witness in a PIC hearing; and
- the PIC Act requires that an officer of the PIC authorised to appear and conduct an examination or cross-examination in a hearing be a person

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<sup>24</sup> PIC, Supplementary Submission to Review 1, 9 February 2011, pp 1-4.

appointed as counsel assisting the PIC pursuant to section 12 of the PIC Act.<sup>25</sup>

Particularly in light of concerns expressed by the Inspector of the Police Integrity Commission regarding the PIC's provision of procedural fairness,<sup>26</sup> the proposal that the PIC Act be amended to allow non-legally qualified practitioners to examine witnesses on behalf of the PIC is not supported at this time.

## ***Investigations and Reporting***

### **Procedural Fairness**

Currently, there is no specific provision within the PIC Act requiring or specifying how the PIC should afford procedural fairness. The application of procedural fairness by the PIC is referred to in Practice notes available on the PIC website.<sup>27</sup> An extract is available at **Appendix B**.

Dissatisfaction with the PIC's compliance with the requirements of procedural fairness during its investigations and in investigation reports was widely identified by contributors to the review.<sup>28</sup> Procedural fairness has been the subject of a number of complaint reports by the Inspector of the Police Integrity Commission.<sup>29</sup>

The Inspector of the Police Integrity Commission has concluded that police officers and others have been denied procedural fairness by the PIC in its investigations including Operation Whistler,<sup>30</sup> Operation Mallard,<sup>31</sup> and Operation Rani.<sup>32</sup>

The NSW Commissioned Officers Branch of the NSW Police Force submitted that:

- adverse findings are not put to officers, denying them the opportunity for to respond;
- there is reluctance by the PIC to remove or notate public reports where an acknowledgement has been made by the PIC that procedural fairness has not been accorded; and
- prejudicial language is used in reports.<sup>33</sup>

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<sup>25</sup> NSW Crown Solicitor, Advice to PIC, 2 February 2011, enclosure to PIC Supplementary Submission to Review 1, 9 February 2011.

<sup>26</sup> 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*, 2 April 2009.

<sup>27</sup> Available at [www.pic.nsw.gov.au](http://www.pic.nsw.gov.au)

<sup>28</sup> NSW Police Force, Submission to Review, 31 August 2010, pp 3-9; Police Association of NSW, Submission to Review, 2010, pp 3-4; NSW Commissioned Officers Branch, Submission to Review, 31 August 2010, pp 7-10

<sup>29</sup> Inspector of the Police Integrity Commission, *Annual Report 2009-2010*, pp 14-29

<sup>30</sup> Report by the Inspector of the Police Integrity Commission, *Re: Complaint by Detective T.S. Briggs of the NSW Police*, 11 December 2007.

<sup>31</sup> Inspector of the Police Integrity Commission, *Inspector's Report pursuant to section 89(1)(b) of the Police Integrity Commission Act arising out of complaint by the Police Association of NSW concerning the Police Integrity Commission*, 28 January 2010.

<sup>32</sup> Inspector of the Police Integrity Commission, *Report pursuant to section 89(1)(b) of the Police Integrity Commission Act Re: Complaint by Ms Stephanie Young concerning the Police Integrity Commission*, 6 March 2009.

Submissions to the review suggested that the PIC Act contain a doctrine of procedural fairness and a legislated code of conduct containing the principles of natural justice.<sup>34</sup>

Mr Bruce McClintock SC examined similar concerns with respect to ICAC's compliance with the requirements of procedural fairness in his review of the *Independent Commission Against Corruption Act* in 2005. In his final report, Mr McClintock concluded that:

*The legislative codification of the application of the rules of procedural fairness can generate rigidity, with a consequent loss of fairness to an affected person. By keeping ICAC's obligation to comply with procedural fairness at common law, the principles that must be applied by ICAC are clear, without circumscribing the circumstances in which they are to apply.*<sup>35</sup>

There is considerable force in Mr McClintock's view. The issues raised by the Inspector's reports above do not suggest a lack of clarity around the requirements of procedural fairness, but rather a question of compliance with those requirements.

