NEW SOUTH WALES

Inspector
of the
Police Integrity Commission

ANNUAL REPORT

FOR THE YEAR ENDED

30 JUNE 2011

NEW SOUTH WALES

Inspector of the Police Integrity Commission

The Hon Don Harwin MLC
President of the Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

The Hon Shelley Hancock MP
Speaker, Legislative Assembly
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr President & Madam Speaker,

In accordance with section 102 of the *Police Integrity Commission Act 1996*, I hereby furnish to each of you for presentation to Parliament the Annual Report of the Inspector of the Police Integrity Commission for the year ended 30 June 2011.

The Report has been prepared in accordance with the requirements of the *Police Integrity Commission Act 1996 ("the Act").*

Pursuant to Section 103(2) of the Act, I recommend that the Report be made public forthwith.

Yours faithfully,

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

16 September 2011

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PRELIMINARY OBSERVATIONS

1) This is my fifth Annual Report to Parliament as Inspector of the Police Integrity Commission.

2) The preliminary observations in paragraphs (3) - (16) hereof have appeared in previous Annual Reports, their purpose being to place on record the purpose and origin of the Office of the Inspectorate, which is perceived as being central to *ensuring the accountability of the Police Integrity Commission*. The Inspectors' previous Annual Reports may now be accessed by going to the Inspector's website at www.inspectorpic@nsw.gov.au.

3) In February 1996, as Royal Commissioner, Justice James Wood, AO, QC, published the first interim report of the Royal Commission into the NSW Police Service.

4) Chapter five (5) of that report proposed the establishment of a new system to deal with Police complaints and corruption investigations in NSW.

5) The proposal took into account that within the NSW Police Service (as it was then entitled)[1] there was a pattern of corruption urgently to be addressed so that public confidence could be restored.

6) There was an acceptance by the Royal Commission that a focused, sophisticated and aggressive approach was necessary to uncover and combat serious police misconduct and corruption. The question for determination largely centred on the model that would be appropriate for NSW and the agency or agencies which should be tasked with appropriate responsibility. The existing agencies and possible models were carefully considered.

7) The Royal Commission concluded that the model which needed to be adopted was one in which:

   i) The NSW Police Service retained a meaningful role in dealing with management matters, customer service complaints, and certain matters of misconduct;

   ii) There was both oversight of the NSW Police Service, and an external capacity and responsibility to investigate allegations of corruption and complaints made against Police, to be shared between the Police Integrity Commission and the Office of the NSW Ombudsman.

8) It was recommended that a new "*purpose built agency*" (which came to be called the Police Integrity Commission) should be established, as an essential plank of the reform process.

9) It was emphasised that such an agency would:

   i) Provide a fresh approach to the problems;

[1] By the Police Service Amendment (NSW Police) Act 2002 No 51. Schedule 1, the title Police Service of New South Wales was changed to NSW Police.

ii) Be purpose built, with specific focus upon the investigation of serious police misconduct and corruption; and

iii) Be free of the institutional baggage attached to an anti-corruption system which had failed to deal with corruption of the kind revealed by the Royal Commission.

10) The principal function of the Police Integrity Commission was seen to be the detection and investigation of *serious* police corruption and misconduct. A key function being to assemble admissible evidence when investigations revealed criminal conduct and to furnish such evidence to the Director of Public Prosecutions.

11) An equally important step in the reform process was to ensure the retention of the jurisdiction of the Office of the NSW Ombudsman to oversight the NSW Police particularly in relation to the management of complaints and compliance with the law.

12) Consideration was given to the accountability of the new and powerful body which the report recommended should be created. Since it would have the status of a Standing Royal Commission with similar powers, it was considered important to ensure that it would be open to public review and accountable to Parliament.

13) The need for accountability recognised the fact that there is always a risk that an agency that is heavily committed to covert investigations, relies upon informants, and possesses powers which are both coercive and of a kind which might involve substantial infringement of rights of privacy, may overstep the mark.

14) For this reason the Royal Commission recommended that there should be a "*watchdog*", able to respond quickly and effectively to complaints of misconduct and abuse of power, without risking the secrecy of operations, or the confidentiality of informants and witnesses. That "*watchdog*" was designated the Inspector of the Police Integrity Commission.

15) Hence it was proposed that the Office of the Inspector of the Police Integrity Commission be created by the legislation governing the agency. The Office, it was suggested, should be given powers to:

i) Audit the operations of the Police Integrity Commission;

ii) Report to Parliament on matters affecting the Police Integrity Commission and its operational effectiveness and needs.

iii) Deal with complaints of abuse of power and other forms of misconduct on the part of its employees;

16) Part 6 of the *Police Integrity Commission Act 1996* contains statutory provisions which confer such powers on the Office of the Inspector.

ROLE OF THE INSPECTOR

17) The position of the Inspector of the Police Integrity Commission (*the Inspector*) derives its authority from the *Police Integrity Commission Act 1996* (the Act).

18) The Inspector is appointed by the Governor with the advice of the Executive Council. *The Joint Committee on the Office of the Ombudsman and the Police Integrity Commission* is empowered to veto the proposed appointment which is required to be referred to the Committee by the Minister[2].

19) The Office of the Inspector may be a full-time or part-time Office, according to the terms of the appointment. A person is eligible (if otherwise qualified) for re-appointment but may not hold the Office of Inspector for terms totalling more than 5 years.

20) Following the retirement on 12 June 2002 of the first-appointed Inspector, the Hon M D Findlay, QC, at the conclusion of his five-year term, on 12 June 2002 the Hon Morris Ireland, QC, was appointed as Inspector of the Police Integrity Commission for a period of three years, and his term was subsequently extended to 31 August 2005. On 1 September 2005 the Hon James Wood, AO, QC, was appointed as Inspector of the Police Integrity Commission for a period of three years, similarly on a part time basis, following the expiration of his predecessor's term of office. On the *22 November 2006* I was appointed as Inspector of the Police Integrity Commission for a period of five years, similarly on a part time basis, following the resignation of my predecessor on 10 November 2006.

21) The Inspector's duties under the *Police Integrity Commission Act 1996* are to investigate complaints against the Commission's staff, to audit its operations, effectiveness and compliance with the law, and to report to the *Joint Committee on the Office of the Ombudsman and the Police Integrity Commission.* That Committee has the function of monitoring and reviewing the exercise by the Commission and the Inspector of their respective functions[3].

22) The Inspector is required to report annually to Parliament and may make Special Reports on any matters affecting the Commission or on any administrative or general policy matter relating to the functions of the Inspector.[4] On 2nd April 2009 I delivered a Special Report to the NSW Parliament upholding a number of serious complaints against the PIC: this Report may be accessed via the Inspector's website: www.inspectorpic.nsw.gov.au.

23) The Inspector's principal functions as provided by Statute[5] are:

(i) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State; and

[2] Schedule 2 Police Integrity Commission Act 1996 and Section 31BA of the Ombudsman Act 1974
[3] Section 95(1)(a) Police Integrity Commission Act 1996
[4] Sections 101, 102 of the Police Integrity Commission Act 1996
[5] Section 89 of the Police Integrity Commission Act 1996

(ii) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission.

(iii) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities;

24) Section 89(1)(b) authorises the Inspector to deal with complaints of relevant misconduct, including, but not limited to, complaints alleging abuse of power and impropriety. The latter expression would appear to go beyond the concept of abuse of power; the Shorter OED defines "impropriety" as including "improper conduct" and "inappropriateness." Section 89(1)(c), again picks up the notions of "propriety" and "appropriateness", so that a further principal function of the Inspector is to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities. Thus, unlike the Inspector's "audit" functions under Section 89(1)(a), Section 89(1)(c) is not confined to assessing the lawfulness of the Commission's relevant procedures, but extends to the effectiveness and appropriateness of those procedures.

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

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

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

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

29) The Inspector may exercise the functions of the Office <u>on the Inspector's own initiative</u>, at the request of the Minister, in response to a complaint made to the Inspector, or in response to a reference by the Ombudsman, the ICAC, the New South Wales Crime Commission, the Joint Committee or any other agency[6]. The Inspector is not subject to the Commission in any respect[7].

[6] Ibid, Section 89(2)
[7] Ibid, Section 89(3)

30) "*The Minister*" referred to in paragraph (24) is the Minister for Police. The Hon Michael Daley, MP, was the Minister during the period 14 September 2009 to 28 March 2011. The Hon Michael Gallacher, MLC has been the Minister for Police since 3 April 2011.

POWERS OF THE OFFICE OF THE INSPECTOR

31) To perform its function, the Office of the Inspector has been given extensive powers to investigate any aspect of the Commission's operations or any conduct of officers of the Commission[8].

32) The Office of the Inspector is also empowered to make or hold inquiries and for that purpose it has the powers, authorities, protections and immunities of a Royal Commissioner[9]. It was *not* found necessary to hold a formal inquiry involving hearings during the reporting year. The approach adopted by this Office has traditionally been to restrict the use of costly, time-consuming, formal inquiry hearings to complaints which necessarily involve a formal hearing in order to resolve some factual conflict critical to the complaint.

33) The Legal Representation Office (as to which, see later in this Report) has advised the Office of the Inspector that they have approval to consider applications for legal advice and representation for persons whose testimony at a formal hearing may warrant legal representation.

34) The question of extending the jurisdiction of the Office of Inspector to authorise investigation of alleged impropriety or misconduct by non-PIC officers engaged in joint or related operations with PIC officers was dealt with in the Annual Report of the Hon Morris Ireland QC for the year ended 30 June 2005, and in the Annual Report of the Hon James Wood, AO, QC, for the year ended 30 June 2006, and was referred to in my 2007 Annual Report at paragraphs (75)-(82) thereof. As far as I am aware, there have been no further developments in respect of this matter since then.

THE OFFICE

35) The Inspectorate has suitable office premises, within the Sydney Central Business District, separate from the Police Integrity Commission which is located at 111 Elizabeth Street, Sydney. The postal address of the Inspectorate is GPO Box 5215, Sydney NSW 2001. The office telephone number is (02) 9232 3350 and the facsimile number is (02) 8243 9471. The website address is: *www.inspectorpic.nsw.gov.au*. This includes a facility whereby complaints may be entered and automatically forwarded to the Inspectorate. The email address is: *pic_inspector@dpc.nsw.gov.au*. One part-time staff member is engaged in the office. Access may be gained to the Inspector's Annual Reports in past years, as well as other Reports, by going to the Inspector's website where such Reports have been posted.

[8] Ibid, Section 90
[9] Ibid, Section 91

36) The office operates appropriate computer systems, which are currently maintained by the Department of Premier and Cabinet.

37) I also have a small office at the Police Integrity Commission where I have full access to the electronic records of the Commission. There I can access, and do so, typically, on a weekly basis, in complete security, the Commission's records of its operations.

FINANCES

38) As from 1 July 2009, the financing of the office of the Inspectorate falls within the operating expenses of the Department of Premier and Cabinet.

39) As the Inspector of the Police Integrity Commission is not a Department nor a Department Head for the purposes of the *Annual Reports (Departments) Act 1985*, the requirements placed by that Act on those bodies do not apply to the preparation of an annual report by the Inspector.

40) Similarly, the provisions of the *Annual Reports (Statutory Bodies) Act 1984* do not apply since the Inspector is not a person, group of persons or body to whom Division 3 of Part 3 of the *Public Finance and Audit Act 1983* applies nor is it prescribed as a statutory body by the *Annual Reports (Statutory Bodies) Act*.

FREEDOM OF INFORMATION LEGISLATION

41) The Office did not receive any FOI applications in 2010/11 for documents held by this Office. There is therefore no information to give in terms of clause 9(1) of the *Freedom of Information Regulation 2000* and Appendix B in the FOI Procedure Manual.

42) As from 1 July 2009, the Inspector of the Police Integrity Commission is part of the Department of Premier and Cabinet for the purposes of the reporting requirement in Part 2 of *the Freedom of Information Act 1989*. Hence, this agency's *"policy documents"* are included by the Department in the *Summary of Affairs* for the Department provided to the Government Printing Service for publication in the Government Gazette.

DEPARTURE FROM OFFICE OF PIC COMMISSIONER

43) The former PIC Commissioner, Mr John Pritchard, resigned as Commissioner effective from 21 January 2011. He had occupied the office of Commissioner since 6 October 2006. His term of office was not due to expire until 5 October 2011.

44) Thereupon the office of PIC Commissioner was filled by the appointment as Acting Commissioner of the Hon. Jerrold Cripps, QC. The latter's appointment is due to expire on 21 November 2011.

MONITORING THE OPERATIONS AND PROCEDURES OF THE COMMISSION

45) In this Report the term "*monitoring*" is used to include the auditing of the *operations* of the Commission for the purpose of reviewing compliance with the law of the State, and Commonwealth, and the assessment of the effectiveness and appropriateness of the *procedures* of the Commission relating to the legality or propriety of its activities.

46) Since the resignation and departure from Office of the former Commissioner, Mr Pritchard, on 21 January 2010, and the appointment as Acting Commissioner of the Hon Jerrold Cripps, QC, I have met with the latter, as the need has arisen, to discuss matters of mutual interest, relevant to my responsibilities as Inspector.

47) In fulfilling my function under Sections 89(1)(a) and (1)(c) of the Act, I have available to me a designated office at the Commission where I have a computer providing electronic access to all the material on file at the Commission (with the exception of Telecommunication Interception (TI) material). This includes the records of the Commission's various operations. Periodically and at random, I access such operations in absolute security. I have a print-out facility should this be required.

48) My meetings with the Acting Commissioner assist me in identifying the operations in which there has been recent activity, such as the issue of new warrants. This in turn enables me examine to those warrants retrospectively to ensure that all necessary approvals and administrative actions were completed in the process of obtaining and executing those warrants. In the course of that exercise I also consider issues of propriety

49) The Acting Commissioner has provided me with unreserved access to the records of the Commission (save for Telecommunication Intercept material in respect of which I am not entitled to access) and to any officer of the Commission respect of whom I have sought to interview.

50) During my term as Inspector I have made numerous serious criticisms of the Commission's practices and procedures identified in my Reports upholding complaints against the Commission, published on the Inspector's website – www.inspectorpic.nsw.gov.au.

ASSESSMENT OF PROCEDURES OF THE COMMISSION

51) Pursuant to Section 89(1)(c) of the Act, the Inspector has the function of assessing "the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities."

52) This statutory requirement was taken from and is, in its terms, almost identical with Section 8(3)(a)(iii) of the Commonwealth "*Inspector-General of Security and Intelligence Act 1986*".

53) As noted above, I have made numerous significant criticisms of the Commission's practices and procedures in my Complaint Reports upholding complaints of unfairness and bias against the Commission. Generally, the Commission has declined to accept my criticisms and accordingly I cannot be satisfied that such unacceptable practices and procedures will not continue.

54) Each operation of the Commission involves a preliminary assessment by the Commission through its Operation Advisory Group (OAG), usually comprising the Commissioner, Assistant Commissioner, Commission Solicitor and Director of Intelligence and Executive Services.

55) Concerns as to timeliness in some of the Commission's procedures and the response thereto, continue to be closely monitored. The Commission, obviously, has limited resources and this may sometimes result in priorities having to be determined in respect of those resources, which may mean that some operations are placed on hold.

56) Whenever it appears to me to be desirable to do so, I have discussions with the Acting Commissioner focussing on this question of timeliness and on the allocation of resources, including the selection of matters for investigation or review with a view to achieving the proper discharge of the Commission's statutory responsibilities.

57) As part of my assessment, I have regard to the records of those operations requiring legislative sanction. For example, I receive regular reports regarding applications for warrants under the *Surveillance Devices Act 2007*. Also, I receive reports on Notices issued to obtain information (Section 25 of the Act); Notices to obtain documents or other things (Section 26); Authority to enter public premises (Section 29); the summoning of witnesses (Section 38); the issue of Search Warrants, and the issue of authorities to conduct *Controlled Operations (see* later in this Report). I inform myself through discussion with the Acting Commissioner and audit of the Commission's records, so as to be satisfied that such powers are fairly and appropriately exercised.

58) Applications to obtain information (Section 25 of the Act) or to obtain documents or other things (Section 26 of the Act) can only be made "*for the purposes of an investigation*." The Commission has in place systems requiring requests for such applications to be in writing and to identify the relevant investigation. These may be seen by me, and may be the subject of discussion at my weekly meetings with the Acting Commissioner.

59) The security of the operations of the Commission is of paramount importance. Unfortunately, that security has recently been called into question by the unauthorised release of confidential PIC information: see later in this Report: **Inspector's Investigation of leak of Confidential Information.**

60) The Act provides that information, acquired through the exercise of the Inspector's functions, shall not be divulged except for the purposes of and in accordance with the Act or otherwise in connection with the exercise of the Inspector's functions under the Act, or in accordance with a direction of the Inspector certifying that it is necessary to do so in the public interest.[10]

[10] Section 56 of the Police Integrity Commission Act 1996

COMPLAINTS CONCERNING THE COMMISSION

61) An important function of the Inspector is that of dealing with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission[11].

62) Section 90 of the Act empowers the Inspector to investigate any aspect of the Commission's operations or any conduct of officers of the Commission and entitles the Inspector to full access to the records of the Commission. It provides that the Inspector "may investigate and assess complaints about the Commission or officers of the Commission".

63) Section 91 of the Act provides that the Inspector may make or hold inquiries for the purposes of the Inspector's functions.

64) Generally, such inquiries involve seeking information and submissions in turn from the parties to the complaint (usually the Complainant, on the one hand, and the Commission on the other) until the gravamen of the complaint is clearly established and both parties have had every reasonable opportunity to present relevant material and arguments on the issues identified. Usually it is also necessary for the Inspector to access by computer relevant electronic records of the Commission.

65) Other inquiries may require the holding of a formal hearing. Generally, a formal hearing exercising the powers of a Royal Commissioner as conferred by Division 1 of Part 2 of the *Royal Commissions Act 1923* will only be held where it is necessary by that means to resolve a disputed issue of fact critical to the inquiry. Such hearings may be small scale and appropriately held in the Inspector's office. For this purpose, the Ministry for Police has in the past made arrangements for a court reporter from the Attorney General's Department to be available for such hearings. It may, on the other hand, require a larger scale hearing. The circumstances may indicate that it should be public or that it should be private. If public, the facility of a Commission hearing room may be appropriate to be arranged pursuant to Section 92(4)(a) of the Act. On the other hand, it may be more appropriate for a hearing room to be arranged through the Attorney General's Department, at a venue which is seen to be quite independent of the Commission. *It has not been necessary to hold any such hearing during the year under review*. The fact that none of the determined complaints summarised below, in so far as they concern the Commission, led to full, as opposed to preliminary inquiries, indicates that these more formal processes are not invoked lightly. However, such preliminary inquiries may on occasions lead to individual matters being either reconsidered or considered afresh by the Commission. Experience establishes that almost all complaints can be dealt with by preliminary inquiry, and such complaints have been treated as putative complaints.

66) During the current reporting period (1 July 2010 to 30 June 2011) **11** complaints or putative complaints concerning the Commission were received by the Inspector's office, and a further **7** were carried over from the previous reporting period.