The Ombudsman and NSW Police Force submission to the review did, however, note that the *Ombudsman Act 1974* includes a specific 'persons to be heard' section.<sup>36</sup> If there are grounds for adverse comment in respect of any person, the Ombudsman, before making any such comment in any report must:

- (a) *inform that person of the substance of the grounds of the adverse comment, and*
- (b) *give the person an opportunity to make submissions.*

This is consistent with other similar agencies such as the Australian Commission for Law Enforcement Integrity. The Review recommends that the PIC Act contain a 'Persons to be Heard' provision similar to the Ombudsman Act.

Such a provision will help to address the concerns that have been expressed about the PIC's observance of procedural fairness requirements in certain matters, while avoiding the issues that may arise with seeking to rigidly codify all aspects of procedural fairness in legislation.

The benefits of this new provision would be augmented if, in cases where PIC does make an adverse comment about a person and it is subsequently assessed (by a court, the Inspector of PIC or the PIC itself) that the person was not afforded procedural fairness, the publicly-available report containing those adverse findings were to be annotated or amended to reflect that subsequent assessment. The Commissioner of PIC should be consulted as to how best to implement this

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<sup>33</sup> NSW Commissioned Officers Branch, Submission to Review, 31 August 2010, p 2

<sup>34</sup> NSW Police Force, Submission to Review, 31 August 2010, p 1; Police Association of NSW, Submission to Review, 2010, p 4.

<sup>35</sup> *Independent Review of the Independent Commission Against Corruption Act 1988*, Final Report, 2005, p 119.

<sup>36</sup> section 24(2) of *Ombudsman Act 1974*; see NSW Police Force, Submission to Review, 31 August 2010, p 8; Ombudsman, Submission to Review, 3 August 2010, p 4.

approach, noting that it does not currently appear to be provided for under the PIC's Practice Note.

**Outcome 8:** Legislation should be introduced to amend the PIC Act to include a 'persons to be heard' section in similar terms to the *Ombudsman Act 1974* with regard to PIC investigation reports and Inspector complaint reports.

## ***Inspector of the Police Integrity Commission***

### **Inspector's office**

The Police Association has called for the position of Inspector to be a full-time position in order for the Inspector to properly discharge the functions of the office.<sup>37</sup>

Clause 3 of Schedule 2 of the PIC Act provides that the office of Inspector may be made on a full-time or part-time basis, according to the terms of appointment:

- (1) The office of Inspector may be a full-time or part-time office, according to the terms of appointment.*
- (2) The holder of a full-time office referred to in subclause (1) is required to hold it on that basis, except to the extent permitted by the Governor.*

To date, all appointments to the position of Inspector have been on a part-time basis.

To date, no Inspector has proposed that the position be extended to full time. Various Inspectors have negotiated the provision of extra resources and extra time (although not full time) based on variations in work-load.

The Act currently allows for flexibility in the terms of the appointment on a part-time or full-time basis. If required, or requested by an Inspector, approval could be sought from the Governor for the office to be occupied on a full-time basis.

This review considers that the flexibility currently allowed for in the PIC Act is appropriate.

### **Inspector complaint reports**

Concerns about the apparent limitations within the PIC Act relating to the capacity of the Inspector to report publicly have been raised by the Inspector of the Police Integrity Commission,<sup>38</sup> and by the PJC.<sup>39</sup>

This issue, in so far as it is mirrored in similar legislative uncertainty surrounding

<sup>37</sup> Police Association of NSW, Submission to Review, 2010, p 14.

<sup>38</sup> Inspector of the Police Integrity Commission, Submission to Review, 13 August 2010, p 3.

<sup>39</sup> Parliamentary Joint Committee on the Office of the Ombudsman and Police Integrity Commission, Submission to Review, 19 August 2010, pp 1-2.

reporting of the Inspector of the Independent Commission Against Corruption, has also been considered by the Committee on the Independent Commission Against Corruption.

As this issue has been canvassed extensively in other reports, it is not proposed to repeat the detail of the legislation that gives rise to the apparent confusion surrounding the Inspector's reporting powers.