[11] Section 89(1)(b) of the Act

67) Unless otherwise indicated below, each complaint has been assigned an identifying code, which preserves, as far as possible, the anonymity of the Complainant, but indicates the year in which the complaint was received, and the numerical position of the complaint in relation to the totality of complaints received in that particular year. For example, "C01-09" denotes that that particular complaint was the first complaint received by the Inspectorate in 2009.

68) As will be obvious from the summary of the complaints below, a number of the complaints alleged misconduct by NSW Police, and were therefore outside the Inspector's jurisdiction. In such cases, where there was also a complaint concerning the Commission, it was usually in the form of an objection by the Complainant to the Commission's having referred the complaint to NSW Police for investigation, in some cases under the supervision of the Ombudsman, or in very few cases, such investigations to be oversighted by the Commission, rather than the Commission itself investigating the relevant allegations. Such objections are, of course, difficult to sustain, because the Commission has a discretion as to whether a particular matter justifies an investigation by the Commission, rather than a referral to NSW Police for investigation. Unless it can be clearly shown that the exercise of that discretion has miscarried, such objections must be overruled by the Inspector.

69) The **11** complaints received during the current reporting period, and the **7** carried over from the previous reporting period are referred to below.

70) **AS TO THE 7 COMPLAINTS OUTSTANDING AS AT 30 JUNE 2010**
(Each of these complaints was referred to in the Inspector's 2010 Annual Report)

i) **C01-10**: I included a summary of this complaint in my 2010 Annual Report at page 24 (xii) in the following terms:

> *This Complainant is the subject of a current investigation by the Police Integrity Commission. Correspondence has passed between myself and the Complainant, and myself and the Commission in relation to this matter. I have recently written to the Complainant suggesting that until the completion of the Commission's investigation concerning the Complainant, which investigation, I am advised is in its final stages, it is not possible for me to finalise this complaint. Accordingly, I have suggested to the Complainant that once the investigation is completed, and he has been advised as to the outcome concerning himself, I will further consider the Complainant's complaints in the light of that outcome.*

There was considerable correspondence in the course of my investigation of this complaint between my office, the Complainant and the Commission. Eventually however I wrote to the Complainant on 15 March 2011 advising him that the Commission had informed me that charges were to be laid against him arising out of the Commission's investigation alleging that he had given perjured evidence to the Commission during the Commission's investigation, and that, accordingly, in those circumstances I had closed his file.

ii) **C08-10:** I included a summary of this complaint in my 2010 Annual Report at page 24 (xiii) in the following terms:

> *This Complainant appears to be in a domestic relationship with the Complainant in the C01-10, and this Complainant is also the subject of the investigation involving the Complainant in C01-10. Accordingly, I have taken a similar course in relation to the complaint in C01-10, and written to this Complainant suggesting that once the investigation being conducted by the PIC involving herself is concluded, I will consider the complaints in the light of the outcome of that investigation.*

After correspondence between the Complainant, my office and the Commission, I eventually wrote to the Complainant on 15 March 2011 and advised that the Commission had informed me that, as a result of its investigation, it intended referring a brief to advise in respect of the Complainant to the Commonwealth Director of Public Prosecutions and that, accordingly, in those circumstances, I had closed my file in respect of her complaints.

iii) **C03-10:** I included a summary of this complaint in my 2010 Annual Report (page 24 (xiv)) in the following terms

> *This Complainant is a solicitor who was a party to proceedings in the Equity Division of the Supreme Court more than 10 years ago. The Complainant makes serious, indeed, scandalous, allegations concerning the Supreme Court Judge who heard the case, as well as a prominent former NSW politician, several Police Officers and other persons, and several law enforcement agencies, in the absence, in my opinion, of any credible evidence to support such allegations. However, so far as my jurisdiction is concerned, essentially his complaint is that the Police Integrity Commission in declining to investigate his complaints in so far as they involve current or former NSW Police Officers, has wrongly exercised the Commission's discretion in that regard. I have advised the Commission, on an informal basis of the nature of this complaint. However, although the Supreme Court judgment in question would not seem to be directly relevant to the only aspect within my jurisdiction, I felt that it may well shed some light on the origin of these multiple complaints. Attempts to obtain a copy of the judgment from the Supreme Court foundered over several months. Following a written complaint by me to the Supreme Court access to a copy of the Judgment has now been made available to my office. I anticipate the need for further correspondence between my office and the Complainant in respect of this matter before the matter can be finalised*

Following further correspondence between myself and the Complainant I advised the latter by letter dated 29 October 2010 that I was satisfied, as a result of my investigation, that there was no substance whatsoever to his scandalous allegations, and that in so far as they appeared to involve the Police Integrity Commission I was unable to discern any credible basis for his allegations and, accordingly, his file would be closed.

iv) **C06-10:** I included a summary of this complaint my 2010 Annual Report (page 25 (xvii)) in the following terms:

> *This Complainant was one of several senior NSW Police Officers identified by name in the telephone intercept material of a derogatory nature published by the Commission, and the subject of my Report responding to and upholding complaints by the Police Association of NSW published on the Inspector's website. In essence, an additional complaint made by this Complainant involved the alleged PIC's service of process upon him in particular circumstances to which he objected. The Commission has provided me with a written response to this complaint, and, there being no objection by the Commission, I have provided a copy thereof to the Complainant, and presently await his response to that document.*

Eventually I wrote to the Complainant on 15 October 2010 advising him that I saw it as impossible to resolve the conflicting factual claims between himself and the Commission relating to his additional complaint and accordingly I proposed to close the file in his matter.

v) **C10-10:** I included a summary of this complaint in my 2010 Annual Report (page 26 (xviii)) in the following terms:

> *The issue raised by this Complainant seems to be that whereas he made specific complaints to the Police Integrity Commission containing allegations against certain NSW Police, which the Commission advised him that it declined to investigate, a decision which the Complainant appears to have accepted, his real complaint seems to be that thereafter he came into additional information supporting his relevant allegations and thereupon passed that material to the Commission, but that the Commission in the Complainant's view, without justification, has refused to consider this additional material. I have brought this complaint to the attention of the Commission, and presently await the Commission's response thereto.*

Subsequently, I was satisfied from information provided by the Commission that they had referred the matter to NSW Police and the Ombudsman and that it was proper for them to take that course, and accordingly, by letter dated 20 August 2010 advised the Complainant of my decision and that his file would be closed forthwith

vi) **C07-10:** I included a summary of this complaint in my 2010 Annual Report (page 25 (xvi)), which, so far as relevant, was in the following terms:

> *This Complainant was formerly Inspector O'Neill, of NSW Police, at the relevant time stationed in Wagga. This Complainant is one of the Police Officers referred to in my Reports published in full on the Inspector's website, dealing with and upholding the complaints by Officers Philpott, Deissel and Jennings, respectively. In the*

> *course of the investigation of the latter complaints, I concluded Inspector O'Neill had been denied procedural fairness by the Commission for the reasons stated in those Reports, even though I had not at that stage received a relevant complaint from the latter. Accordingly, I wrote to him informing him of my findings in that regard, which in turn resulted a letter from him dated 2 June 2010, containing a formal complaint concerning various aspects of the material published in the Whistler Report, concerning him, ... the main thrust of his complaint concerns not the areas already dealt with in the abovementioned complaint Reports by me, but rather an aspect of the Whistler Report in respect of which until this complaint I had not received a complaint, namely, the segment described in the Whistler Report as "The Arrest of WH-1". I have advised the PIC of this complaint, but at this stage have not had the opportunity to evaluate that complaint, although it is my intention to do so as soon as time permits. The Complainant has elected to have his identity published herein.*

Subsequently I investigated Mr O'Neill's complaints and produced my Report upholding those complaints. That Report appears in the Schedule to this Annual Report and is also available on the Inspector's website – www.inspectorpic.nsw.gov.au.

vii) **C03-07:** I included a summary of this complaint in my 2010 Annual Report (page 14 (64)) in the following terms:

> *The Complainant in this matter is Mr **Bradley Hosemans** (a former Detective Sergeant in NSW Police) who has elected to be identified by name in this Annual Report. The complaint as formulated in the Draft Report comprises a number allegations of apprehended bias towards the Complainant by the Commission, as well significant breaches by the Commission of its duty to accord the Complainant procedural fairness. The PIC investigation of an anonymous allegation concerning this Complainant commenced in September 2005 (**Rani Report iii)**. The evidence called by the PIC concluded on 14 November 2006. Counsel Assisting's submissions were dated 3 May 2007. The **Rani Report** was delivered to NSW Parliament in December 2007, some 2 years and 3 months after the commencement of the investigation. No criminal prosecution has been commenced against any person, nor has any action been taken by the Commissioner of Police under the Police Act, despite the PIC's recommendations in that regard in Section 10 of the Rani Report. The investigation found not a shred of credible evidence to support the anonymous allegation which gave rise to the investigation, and which, according to the Complainant has caused a great deal of damage to his reputation. My investigation into this complaint has reached the stage where I have prepared a Draft Report which has been provided for comment, if any, to the Complainant and his solicitor, the Commission, and, in view of express or implied criticisms therein in respect of the following persons, to the former PIC Commissioner who presided during*

> *hearings highly relevant to some aspects of the complaint (to date, all attempts at making contact with the latter have been to no avail) Counsel Assisting (as he then was), and Counsel who appeared for the Complainant. Each of Counsel Assisting, and Counsel, have responded to the Draft Report, but I am still awaiting the Commission's response thereto (although there has been considerable correspondence between myself and the Commission during the progress of my investigation of these complaints, from which the Commission's general response is clear). I will in due course take all such responses into account, including in producing Draft Conclusions to the Report, which will likewise be provided for comment to the abovementioned recipients. Again, all comments, if any, will then be taken into account by me before finalising the Report.*

Subsequently, I completed my investigation and produced a Report upholding Mr Hosemans' complaints. That Report appears in the Schedule to this Annual Report and is also available on the Inspector's website – www.inspectorpic.nsw.gov.au.

71) **AS TO THE 11 COMPLAINTS OR PUTATIVE COMPLAINTS RECEIVED SINCE 1 JULY 2010**

10 of these complaints have been DISPOSED of as follows:

(i) **C11-10:** This complaint essentially comprised allegations of NSW Police acting corruptly in respect of drug dealers. There was also a subsidiary complaint involving a related investigation carried out by PIC investigators. With the Complainant's written consent I forwarded his complaints to the Commission for their attention. Subsequent correspondence from the Commission satisfied me that the Commission had investigated the matters referred to in the complaint effectively and appropriately and that the information gathered by the Commission had been assessed and decisions made in the light of that assessment. Further I was satisfied there was no basis for any complaint concerning the Commission in relation to the matters raised by the Complainant. By letter dated 4 August 2010, I advised the Complainant accordingly and that his file would be closed.

(ii) **C13-10:** This Complainant was a Senior Constable in NSWP. He had been investigated by the Commission and had been compelled to give evidence to the Commission in the course of the Commission's investigation. His overriding complaint seemed to be that he "should not have been forced to give evidence" at the particular hearings before the Commission, because he had previously provided the Commission with medical evidence as to his state of health.

I forwarded the complaints to the Commission and received a lengthy response. In the light of that response, which included copies of the confidential transcript of the Complainant's evidence, I was satisfied that the Commission was aware of the evidence as to the health of the Complainant and that in the light of the whole of the material provided to me I was unable to see any basis for the

complaint made. Accordingly, by letter dated 20 August 2010 I advised the Complainant of my decision and that it appeared to me that the Commission had proceeded on a proper basis and had due regard to his interest as well as to the undoubted public interest involved in the investigation and that I proposed to close his file.

(iii) **C15-10:** Voluminous correspondence was received in my office from this Complainant which in broad terms alleged numerous instances of misconduct of a very serious nature concerning NSW Police. It also appeared to me from the nature of the Complainant's correspondence that the latter may suffer from some mental illness. By letter dated 24 August 2010, I advised the Complainant that the Inspector had no jurisdiction to deal with complaints of misconduct by NSW Police and that accordingly I had forwarded his documentation to the Commission, and that his file would be closed.

(iv) **C16-10:** This matter comprised an anonymous complaint received in the Inspector's office as a result of it having been forwarded by Member of the NSW Parliament. The allegations concerned misconduct by NSW Police and accordingly by letter dated 31 August 2010 I forwarded the complaint to the Commission, and the same day wrote to the Member of Parliament who had forwarded the Complaint advising him that the matter was outside the Inspector's jurisdiction, that I had forwarded the material to the Commission, and that in due course the Commission would advise him as to the results of their investigation. The file was closed on that date.

(v) **C17-10:** This Complainant was a Senior officer in NSWP. He complained that he had been unfairly treated when he appeared as a witness before the Commission, and in particular, that there had been undue delay in his matter being finalised by the Commission. By letter dated 7 September 2010, I wrote to the Complainant seeking further and better particulars of his complaint. Suffice it to say that the complaint was not persisted in by the Complainant and accordingly by email dated 3 June 2011 my office advised him that his file had been closed**.**

(vi) **C18-10:** This Complainant alleged that the Commission had refused to investigate his complaints relating to NSWP and NSW Crime Commission. Having investigated his complaints I wrote to the Complainant by letter dated 1 December 2010 advising him that in light of the fact that the Commission had offered to refer his complaints to be investigated by NSWP under the supervision of the Ombudsman, and that he had declined to accept that invitation, that I could see no basis for his complaint concerning PIC. I also drew to his attention to the fact that the Supreme Court had made an order, which was current, freezing his assets on application by the NSW Crime Commission, and that it seemed to me that before any law agency could further investigate his complaints it would be prudent to await the outcome of the Supreme Court proceedings and that, accordingly, his file would be closed.

(vii) **C19-10:** This Complainant alleged police misconduct by NSW Police arising out of some incident said to have occurred many years ago. By letter dated 17 December 2010, I wrote to the Complainant, advised him that I had no jurisdiction, and provided him with contact details for the PIC. Subsequently,

the Complainant contacted my office and requested that his documentation be returned to him and that was done on 21 December 2010 and accordingly, I regarded this complaint as having been discontinued.

(viii) **C02-11:** This Complainant had been an officer in NSWP. He had made a complaint to a previous Inspector of the Police Integrity Commission. That Inspector had conducted a lengthy enquiry into that complaint and had produced a written report dated 1 August 2006, a copy of which had been then provided to the Complainant.

The Complainant raised no objection to the results of that enquiry until he wrote to my office on 14 January 2011.

Essentially, his current complaint was that his original complaint "may not have been investigated as comprehensively as advised".

Having investigated this complaint at some length, and after further correspondence with the PIC and the Complainant, by letter dated 16 March 2011 I wrote to the Complainant informing him that in my view there was no substance to his complaint and no justification for me to consider reopening the previous enquiry conducted by my predecessor some five years ago, and that accordingly his file would be closed.

(ix) **C03-11:** This Complainant made complaints which arose out of the same circumstances referred to above in C02-11. Accordingly, by letter dated 16 March 2011 I wrote to the Complainant and referred him to my letter to the previous Complainant mentioned above, to which this Complainant appeared to have access, and advised him that for the reasons indicated in the letter to the previous Complainant, I was satisfied that there was no ground to doubt the correctness and conclusions come to in the previous enquiry, and accordingly, I was closing his file.

(x) **C04-11:** This complaint arose out of the fact that the Complainant had been identified as a "affected person" in a public report published by the PIC and posted on its website. The Complainant was shortly to stand trial in the Sydney District Court and his complaint expressed concern that the adverse material concerning him in the report on the Commission's website may prejudice his forthcoming trial should those matters come to notice in the Court proceedings. Accordingly, I wrote to the PIC and drew the perceived problem to their attention. I then wrote to the Complainant providing him with a copy of the letter I have written to the PIC and requested that if the matter was not resolved to his satisfaction that he again bring the matter to my attention. As my office received no further correspondence from the Complainant, I regarded the matter as closed.

Complaint by Detective-Inspector Paul Jacob

72) On 14 February 2011, Detective Inspector Jacob made a number of written complaints to my office, arising out of what was published concerning him in the Commission's *Rani* Report, which was presented to the NSW Parliament in December 2007.

73) In due course, I provided notice of those complaints to the PIC for their comment.

74) I also commenced an investigation over several months into those complaints. At this stage I have produced a Draft Report which has been provided to the PIC, DI Jacob, and a number of other directly affected persons, so that each would have the opportunity to comment on the Draft Report prior to its publication.

75) That Report is the result of that investigation, and includes a detailed analysis of the *Rani* Report relevant to those complaints, and the evidence on which that Report was based, together with my opinions, conclusions and recommendations arising from that investigation.

76) For reasons explained in that Draft Report, I also conducted an examination of the Commission's adverse opinions and recommendations concerning *DSC Sim*.

77) The *Rani* Report in effect recommended to the NSW Commissioner of Police that DI Jacob and DSC Sim be dismissed from NSW Police forthwith on the basis of adverse findings against them published in the *Rani* Report.

78) The numerous, disparate, complaints made by DI Jacob would be difficult to sumarise. However they include the complaint that the PIC made findings of intentional misconduct against him which were not only not supported by the evidence but were contrary to it.

CRITICISMS OF THE COMMISSION'S 2010 ANNUAL REPORT

79) The Commission is required by the *Police Integrity Commission Act* (Section 99) to furnish to the NSW Parliament an Annual Report of its operations during the relevant year. Subject to that overriding requirement, the Commission must address in that Annual Report each of the eight subject matters specified in that Section.

80) I regard it as an important part of the Inspector's functions to pay close regard to the Commission's Annual Reports with a view to ensuring that apart from complying with the formal requirements of the statutory provision referred to above, the Commission provides a *full, frank and fair disclosure* to Parliament of its operations.

81) In my opinion the Commission's 2010 Annual Report did *not* present a full, frank and fair disclosure of its operations during the relevant year.

82) By letter dated 15 December 2010 I directed a number of questions to the Commission concerning the content of its 2010 Annual Report. The Commission responded by letter dated 15 April 2011.

83) That correspondence reveals a number of significant matters that are not included in the Commission's Annual Report. Reference is made to these below.

84) Pages 4 and 27 of the PIC's Annual Report contains the information that 28 private hearings were conducted by the Commission but without any indication as to the time involved in the totality of those hearings.

85) However, the Commission has informed me that those hearing occupied in all 28 days, and that there were no Reports to Parliament arising out of any of those hearings.

86) Further, that that was the first year in the Commission's history in which there were no public hearings.

87) There is no explanation in the Annual Report for the omission of this significant information as to the Commission's operations.

88) There is no explanation as to why the Commission's total hearings during the year occupied only 28 days and why there were no public hearings or Reports to Parliament.

89) At pages 4 and 50 of the Annual Report there is a reference to the Commission's *Alford* Report to the NSW Parliament in December 2009.

90) However there is no reference to the Inspector's criticisms as to the adequacy of that Report contained in the Inspector's three complaint Reports upholding complaints against the Commission by Officers Philpott, Deissel and Jennings, respectively on the Inspector's website - www.inspectorpic.nsw.gov.au. The Commission's response in the correspondence referred to above was, in effect, that it was not required to publish that information.