It is sufficient to note that the issues identified by Inspector of the Police Integrity Commission during Committee hearings are that the PIC Act is unclear as to:

- who, if anyone, is entitled to receive a copy of a complaint report;
- what discretion, if any, the Inspector had 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.

In March 2009, the PJC recommended that the *Police Integrity Commission Act 1996* be amended to clarify that the Inspector of the Police Integrity Commission is able to report to any party, including Parliament, at his discretion, in relation to any of his statutory functions.<sup>40</sup>

In November 2010, the PJC recommended (in Report No 14/54) that the Inspector's reports on upheld complaints should be published unless to do so would be against the public interest.<sup>41</sup>

The ICAC Committee made recommendations on this issue in its Review of the 2008-09 Annual Report of the Inspector of the Independent Commission Against Corruption (Report No 11/54). In response to these recommendations the ICAC Act was amended to:

- broaden the powers of the Inspector by enabling the Inspector to report to Parliament at any time on any matter relating to the exercise of the Inspector's principal functions if the Inspector considers a report to be in the public interest;
- make it clear that the Inspector may provide a report or recommendation (or any relevant part of a report or recommendation) concerning any matter relating to the Inspector's principal functions to: the ICAC, an officer of the ICAC, a person who made a complaint, or any other affected person, if the

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<sup>40</sup> Parliamentary Joint 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*, Report No. 6/54, March 2009.

<sup>41</sup> Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the Eleventh General Meeting with the Inspector of the Police Integrity Commission*, Report No. 14/54, November 2010.



Inspector considers that the matter can be effectively dealt with by such a recommendation or report.<sup>42</sup>

Submissions to this review agreed that the PIC Act should be amended to clarify that the Inspector of the Police Integrity Commission is able to report to any party, including Parliament, in relation to any of his statutory functions, if it is in the public interest to do so.<sup>43</sup> It is also noted that the Inspector's current powers to publish and distribute reports have been a matter of contention which, in September 2011, led to public disagreement between the Inspector and the PIC.<sup>44</sup>

On 14 October 2011, the Premier requested that the PJC review and make recommendations concerning the arrangements for the tabling in the Parliament of reports by the Inspector of the Police Integrity Commission. The PJC replied on 19 October 2011, referring to its previous recommendations on the matter, which are taken into account in this review.

As the recent changes to the ICAC Act address the same issues identified in the *Police Integrity Commission Act 1996*, it is proposed that the Police Integrity Commission Act be amended to reflect those amendments made to Inspector reporting provisions in the *Independent Commission Against Corruption Amendment Act 2011*.

**Outcome 9:** Legislation should be introduced to confer on the Inspector of the PIC the same powers with respect to the disclosure of reports as those available to the Inspector of the ICAC.

#### Response to Adverse Reports by PIC (PJC Recommendation)

The PJC in the Inquiry into Complaints Handling Against the Police Integrity Commission recommended:

*That the Minister for Police amend the Police Integrity Commission Act 1996 so that, should the Police Integrity Commission 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.*<sup>45</sup>

<sup>42</sup> *Independent Commission Against Corruption Act 1988*, sections 57B(5) and 77A(c).

<sup>43</sup> Police Integrity Commission, Submission to Review, 31 August 2010, p 17; NSW Police Force, Submission to Review, 31 August 2010, pp 2-3; Parliamentary Joint Committee on the Office of the Ombudsman and Police Integrity Commission, Submission to Review, 19 August 2010, pp 1-2; Police Association of NSW, Submission to Review, 2010, p 14; Inspector of the Police Integrity Commission, Submission to Review, 13 August 2010, pp 3-4.

<sup>44</sup> See letter dated 21 September 2011 from the Clerks of the Parliament of NSW to the Crown Solicitor 'Making and tabling of the annual report of the Inspector of the Police Integrity Commission for the Year ended 30 June 2011', tabled 11 October 2011, see *Hansard*, Legislative Assembly, 11 October 2011, 'Police Integrity Commission' p. 5936

<sup>45</sup> Committee on the Office of the Ombudsman and the Police Integrity Commission *Report on an Inquiry into Complaints Against the Police Integrity Commission*, Report No. 9/54 – April 2010.