91) At pages 49 and 50 of the Annual Report there is a reference to the Commission's *Whistler* Report to the NSW Parliament in December 2005, but no reference to the Inspector's significant criticisms of that Report contained in five complaint Reports upholding complaints by the police officers adversely named in and affected by that Report of unfairness and bias against the Commission. The Commission's response, in effect, was that it was not required to publish that information.

92) If the information had been included that the Inspector had found the *Whistler* Report to be unfair and the adverse conclusions and recommendations therein unsustainable, in relation to the police officers mentioned above, that would have alerted Parliament to the fact that that Report should be read bearing those criticisms in mind and that it should not necessarily be taken at face value.

93) In my opinion, the information referred to above in respect of the Commission's *Alford* and *Whistler* Reports which was not included in the Annual Report was relevant to a better understanding and assessment of the Commission's relevant operations.

94) Part 7 of the Commission's 2010 Annual Report is headed "Tracking the Commission's Recommendations."

95) One of the eight subject matters referred to above that the Commission must include in its Annual Report is *an evaluation of the response of the Commissioner of Police* to the PIC's findings and recommendations (Section 99(2)).

96) The Introduction to Part 7 refers to that statutory provision and then states that "The purpose of this Chapter is to report the evaluation of NSWPF responses to the Commission's ... recommendations for managerial action arising from investigations".

97) Included in that Part (at page 50) is a reference to the Commission's public report in *Mallard* presented to the NSW Parliament in December 2007. Then follows a paragraph in the following terms (so far as relevant, with emphases added) –

> *The [Mallard] Report recommended that consideration be given to removal under section 181D [i.e. dismissal from NSWPF] or reviewable action…. in relation to two officers, Adam Purcell and Alison Brazel. Purcell was discharged medically unfit on 31 July 2008. Brazel was discharged medically unfit on 16 July 2010.*

98) In my correspondence with the PIC referred to above I questioned the basis on which the Commission had included the material referring to Sergeant Alison Brazel in the Annual Report.

99) From the Commission's response it is clear that it neither sought nor received *any* communication from the Commissioner of Police as to whether or not the latter had accepted the adverse findings and recommendation concerning Sergeant Brazel.

100) The Commission informed me it had obtained the information as to that Officer's medical discharge "from the Police personnel database."

101) The Commission also informed me that its purpose in publishing that information was because it was required to include an evaluation of the response of the Commissioner of Police to its findings and recommendations.

102) Further that the Commission meant to imply by publishing that information concerning Sergeant Brazel that the fact of her medical discharge was relevant to the Commission's recommendations "to the extent that medical . . . discharge precludes disciplinary action being taken against officers by NSW Police Force so can be relevant to the decision to take disciplinary action."

103) In my opinion this explanation for the inclusion of this material is seriously flawed.

104) The PIC made no enquiry of the Commissioner of Police as to whether the latter had decided to accept or reject the Commission's adverse findings and recommendations concerning this Officer.

105) The Commission was aware that it had no information as to whether the Commissioner of Police had accepted or rejected its adverse findings and recommendations.

106) The Commission was aware that it could *not* evaluate the Police Commissioner's response to the Commission's findings and recommendations in respect of Sergeant Alison Brazel because it had made no attempt to ascertain from the Police

Commissioner what if any decision he had come to in respect of those findings and recommendations.

107) The Commission had no basis for drawing any inference that the Commissioner of Police had accepted its adverse findings and recommendations.

108) The Commission nevertheless published this material in its Annual Report to Parliament with the intention that the Parliament and the public should read into it the implication that the intervention of the Officer's medical discharge may have precluded the Commissioner of Police from acting on the Commission's recommendations and that Sergeant Brazel may have taken medical discharge so as to avoid dismissal from NSWPF.

109) The Commission's action in publishing that material in the context of the paragraph quoted above from the Commission's Annual Report made it more likely that such would be the interpretation placed upon it.

110) The Commission published that material without prior notice to either that Officer or NSW Police.

111) There could be *no justification* for the publication by the Commission of this prejudicial material with the potential to reflect adversely on the Officer's integrity.

112) For the same reasons there could be no basis for the Commission's accessing the police personnel database referred to above for the purpose of abstracting therefrom and publishing these personal details concerning this officer.

113) What is particularly objectionable about the unjustified publication of this prejudicial material is the absence of any acknowledgment by the Commission of the fact that I upheld significant complaints made to my office by Sergeant Brazel arising out of the Commission's treatment of her as a witness when she gave evidence to the Commission, and the Commission's findings and recommendations concerning her in the Mallard Report.

114) In my Report I expressed the opinion that the Commission had denied procedural fairness to Sergeant Brazel and that accordingly the Commission had no authority to publish the adverse opinions and recommendations concerning her in the Mallard Report and that no reliance should be placed on those opinions and recommendations.

115) That Report dated 23 February 2009 has peen posted on the Inspector's website – www.inspectorpic.nsw.gov.au. The Commission in responding to that Report advised me that did not accept that in conducting itself in the manner described below, in particular, it had treated Sergeant Brazel unfairly or had acted improperly.

116) Included in Sergeant Brazel's complaints upheld by me, the facts not being in dispute, was the circumstance that on being notified by the Commission that she was to be identified in the forthcoming Mallard Report as an "affected person", her solicitors forwarded to the Commission medical reports which referred to a diagnosed medical condition from which she was suffering which significantly affected her memory and cognitive functioning.

117) Those medical reports were tendered by Sergeant Brazel's solicitors on the express basis that they be received by the Commission as a *confidential* exhibit containing "*highly personal*" details and, accordingly, that they not be made public.

118) The Commission's kept those medical reports in the Commission's possession, without acknowledgment or explanation to Sergeant Brazel's solicitors, for approximately four months.

119) The Commission then wrote to Sergeant Brazel's solicitors, at a time when the Mallard Report had been printed and was about to be presented to the NSW Parliament and made public, and informed them that it would not accept the tender of the medical reports.

120) The Commission did not return those medical reports to Sergeant Brazel's solicitors.

121) Subsequently, the Commission, without the knowledge or consent of Sergeant Brazel or her solicitors, forwarded those highly personal documents to the Director of Public Prosecutions.

122) The Commission did not reveal to the DPP the circumstances in which it had come into possession of those medical reports or that in providing them to the DPP it did so without the knowledge or consent of Sergeant Brazel or her solicitors.

123) The Commission was aware when it published the material referred to above in its Annual Report that Sergeant Brazel prior to the publication of the Mallard Report had been diagnosed with the medical condition referred to in those medical reports.

INVESTIGATION OF LEAK OF CONFIDENTIAL PIC INFORMATION AT REQUEST OF MINISTER FOR POLICE

124) In February 2011, the Minister for Police forwarded to my office a written request pursuant to Section 89(2) of the *Police Integrity Commission Act* that I exercise my functions under the Act "*to ascertain if there have been any breaches of the Section 56 secrecy provisions of the Act or other relevant provisions by any current or former officers of the PIC or any other persons.*"

125) The subject matter of the Minister's concerns in this regard was expressed in that communication as follows: "that some of the material included in recent reports in the Fairfax media concerning the NSW Crime Commission appears to be derived from the Police Integrity Commission, including from recent confidential reports such as Project Rhodium and current investigations such as Operation Caesar."

126) The integrity of the Commission's processes is obviously dependent on the Commission's ability and determination to ensure the security of confidential information in its keeping, particularly that gathered from witnesses during confidential hearings, in this case from officers of the Crime Commission, underwritten by assurances from the PIC that that evidence will not be disclosed to any person outside the Commission.

127) Also involved is the need to ensure that the reputations, and safety, of confidential witnesses are not unnecessarily damaged or threatened by the unauthorised release of their confidential evidence to the Commission or the fact that they have appeared as confidential witnesses.

128) Essentially such ability and determination rests on the trustworthiness of PIC officers, in particular, senior officers who are privy to confidential information not necessarily available to more junior staff, and their commitment to ensuring the security of such confidential information within the Commission's holdings.

129) The fact that an intentional breach of the secrecy provisions of the Act (Section 56(2)) by a current or former officer of the PIC is made a criminal offence is an indication of the importance placed by the Parliament on the maintenance of absolute security of its confidential information by the PIC.

130) The particular articles to which the Minister was referring included two articles, in particular, the first of which appeared in the *Sun Herald* newspaper on 13 February 2011, and the second in the *Sydney Morning Herald* newspaper on 14 February 2011, the latter being in the following terms:

> *THE NSW Crime Commission has taken substantial slices of seized criminal assets to pay for its own legal costs and rewarded defence solicitors with hundreds of thousands of dollars for work that may have taken only several hours, according to a top-secret inquiry.*
>
> *The inquiry, by the NSW police watchdog, also raised concerns that the commission had failed to adequately audit the assets of criminals it was acting against, meaning the state is potentially missing out on millions of dollars in criminal assets.*
>
> *A Herald investigation has revealed that the commission has been sharing the proceeds of crime with organised crime figures, cutting deals allowing them to walk away with millions.*
>
> *The Police Integrity Commission is now investigating the NSW Crime Commission and the way it manages its assets confiscation powers.*
>
> *The inquiry has included a specific focus on one crime commission financial analyst and his defence solicitor partner, over allegations the pair colluded to secure the solicitor large amounts in legal costs. The PIC is also examining whether the analyst leaked sensitive financial information to his partner.*
>
> *Both the analyst and the solicitor have been hauled into secret hearings, where the solicitor was accused of receiving hundreds of thousands of dollars for only a few hours' work.*
>
> *Now the Crime Commission is believed to be resisting plans by the acting head of the PIC, Jerrold Cripps, QC, to hold public hearings into the affair.*

The investigation, dubbed Operation Caesar, has revealed several separate instances in which substantial legal costs have been carved up between the commission and defence lawyers - sometimes within half an hour.