The PJC considered that it would be beneficial to put 'disagreements on record in one report as opposed to having the differing opinions appear in separate reports by both parties'<sup>46</sup>.

This recommendation is supported by the PIC. The PIC notes in its submission to the review that:

*Where such a report contains criticisms or conclusions which the Commission does not accept, the Inspector's final report should also refer to if not include as an annexure the submissions of the Commission as to the relevant points of disagreement. In the Commission's view, 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.*<sup>47</sup>

The PJC's recommendation is not supported by the Inspector of the Police Integrity Commission,<sup>48</sup> or the Inspector of the ICAC.<sup>49</sup> The Inspector of the ICAC notes that the recommendation overlooks one of the primary functions of the Office of the Inspector – to deal with complaint through reports, and undermines the nature of the relationship between the PIC and the Inspector by making an assumption that the two offices are in conflict.

In any case, the PIC is able to publish a response to the Inspector's Reports at any time. As such, this review suggests that there is little benefit in including items of correspondence in reports by the Inspector and recommends that the current arrangement should continue.

### Functions of the Inspector

The Inspector of the ICAC notes that Section 57B of the *Independent Commission Against Corruption Act*, provides for a function concerning maladministration:

*"To deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission."*<sup>50</sup>

The Inspector of the ICAC suggested that the inclusion in the PIC Act of such a function for the Inspector of the Police Integrity Commission would further clarify that Inspector's jurisdiction.

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<sup>46</sup> Committee on the Office of the Ombudsman and the Police Integrity Commission, Submission to Review, 19 August 2010, p 3.

<sup>47</sup> Police Integrity Commission, Submission to Review, 31 August 2010, paragraph 3.9, p 16.

<sup>48</sup> Inspector of the Police Integrity Commission, Submission to Review, 13 August 2010, paragraph 8, p 4.

<sup>49</sup> Inspector of the Independent Commission Against Corruption, Submission to Review, 14 September 2010, p 2.

<sup>50</sup> Inspector of the Independent Commission Against Corruption, Submission to Review, 14 September 2010, p 1.

The Inspector of the ICAC's functions were developed following the 2005 Review of the ICAC Act. Prior to this review, there was no Inspector role. Provisions relating to the Inspector of the ICAC are identical to the Inspector of the Police Integrity Commission with this exception.

The proposed amendment was raised with the Inspector of the Police Integrity Commission during consultations. The Inspector of the Police Integrity Commission noted that the current principal functions were not presenting any limitations to his oversight role.

The inclusion of maladministration in the principal functions would nonetheless ensure that the principal functions of both Inspector positions are the same. The review considers that the principal functions of the Inspector of the Police Integrity Commission should cover maladministration of the PIC as an important component of the general oversight of the PIC.

**Outcome 10:** Legislation should be introduced to amend the principal functions of the Inspector's functions to include oversight of potential maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy), corresponding to similar functions conferred on the ICAC Inspector.

## ***Accountability and integrity of the NSW Crime Commission***

### ***NSW Crime Commission concerns regarding the PIC***

As part of its functions under the PIC Act, the PIC has undertaken or is undertaking reviews and inquiries into the practices and operations of the NSW Crime Commission, namely:

1. Project Rhodium, concerning the capacity of the New South Wales Crime Commission to identify and manage serious misconduct risks;<sup>51</sup>
2. Project Caesar, concerning misconduct risks within the New South Wales Crime Commission in the area of assets confiscation;<sup>52</sup> and
3. Operation Winjana, concerning:
  - a. whether certain members of staff of the New South Wales Crime Commission, or their associates are, or have been, involved in criminal activity or serious misconduct; and
  - b. the practices and procedures of the New South Wales Crime Commission in the conduct of actions under the *Criminal Assets Recovery Act 1990*.<sup>53</sup>

The NSW Crime Commission, and members of the NSW Crime Commission staff in their personal capacity, commenced legal proceedings against the PIC following its

<sup>51</sup> Police Integrity Commission, *Annual Report 2009-2010*, pp 52.