A senior law enforcement source said: "It is not necessarily illegal, but they have not done the work that might have justified those thousands of dollars.

"Costs are meant to repay you for the work you've done … They were taking a slice of money that was meant to be the result of illegal activity and all of a sudden it is proceeds [for the commission]."

Since July 1997, when the then NSW Treasurer, Michael Egan, gave the commission permission to retain its legal costs in seizure proceedings, it has taken more than $21 million out of a total pool of $160 million, or about 13 per cent, in criminal proceeds.

The commission boss, Phillip Bradley, told parliament in 2007 that "the costs we recover for the conduct of the litigation … is in the order of about $3 million [that year]. You will see that in the accounts as the biggest revenue item".

But in July 2008 Mr Bradley agreed to stop taking the costs from individual confiscations due to concerns expressed by the PIC. The source said: "The crime commission was benefiting from [seizing] money, and Bradley must have realised that it was not a good look."

As an indication of just how bad a look it was, five years ago the commission recouped 21.1 per cent of its total criminal confiscations to pay for what it described simply as "costs".

More than $8 million has been retained by solicitors acting for alleged criminals since 1999.

The PIC has also recommended that the crime commission's four-person management committee receive far more information about the nature and extent of assets the commission had seized.

The police watchdog urged that the management committee be advised on "the amounts claimed and recovered by the NSWCC as professional costs" in each confiscation matter.

The concerns about the payments come on top of a series of questions about opportunities for misconduct at the commission, which were raised in a previous PIC review.

In one case in January 2007 the crime commission seized about $1.2 million in cash and then claimed $595,000 in what it described as

> *"NSWCC costs". As a result the NSW government received only $414,000, about a third of the overall seizure.*

131) These articles made it clear that the relevant journalists had illicitly "obtained elements of the 172-page" confidential Report by the PIC, delivered to the Police Minister in mid-2009, and that the journalists had gained unauthorised access to the confidential recommendations made in that Report.

132) The article of 14 February 2011 appeared to indicate specific knowledge of the identity of witnesses called before the PIC during the confidential hearings involving aspects of Crime Commission's procedures. In particular, the article identified, although not by name, a particular officer of the Crime Commission, and a particular solicitor, each of whom had in fact been a confidential witness before the PIC.

133) I immediately embarked on an investigation into the circumstances surrounding the unauthorised release of this confidential information and advised the PIC accordingly. I received assurances of cooperation and assistance from the Acting Commissioner PIC and I have kept the latter broadly informed of the progress of my investigation.

134) Despite the seriousness of the breach of the Commission's confidential processes demonstrated by this unauthorised release of confidential information, the PIC informed me that it had not itself initiated an internal investigation with a view to establishing how the breach of its security had occurred.

135) In the course of my investigation which extended over the months since I received the Minister's brief, and pursuant to the Statutory powers vested in the Inspector, I took possession of a substantial quantity of various records of the Commission relating to the period of three months prior to the date of the unauthorised release of the confidential information, and obtained possession a number of mobile telephones from current and former Commission officers.

136) I also obtained written statements from certain current and former Commission officers.

137) At this stage I have not delivered my formal confidential Report to the Minister. I have, however, briefed his office on significant developments in the course of my investigation, and, as mentioned above, I have also kept the Acting PIC Commissioner similarly informed.

138) It is my intention to complete my Report as soon as possible and to deliver the same to the Minister.

ADVICE FROM THE COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

139) As noted in my 2010 Annual Report (page 17), I wrote to the Commonwealth DPP in respect of the apparent breaches by the Commission of the *Telecommunications (Interception and Access) Act (1979)* (Cth), identified in my Report dated 28 January 2010 (published on the Inspector's website). My Report dealt with complaints by the Police Association (NSW) of improper use by the Commission of lawfully intercepted telephone conversations. In that correspondence I sought the advice of the DPP as to

whether, in light of my opinions as to a breach of that legislation, proceedings should be commenced by the DPP against the Commission or any officer thereof. The advice subsequently conveyed to me by letter from the CDPP was to the effect that in his opinion there was no reasonable prospect of securing a conviction against the Police Integrity Commission or any of its officers under section 105 of that legislation in respect of the publication by the Commission of the material the subject of the complaint.

140) As also noted in my 2010 Annual Report (page 17) I had of my own initiative "commenced an investigation into the circumstances in which the Commission published in that [Mallard] Report, the telephone conversations of certain persons together with the identity and personal details of those persons, apparently on the basis that such persons were parties to a telephone conversation with a person being investigated by the Commission, and also details sufficient to identify another person referred to in those conversations together with potentially adverse material relating to that person." **Subsequently, I completed my investigation and produced a Report detailing my findings and recommendations. That Report appears in the Schedule to this Annual Report and is also available on the Inspector's website – www.inspectorpic.nsw.gov.au.**

141) For convenience, I include below the following summary of the background to and the conclusions reached in that Report, including paragraphs 1-7 of my Report.

> *1) The Police Integrity Commission's Operation Mallard Report was presented to the NSW Parliament in December 2007, and thereupon made a public document, on the recommendation of the Commission.*
>
> *2) Contained in that Report is a considerable amount of material comprising personal details concerning two persons identified therein as Quenten Roberts and Michelle Roberts, neither of whom was at any time under investigation by the Commission, nor was either called as a witness by the Commission during the conduct of the Mallard hearings. There is also material concerning a person identified in the Report only, and unceremoniously, as "Purcell's ex-wife" who falls into the same category, although such material is confined to one subject matter of narrow compass.*
>
> *3) In fact, the only reason Mr and Ms Roberts were identified in the Commission's public Report, together with the personal details pertaining to them, was that each participated in telephone conversations with, and at the behest of, the then Superintendent Purcell of NSW Police, who was under investigation by the Commission at that time, which telephone calls were lawfully intercepted by the Commission pursuant to telephone intercept warrants obtained by the Commission.*
>
> *4) However, unlike the Roberts, the woman referred to as "Purcell's ex-wife" was not, as will appear below, a party to any such lawfully intercepted telephone conversation, her involvement resting on the even more tenuous basis that she was so-described when mentioned in relation to a lawfully intercepted telephone call between Purcell*

and another police officer. Nevertheless, personal details concerning her were published by the Commission in its Mallard Report.

5) These personal details were among those also published about these three persons during the Commission's public hearings, which took place on 30-31 May, and, in particular, on 1 June 2007, when the telephone calls between Purcell and each of the Roberts were played in full so as to be audible to those in the hearing room, and the text thereof displayed on a public monitor (subject in each case to deletions made by the Commission relating to other persons mentioned therein), and when portion of the content of the telephone conversation referred to above, in respect of "Purcell's ex-wife", was put to Purcell by Counsel Assisting during Purcell's examination.

6) Transcripts and the audio-tapes relating to the telephone calls involving the Roberts, were then provided by the Commission to the representatives of the Media present in the hearing room. None of this material was at any time sought to be retrieved by the Commission from these recipients, and no restriction was placed by the Commission on the use to which this material might be put by them.

7) In my opinion, the overall effect of the publication of the material in question, both in the public hearing and in the subsequent Report, because of the nature of that material, and the construction that might not unreasonably be placed upon it, was capable of damaging the interests and reputations of the three persons publicly identified in this manner.

142) I concluded that the Commission had published concerning those three persons, without their knowledge or consent, highly personal information which was capable of causing each of them embarrassment, which was potentially prejudicial to their interests, and damaging to their integrity and reputations, and that there was *not the slightest justification* for the Commission's conduct in so doing.

143) Subsequently, I again sought the advice of the CDPP as to whether, in light of my opinions as to a breach of the TIA Act, proceedings should be commenced by the DPP against the Commission or any officer thereof. The advice subsequently conveyed to me by letter from the CDPP was to the same effect as the previous advice, namely, that in his opinion there was no reasonable prospect of securing a conviction against the Police Integrity Commission or any of its officers under that legislation.

144) The gravamen of that and the previous advice seems to be that the CDPP takes the view that the question of the relevance to an investigation of lawfully intercepted material gathered by the Police Integrity Commission is a matter solely for the Commission to determine, and that the issue of whether in the circumstances the Commission ought to have excised the offending material did not bear on whether an offence had been committed.

145) This situation in my opinion gives rise to a most unsatisfactory state of affairs. As the extracts published by the Commission from the lawfully intercepted conversations identified in my two Reports demonstrate, in my opinion, the Commission in each case published personal details of and or derogatory references to a number of persons arising out of the intercepted telephone conversations. That material was entirely irrelevant to the Commission's investigation. The Commission nevertheless published that irrelevant material to the potential detriment of the interests and reputations of those involved.

146) Yet it appears that such persons are left without remedy or protection under that legislation or any other law.

EXTENSION OF POLICE INTEGRITY COMMISSION'S JURISDICTION TO OVERSEE ASPECTS OF NSW CRIMES COMMISSION OPERATIONS

147) As noted at paragraph 74 of my last Annual Report, the amendments made to the *Police Integrity Commission Act* by Act 60 of 2008, in particular, the inclusion of Section 13B (in effect, to detect or investigate misconduct of NSW Crime Commission officers and to prevent such conduct), so far as the Inspector's jurisdiction is concerned, have the effect of enlarging the classes of persons who may, in a proper case, make a complaint to the Inspector pursuant to Section 89(1)(b) of the legislation; such amendments also have an effect on the Inspector's functions pursuant to Sections 89(1) (a) and (c), to the extent that the effect of those statutory provisions adds to the workload of the Commission, and thus impacts on the Inspector's regular audit of the Commission's operations pursuant to Section 89(1)(a), and upon the procedures referred to in Section 89(1)(c). To date, in practice, the effect has been to increase the number of PIC investigations falling within the Inspector's auditing functions.