<sup>52</sup> Police Integrity Commission, *Annual Report 2009-2010*, pp 53.

<sup>53</sup> Police Integrity Commission, Media Release, "Operation Winjana", 12 August 2011.

decision to hold public hearings as a part of Project Winjana.<sup>54</sup> The legal proceedings were unsuccessful, although the PIC agreed to suspend public hearings until the conclusion of the trial of Mark William Standen.<sup>55</sup>

On 10 March 2011 the Crime Commission provided a supplementary submission to the review outlining a number of concerns regarding the activities of the PIC.

These concerns included the exercise of the PIC of its powers to issue non-publication orders, the apparent willingness to override legal professional privilege with its powers to compel the production of documents, and its practice in dealing with the NSW Crime Commission's human sources.<sup>56</sup>

The supplementary submission of the Crime Commission states that the current practices of the PIC would potentially "put lives at risk", and that the Crime Commission's "fight against organised crime is being significantly weakened by the conduct of the PIC".<sup>57</sup>

Following Standen's conviction on 11 August 2011, the PIC announced it would recommence public hearings for Operation Winjana on 5 September 2011.<sup>58</sup>

While there are important matters, the Special Commission of Inquiry into the NSW Crime Commission has been established to investigate and report on the adequacy of accountability mechanisms under the *Police Integrity Commission Act 1996* and whether alternative or additional accountability mechanisms should be adopted. The Commission is due to report on 30 November 2011.

### Audit function

Section 13 of the PIC Act outlines the principal functions of the PIC relevant to NSW Police, administrative officers and Crime Commission officers. It also outlines the PIC's functions relating to research and education.

In its submission to the review, the PIC noted that its functions in respect of misconduct by officers of the NSW Crime Commission are limited to the prevention, detection and investigation of misconduct as outlined in Section 13B of the PIC Act and that they do not specifically include an audit function related to the Crime Commission, whereas there is an express provision for auditing the NSW Police Force:

### **Section 3 Principal objects of Act**

*(d) to provide for the auditing and monitoring of particular aspects of the operations and procedures of the NSW Police Force.*

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<sup>54</sup> New South Wales Crime Commission v Police Integrity Commission; Giorgiutti v Police Integrity Commission [2011] NSWSC 443

<sup>55</sup> Police Integrity Commission, Media Release, "Operation Winjana", 12 August 2011.

<sup>56</sup> NSW Crime Commission, Supplementary Submission to Review, 10 March 2011, pp 1-4.

<sup>57</sup> NSW Crime Commission, Supplementary Submission to Review, 10 March 2011, p 3.

<sup>58</sup> Police Integrity Commission, Media Release, "Operation Winjana", 12 August 2011.

## **Section 14 Other functions regarding police activities and education programs**

*(a) to undertake inquiries into or audits of any aspect of police activities for the purpose of ascertaining whether there is police misconduct or any circumstances that may be conducive to police misconduct,*

The PIC has submitted that an audit function relevant to the NSW Crime Commission is necessary to proactively monitor and review selected activities and identify issues including governance and control frameworks given their substantial powers. The PIC has requested that Section 13B of the PIC Act be amended to specifically provide for an audit function in relation to the NSW Crime Commission.<sup>59</sup>

The NSW Crime Commission does not support a proposal to broaden the legislative functions of the PIC to include an audit function. The NSW Crime Commission submits that the burden of responding to audits is time consuming and resource intensive for a small agency and will distract the NSW Crime Commission from its core work. The NSW Crime Commission notes that the functions of the PIC should be limited to investigating allegations of serious misconduct and corruption.<sup>60</sup>

It is not contested that the NSW Crime Commission's exceptional powers should be matched with effective integrity supervision. This review does not consider that objections based on increased workload or diversion of resources are sufficient to justify lighter scrutiny. It is suggested that this objection is as much based on its other objections to the operations of the PIC and a desire that its current remit not be expanded.

On 11 August 2011, the NSW Government announced a Special Commission of Inquiry into the governance and operations of the NSW Crime Commission, following the outcome of the trial of Mark Standen. While the Special Commissioner may consider the issues concerning effective supervision of the NSW Crime Commission, the issue would benefit from investigation by the PJC which may make recommendations to the Parliament.

**Outcome 11:** The Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission should be asked to make recommendations concerning an audit function of for the PIC in relation to the NSW Crime Commission.

<sup>59</sup> Police Integrity Commission, Submission to Review, 31 August 2010, paragraphs 2.27-2.30, pp 13-14.

<sup>60</sup> NSW Crime Commission, Submission to Review, 26 October 2010, pp 1-2.

## **Miscellaneous**

### Notification of Police Misconduct

In 2006 the PIC Act was amended to transfer the jurisdiction to investigate civilian members of NSW Police Force from the Independent Commission Against Corruption to the PIC<sup>61</sup>.

The Act imposes a duty on certain officers, such as the Commissioner of Police, to notify the Commission of corrupt conduct by administrative officers.

This duty exists in the *Independent Commission Against Corruption Act 1988* and was inserted into the *Police Integrity Commission Act* on transfer of jurisdiction of administrative officers in 2006.<sup>62</sup>

Similar provisions were then inserted into the PIC Act in relation to New South Wales Crime Commission officers in 2008 following expansion of PIC jurisdiction to include NSW Crime Commission officers.<sup>63</sup>

In contrast, there is no requirement in the PIC Act for principal officers and officers who constitute a public authority to notify the Commission of possible corrupt conduct respect of police officers. The PIC notes that the effect is that:

*There is no corresponding obligation on these officials to notify the Commission of similar misconduct by a police officer although police misconduct remains the principal statutory concern of the Commission.*<sup>64</sup>

The review supports the extension of the requirement for principal officers and officers who constitute a public authority to notify of possible corrupt conduct of police officers.

This amendment will ensure consistency with NSW Crime Commission officers and administrative officers and other public officials as required under Section 11 of the *Independent Commission Against Corruption Act 1988*.

**Outcome 12:** Legislation should be introduced to require principal officers and officers who constitute a public authority to notify the PIC of possible corrupt conduct of NSW Police Force officers, consistent with the duty that applies to the NSW Crime Commission and administrative officers of the NSW Police Force.

<sup>61</sup> *Police Integrity Commission Amendment Act 2006*.

<sup>62</sup> *Police Integrity Commission Amendment Act 2006*.

<sup>63</sup> *Police Integrity Commission Amendment (Crime Commission) Act 2008*.

<sup>64</sup> Police Integrity Commission, Submission to Review, 31 August 2010, paragraph 2.13, p 9.

### Special Powers and Weapons

PIC investigators and surveillance officers are currently exempt from the requirement to hold a permit or licence for semi-automatic pistols, handcuffs and body armour vests.

The PIC has sought an amendment to the PIC Act to expand the current exemption outlined in section 124 to include antipersonnel spray and batons. These items currently require a permit.

The review sought formal advice from the NSW Police Force in respect of the PIC request. The NSW Police Force indicates that it does not have any objections to the proposed amendment, but the precise classification of weapons should be consistent with the *Weapons Prohibition Act 1998* and the position titles of PIC personnel sought to be covered by the exception may require review.

The review is not in a position to judge the requirement of the PIC to use semi-automatic pistols, handcuffs and body armour vests, or antipersonnel spray and batons. It is noted that the PIC has the capacity to create joint taskforces or otherwise work cooperatively with other investigative agencies that have the power to use such equipment.

Nonetheless, it is agreed that in principle, if the PIC is to have the capacity to use such equipment, then it should at least have the opportunity to employ weapons less lethal than semiautomatic pistols such as batons or antipersonnel spray. It is suggested that the PJC examine this issue under section 95(d) of the PIC Act, as it represents a trend in practices and methods relating to police corruption.

**Outcome 13:** The Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission should be asked to examine the request of the PIC to allow it to use antipersonnel spray and batons.

### Special Constables in the Security Management Unit

Special constables in the Security Management Unit (SMU) perform security officer roles at locations such as NSW Parliament House and other State Government sites. The *Police Integrity Commission Act 1996* does not extend to SMU Special Constables, as they are not sworn police and are not employed or otherwise retained under the *Police Act 1990*.