148) Assistant Commissioner Clark SC was appointed an Assistant Commissioner on 25 September 2008 to assess the capacity of NSW Crime Commission to identify and manage risks of serious misconduct involving Crime Commission officers, such appointment expiring on 7 July 2009, at which time the confidential Report of the *Review of the Capacity of the NSWCC to identify and manage serious misconduct risks* (Project Rhodium) was provided to the Minister for Police in his capacity as Chair of the Management Committee of the NSWCC.

149) As to the unauthorised release of confidential information concerning that Report to the Minister, see earlier in this Report: **Inspector's investigation of leak of confidential PIC information**.

150) In the Commission's 2010 Annual Report (pages 52-53) the Commission reported further information relating to this confidential Report to the Minister of Police. Subject to "*the sensitivity of the Report*" the Commission's conclusions (as distinct from its recommendations) are summarised.

151) During the current reporting year the Commission held private hearings at which officers of the NSWCC gave evidence. The Commission has made public its intention of holding public hearings during the next reporting period in respect of the NSWCC in which this evidence or some portion of it may be made public.

CONTROLLED OPERATIONS

152) Subject to the provisions of the *Law Enforcement (Controlled Operations) Act 1997*, the Police Integrity Commissioner may authorise the carrying out of controlled operations. This function is seen as an important and productive weapon which, absent statutory authority, would contravene the law. A controlled operation may be described as a covert investigative method used by law enforcement agencies, including the Commission, during which, for example, an undercover Police officer infiltrates a suspected criminal enterprise to obtain evidence to identify and prosecute those involved, and in the course of so doing may himself necessarily engage in conduct which but for the Act would be unlawful and expose him to criminal and/or civil liability.

153) The approval procedures for authority to conduct a controlled operation have been settled by the Commission's Solicitor and are set out in some detail. Although the application for a controlled operations authority is prepared by the relevant investigative officer with the assistance of the Team lawyer, as and when required the Commission Solicitor also provides advice upon the necessity or appropriateness of the application. Such operations are subject to the external audit, as far as documentation is concerned, by the Ombudsman in accordance with Part 4 of the Act.

154) In practice controlled operations undertaken by the Police Integrity Commission from time to time of necessity involve police officers in the exercise of investigative, surveillance or enforcement functions and accordingly fall within the purview of Section 142(1) of the *Police Integrity Commission Act* which provides:

"142 Exercise of functions by police

(1) A police officer may not exercise investigative, surveillance or enforcement functions under or for the purposes of this Act unless authorised to do so by the Commissioner."

(1A) As soon as practicable after giving such an authorisation, the Commissioner must notify the Inspector of that fact.

155) Although by virtue of the definition of "police officer" in Section 4 of the *Police Integrity Act*, the reference to "police officer" in subsection (1) must be read as referring to NSW police officers only, I am in a position to inform myself of all Controlled Operation authorisations by the Commissioner by reason of my access to the Commission's internal records, and I also intend to further inform myself in this regard by reference to the Ombudsman's Annual Report dealing with compliance with the relevant provisions of the *Law Enforcement (Controlled Operations) Act*. The PIC has advised me in correspondence that during the current year four controlled operations were duly authorised only one of which involved NSW police.

156) A code of conduct applicable to all relevant agencies is contained in Schedule 1 of the Regulations made pursuant to Section 20 of the Act. The Section provides, so far as relevant, that a Regulation must be not be made pursuant to Section 20, except on the recommendation of the Inspector, and that a contravention of the code of conduct by

any person employed with a relevant agency (which includes the Commission) is taken to be misconduct for the purpose of any relevant disciplinary proceedings.

PROBLEMS WITH THE LEGISLATION RE: S 89(1)(b) OF THE POLICE INTEGRITY ACT: THE INSPECTOR'S COMPLAINT REPORTS

157) In my last Annual Report I attempted to spell out problems I perceived in respect of the publication of the *Inspector's Complaint Reports*, and concluded in the following terms:

> *Thus, it seems to me, the legislation gives no guidance, expressly, as to who should be seen as the recipients of such reports. Nor any guidance as to the status that should be accorded to such reports, In my opinion it is not clear that the Inspector has any power to publish the reports so that they become public reports. Nor does there appear to be any power in the legislation authorising the Inspector to present such reports to Parliament. 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.*

158) There has been much discussion between my office and the Parliamentary Joint Committee during my term of the need for a relevant amendment and as to the form such an amendment might take. By letter dated 23 June 2010 from the Deputy Director-General, Department of Premier and Cabinet, I was advised that the Minister for Police had established a review of the *Police Integrity Commission Act 1996*, that the review was pursuant to Section 146 of the Act and that a Report to Parliament was due by March 2011. I was further advised by that letter that the Minister had requested that the review be undertaken by the Department of Premier and Cabinet, and attached to the letter was a copy of the Terms of Reference in respect of the review, and that any submissions from myself should be received by the Department by 31 August 2010. Subsequently, I provided written submissions to the Department including a submission supporting an amendment to the legislation to overcome the difficulties referred to above. On 29 October 2010 I had discussions with representatives of the Department of Premier & Cabinet in my office concerning aspects of the review.

TELECOMMUNICATION (INTERCEPTION) ACT 1979 (Cth)

159) The *Telecommunication (Interception) Legislation Amendment Act 2000* (Cth) (the TI Act) which included the Inspector of the Police Integrity Commission as an "eligible authority" was given Royal Assent on 23 June 2000.

160) The formalities associated with access to the foundational material upon which reliance is placed in seeking the issue of TI warrants and access to the product of such warrants is recorded to facilitate the statutory audit of such access by the NSW Ombudsman. By reason of the constraints contained in the TI Act, I do not have access to the product of such warrants, such material being carefully isolated within the Commission's IT procedure so as to quarantine it save for essential operational purposes.

161) As to the issue of misuse of telephone intercept material by the PIC, see, earlier in this Report: **Advice from Commonwealth DPP.**

LEGAL REPRESENTATION OFFICE

162) This Office was established in 1994 to provide legal advice and representation in relation to witnesses appearing before the then current Wood Royal Commission into NSW Police. Upon the establishment of the Police Integrity Commission in 1997, the function of the Office was extended by reference to the Police Integrity Commission (and the Independent Commission Against Corruption).

163) In relation to witnesses appearing before the Police Integrity Commission, Section 43 of the *Police Integrity Commission Act* allows such a witness to apply to the NSW Attorney-General for legal assistance. The Attorney- General then determines the application in the light of that Section.

ELECTRONIC RECORD KEEPING

164) The MATRIX system of electronic record keeping has resulted in easier access to operational reports and to the minutes of the regular Operational Advisory Group meetings.

165) From time to time changes in the formatting and operational procedures continue to improve the easy access to the recorded information.

MEETINGS WITH PARLIAMENTARY COMMITTEES

166) The *Committee on the Office of the Ombudsman and the Police Integrity Commission* (the Parliamentary Joint Committee) is constituted under Part 4A of the *Ombudsman Act 1974*. The functions of the Committee under the *Ombudsman Act 1974* are set out in section 31B.

167) Under the *Police Integrity Commission Act 1996*, the Parliamentary Joint Committee has the function of monitoring and reviewing 'the exercise by the Commission and the Inspector of their functions'.[12]

168) On 27 October 2010, I appeared and gave evidence before the Parliamentary Joint Committee on the occasion of the Committee's Eleventh General Meeting with the PIC Inspector. Prior to my appearance I received correspondence from the Committee containing a number of questions relating to matters within the Inspector's functions of interest to the Committee, and I responded to each of those questions in writing prior to my appearance.

169) The Report of the Parliamentary Joint Committee on the Eleventh General Meeting with the Inspector of the Police Integrity Commission (which includes copies of the correspondence referred to above) was published in November 2010, and is accessible on the Committee's website. at:

www.parliament.nsw.gov.au/prod/parlment/committee

170) On 22 June 2011 the membership of the newly-constituted Parliamentary Joint Committee was announced. On 23 June 2011 the Committee met and elected a Chair and Deputy Chair. As a result, details of the membership of the Committee may be stated as follows: The Hon Catherine Cusack, MLC, Chair, Mr Lee Evans, MP, Deputy Chair, Messrs Kevin Anderson, MP, Paul Lynch, MP, Ryan Park, MP, Hon. Adam Searle, MLC, and Hon Sarah Mitchell, MLC.

171) This Inspectorate holds itself available and would welcome enquiries and discussions on any matter of concern to members of the Parliamentary Joint Committee at any time.

EXPIRY OF PIC INSPECTOR'S TERM OF OFFICE

172) My 5-year term of office as Inspector expires on 21 November 2011. It follows that this will be my final Annual Report.

ENDNOTES

173) Establishment of Inspector's website: On 7 May 2008, the Inspector's website was established. Included on the website is the facility to allow details of complaints to be entered thereon and forwarded automatically to the Inspectorate. All Annual Reports of previous PIC Inspector's are available on this website, as well as copies of my previous Annual Reports, this Annual Report, Special Report to the NSW Parliament, and a number of Reports upholding complaints concerning the Commission: www.inspectorpic.nsw.gov.au. The Inspector's website is currently managed by officers of the Department of Premier and Cabinet.

174) Access to DPP's Law Library: Once again I wish to record my deep indebtedness to the former Director of Public Prosecutions, Mr Cowdery, QC, AO, for allowing me access

[12] Section 95(1)(a) of the Act

to the DPP's extensive law library; and to the Principal Librarian, Ms Gayle Davies, and her Staff, for their considerable and generous assistance in providing me with access to relevant texts and case-law from time to time. I should also like to record my sincere thanks to the current Director of Public Prosecutions, Mr Babb, QC, for kindly permitting the continuance of such access during the remainder of my term of office.