SMU Special Constables are treated as Ministerial employees, and as such allegations of serious misconduct concerning such officers are referred to the ICAC rather than the PIC.

It has been proposed by the PIC and the NSW Police Force that SMU Special Constables be brought within the investigative purview of the PIC rather than the ICAC.<sup>65</sup>

Most SMU Special Constables wear a police-style uniform and carry a firearm. To the public, a special constable would be considered a police officer. In this sense, like all other officers, sworn or unsworn, it is recommended that special constables should be brought within the purview of the PIC.

The transfer of SMU Special Constables from the jurisdiction of ICAC to PIC would allow all NSW Police Force employees facing allegations of serious misconduct to be handled by the one oversight organisation.

**Outcome 14:** Legislation should be introduced to bring Special Constables in the Security Management Unit within the oversight of the PIC, consistent with all other NSW Police Force employees.

#### Further review of the PIC Act

There should be a further review of the PIC Act in five years (2016) to determine whether the policy objectives are valid and the terms of the PIC Act are appropriate for securing those objectives.

**Outcome 15:** Legislation should be introduced to require a further review of the validity of the policy objectives of the PIC Act, and the appropriateness of the terms of the PIC Act for securing those objectives five years from the commencement of the amending legislation.

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<sup>65</sup> Police Integrity Commission, Submission to Review, 31 August 2010, p 10; NSW Police Force, Submission to Review, 31 August 2010, p 13.



## 5. LIST OF SUBMISSIONS & INTERVIEWS

- NSW Police Force (31 August 2010)
- Police Integrity Commission (31 August 2010)
  - *Supplementary submission 1 (9 February 2011) – Request for amendment to authorise Police Integrity Commission officers to examine witnesses*
  - *Supplementary submission 2 (14 March 2011) – Publication of Inspector Reports*
  - *Supplementary submission 3 (23 March 2011) – Request for amendment to authorise Police Integrity Commission officers to examine witnesses – hearing provided*
- Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission (19 August 2010)
- Police Association of NSW (received 3 August 2010)
- NSW Commissioned Police Officers Branch (31 August 2010)
- NSW Ombudsman (3 August 2010)
- Inspector of the Police Integrity Commission (13 August 2010)
- Inspector of the Independent Commission Against Corruption (14 September 2010)
- NSW Crime Commission (26 October 2010)
  - *Supplementary submission (10 March 2011) – Public hearings*

The Law Enforcement Policy Branch of the Department of Premier and Cabinet also met stakeholders to discuss their submissions on the following dates: the Police Integrity Commission (1 October 2010), the Police Association of NSW (1 October 2010), the NSW Crime Commission (7 October 2010), the Inspector Police Integrity Commission (29 October 2010), the NSW Police Force and the Ombudsman (3 February 2011) to discuss their submissions.

## APPENDIX A – Terms of Reference

Under section 146 of the *Police Integrity Commission Act 1996*:

- (1) The Minister is to review this Act to determine whether the policy objectives of the PIC Act remain valid and whether the terms of the PIC Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as practicable after the period of 5 years from the date of assent to this Act.
- (2A) A further such review is to be undertaken as soon as practicable after the period of 5 years from the date of assent to the Police Integrity Commission Amendment Act 2005.
- (3) A report on the outcome of each such review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

The Minister for Police has requested that the review be undertaken on his behalf by the Department of Premier and Cabinet.

At the request of the Minister the review will consider, in addition to the general efficacy of the PIC Act, the following specific issues:

- Recent recommendations or issues raised by the Parliamentary Joint Commission on the Ombudsman and Police Integrity Commission; and
- The adequacy of the powers, including the reporting powers, of the Inspector of the Police Integrity Commission.

Submissions are to be sought from:

- the Police Integrity Commission
- the Inspector of the Police Integrity Commission
- the Parliamentary Joint Committee on the Ombudsman and Police Integrity Commission
- the NSW Police Force
- the NSW Crime Commission
- the NSW Ombudsman
- the Independent Commission Against Corruption
- the Inspector of the Independent Commission Against Corruption; and
- the Police Association of NSW

The review must provide an interim report to the Minister for Police by the end of 2010. A final review report must be tabled in Parliament by March 2011.

## APPENDIX B – Extract of Police Integrity Commission Practice note

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### [15] Application of the rules of procedural fairness

15.10 While the rules of procedural fairness may apply to a Commission investigation, they are not applicable in every case, nor in the same manner or to the same extent as in court proceedings.

#### **The hearing rule**

15.20 In the broad, the hearing rule requires the Commission, before publishing a report containing assessments, opinions or recommendations adverse to the interests of a person, to provide an opportunity for the person to persuade it to a different view of the relevant evidence. In *Independent Commission Against Corruption v Chaffey* (1992) 30 NSWLR 21 per Gleeson CJ at 28 it was said:<sup>44</sup>

... an authority having power to inquire and make a report which may include adverse findings must listen fairly to such relevant evidence and rational argument against the finding as a person likely to be adversely affected may wish to put.

15.30 Within these boundaries, it has been recognised that the actual *content* of the rules will vary according to what is necessary in the circumstances of the particular case.<sup>45</sup> Although the need to protect the integrity or confidentiality of the investigation does not exclude the rules, it may greatly reduce their content, even to the extent of reducing them to nil in certain situations.

15.40 Thus it has been held that the rules of procedural fairness do not require a commission of inquiry to suppress the publication of evidence until such time as a person affected has had an opportunity to respond,<sup>46</sup> to conduct a hearing wholly in private,<sup>47</sup> or to proceed as if it were a court by granting all persons who might be affected by a hearing an appearance.<sup>48</sup> The form of notice which a commission of inquiry such as the Commission is obliged to give a witness before publishing

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<sup>44</sup> Agreeing with Lord Diplock's observations in *Mahon v Air New Zealand Ltd* [1984] AC 808 at 820.

<sup>45</sup> See *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21 per Gleeson CJ at 28; *Donaldson v Wood* (unreported, SCNSW, 15/09/95) per Hunt CJ at CL.

<sup>46</sup> *Donaldson v Wood* (supra).

<sup>47</sup> *Independent Commission Against Corruption v Chaffey* (supra).

<sup>48</sup> *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296.

opinions which may be adverse to the witness was discussed in *Cox v Corruption and Crime Commission*.<sup>49</sup>

**The rule against bias**

15.50 Similarly, while the second limb of the rules of procedural fairness - the rule against bias - is not excluded by the Commission's functions, the content and practical application of the rule will vary and may in some cases be very limited. In *Re Finance Sector Union; ex parte Illaton Pty Ltd* (1992) 66 ALJR 583 the High Court observed:<sup>50</sup>

The precise practical requirements of the principle vary from case to case. They will be influenced by the nature, function and composition of the particular tribunal. Thus, the operation of the principle in a case such as the present where it is sought to prevent a member of the Commission from participating in the determination of particular proceedings is governed by a number of considerations relating to the nature and function of the Commission, the prescribed or desirable formal qualifications and practical experience of those appointed to discharge those functions, the nature of the contests involved ...

15.60 A significantly greater degree of intervention will be permitted on the part of a presiding official in an inquisitorial hearing than might be the case in curial proceedings:<sup>51</sup>

In applying the principles different expectations of conduct will exist according to the function being performed by the person or entity who exercises the relevant public power. For example, a degree of intervention that is unacceptable in a judge may be acceptable in a commissioner. The commissioner has an inquisitorial function while the role of a judge is essentially to adjudge an adversarial contest. But the expectation that the person exercising the power will bring an impartial and unprejudiced mind to the resolution of the question to that person is not diluted.

15.70 Decision makers who are performing statutory functions may be entitled to be involved in an investigation and to make final decisions where they are authorised by statute to act in both capacities.<sup>52</sup> Accordingly, something more than the mere fact of prior involvement in an investigative decision may need to be present before a reasonable apprehension of bias can be said to be firmly established.