175) Since my appointment as Inspector of the Police Integrity Commission, I have received much assistance and encouragement from sundry sources, apart from those expressly referred in this Report for which I am extremely grateful and wish to acknowledge here. In particular, I acknowledge the assistance provided by the Acting Commissioner of the Commission, and his Executive Assistant, Ms Gabrielle Wanner. I also wish to acknowledge the invaluable assistance provided to me by my Executive Assistant, Ms Jane Cecilia.

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

13 September 2011

SCHEDULE TO PIC INSPECTOR'S 2011 ANNUAL REPORT

Report upholding complaints by Mr B Hosemans

NEW SOUTH WALES

Inspector of the Police Integrity Commission

INSPECTOR'S REPORT

PURSUANT TO SECTION 89(1)(b) OF THE
***POLICE INTEGRITY COMMISSION ACT* 1996**

COMPLAINT MADE BY MR BRADLEY HOSEMANS

CONCERNING THE POLICE INTEGRITY COMMISSION

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OVERVIEW

1) This Report by the Inspector of the Police Integrity Commission arises as a result of formal complaints in writing made to the Inspector by Mr Bradley Hosemans (the Complainant), initially by Mr Hosemans himself, and subsequently as formulated on his behalf by the Legal Representation Office. In effect, it is claimed that when he appeared as a witness before the Police Integrity Commission during the hearings referred to below, and in what was published concerning him in the Commission's subsequent public Report, he was in a number of respects *denied natural justice*, and, as a consequence, his reputation has been severely damaged. The purpose of this Report is to examine those complaints and to set out the results of the Inspector's investigation of those complaints. It might usefully be noted at the outset that, unless otherwise stated, the facts referred to in this Report do not appear to be in dispute.

2) The Commission's investigation of an anonymous allegation concerning Mr Hosemans, contained in a letter received by the NSW Commissioner of Police on 2 June 2005, was formally commenced by the Commission on 26 September 2005 having been referred to the Commission in August 2005 (*Rani* Report 1.9). At 1.7 of the *Rani* Report, the terms of the anonymous letter are in part set out. This letter referred to Mr Hosemans, at the relevant time a Detective Sergeant of Police stationed at Bathurst, and Deputy-Mayor of Bathurst, in an extremely crude and derogatory manner, and its terms purported to implicate him directly in the disappearance of Ms Vaughan (see below). The content of this letter also implied that this was widely known in the Bathurst area. Further, that some nurses at Bathurst Hospital "know that he did it" and "were there that night" but "they are to (sic) frightened to speak up . . . . as he will get at them to (sic) like he has others before him . . . ."

3) Despite the publication of this very damaging anonymous allegation in the Commission's Report, in the paragraphs referred to above, nothing further appears in the Commission's Report as to the course of the Commission's investigation into this allegation, when it was concluded, and, in particular, the outcome of the Commission's investigation. However, at 5.10 the following appears: "The information from the telephone records, being inconsistent with Hosemans' alibi, *added considerable weight*

to the anonymous complaint….." (italics added.) I will return to this aspect of the matter later in these reasons.

4) Thereafter the Commission commenced public hearings which included those conducted on 5, 6 and 7 June 2006, the whole of the evidence, some of it heard in private, concluding on 14 November 2006. The scope and purpose of those hearings is stated in 1.9 as being: *To investigate the circumstances surrounding the disappearance of Ms Janine Mary Vaughan from Bathurst on 7 December 2001, and the conduct of NSW Police involved in the subsequent investigation of her disappearance.*

5) When Counsel Assisting made his opening address at the commencement of the public hearings on 5 June, 2006, he included the following statement –

> "*Ms Vaughan was seen to enter a motor vehicle which was said to be red in colour. The vehicle drove off. Ms Vaughan has not been seen or heard from since early that morning."* [The date referred to being 7 December, 2001].

6) According to 1.10: "The Commission's investigation focused on the role of [Detective Sergeant] Hosemans in the initial investigation of Ms Vaughan's disappearance, the manner in which any association between [Detective Sergeant] Hosemans and Ms Vaughan was investigated, and the reports [Detective Inspector] Jacob prepared in response to the anonymous letter received on 2 June 2005 by the Commissioner of Police."

7) The *Rani* Report was delivered to the NSW Parliament on 19 December 2007, some two years and three months after the commencement of the investigation.

8) Mr Hosemans, who was represented by Counsel, was first called to give evidence on 5 June 2006 and again on 7 June 2006. It appears that both he and his Counsel were present during the evidence given by each of the witnesses who gave evidence on 5, 6 and 7 June 2006. However, neither the Complainant nor his Counsel was present when any of the subsequent witnesses gave evidence, other than on 21 and 22 August 2006,

on the latter date during evidence given at a private hearing at which the Complainant's Counsel, but not the Complainant himself, was present.

9) Despite the fact that at the conclusion of the Complainant's evidence on 7 June 2006, the presiding Commissioner informed the Complainant and his Counsel (transcript 234/12) that it was clear he would be called again to give further evidence, and that his Counsel had thereupon responded to the presiding Commissioner that, in effect, his examination of the Complainant on that occasion would be a limited, given the information he was to be re-called to give evidence later, in fact he was never at any stage recalled to give further evidence. Nor was he at any stage notified of the Commission's subsequent decision not to recall him to give evidence despite the assurance that he would be recalled, or the basis for that decision.

10) In summary, the Complainant claims that he was denied procedural fairness by the Commission, *first*, in failing to recall him to give evidence, so as to provide him with an opportunity to refute or comment upon the numerous adverse and negative references to him appearing in the *Rani* Report, none of which was put to him by the Commission when he gave evidence, or, alternatively, in failing to raise such matters with him when he gave evidence (see: *Schedule* to this Report).

11) *Second*, the Commission heard evidence, on two occasions, initially in private, from a witness code-named *RA1*, which contained extremely serious, indeed, shocking, and damaging allegations concerning the Complainant and the missing woman (*see below*). The Complainant claims he was never given the opportunity to refute these allegations because they were never put to him when he gave evidence nor was he subsequently recalled by the Commission and provided with an opportunity to do so. He was given no prior notice of the fact that the witness was to give evidence on the first occasion that she did so, and on the second occasion he was *excluded* by the Commission from that hearing, although his Counsel was permitted to be present (see: *Schedule* to this Report). It follows that on the second occasion when RA1 gave evidence, he was prevented by the Commission from observing the proceedings and hearing the evidence given concerning him and was unable to instruct his Counsel in the course of the giving of that evidence. There is no reference to the reason for his exclusion in the relevant

transcript, and both the reason for, and the fact that he was so excluded, are matters omitted from the Commission's Report.

12) *Further*, complaint is made that that very damaging evidence given by RA1 purporting to implicate the Complainant directly in the circumstances surrounding the apparent disappearance of the relevant woman, which he had been excluded from hearing, and not given the opportunity to refute or comment on, and which was entirely uncorroborated, was then released as a media release by the Commission over his Counsel's objection, and thereby made public, causing severe and continuing damage to the Complainant's reputation and standing in the community, and that such damage was exacerbated by the Commission's conduct in re-publishing this discredited evidence in the Commission's Report, as well as the particular terms of, and references to, the anonymous allegation referred to above.

13) The Complainant *also* contends that the procedures adopted by the Commission in relation to his appearance before the Commission, as identified in this Report, give rise to a perception of *apprehended bias* (see: *Schedule* to this Report) by the Commission towards him, including the perception of a marked difference in the procedures adopted by the Commission towards and involving the witness RA1 when compared to the procedures adopted in respect of the Complainant, examples being the granting of apparently unconditional anonymity to that witness, and as reflected in the Commission's initial evaluation of the latter's very damaging allegations concerning the Complainant and the missing woman, the unduly favourable treatment extended to RA1 as a witness when she gave evidence (*see*: paragraphs 23-25 hereof), and the exclusion of the of the Complainant on both occasions when that witness gave evidence.

14) *Further*, that the adoption by the Commission, without prior notice or explanation, contrary to the clear indication earlier given by the Commission to the Complainant and his Counsel, of the procedures whereby the Complainant was not recalled to give further evidence and provided with the opportunity to refute and comment on by way of sworn evidence the adverse material concerning him on which the Commission was proposing to place reliance, but instead limited to responding to the written submissions of Counsel Assisting, formulated by the latter some months after the hearings had concluded, and some 12 months after the Complainant had given evidence, and which,

in effect, took the form of a Draft Report by the Commission, containing adverse opinions and comments concerning the Complainant formed by the Commission in the absence of any prior notice to the Complainant, and purporting to identify him without prior notice as an "affected person", manifestly failed to accord the Complainant procedural fairness (see: *Schedule* to this Report).

15) The Complainant *also* complains that in publishing in its Report the Commission's purported opinion that the evidence justified the Commission's publicly identifying the Complainant as an "affected person" against whom, in the Commission's opinion, "substantial allegations" had been made in the course of or in connection with the relevant investigation, within the meaning of Section 97 of the *Police Integrity Commission Act*, including, in particular, an allegation that he had been directly involved in the circumstances surrounding the disappearance of the relevant woman, denied the Complainant procedural fairness by publishing such potentially damaging allegations, there being no credible evidence before the Commission involving him in the relevant disappearance, and further that there was no evidence to support an opinion that any "substantial allegations" were made against the Complainant (see: *Schedule* to this Report).

16) The Complainant *further* complains that the way the *Rani* Report is structured, and having regard to its content, presents the evidence concerning him in a confusing, unfair and biased manner, that it misrepresents and distorts the evidence, and that it fails to make reference to significant aspects of the unfair procedures adopted by the Commission which have resulted in the denial of procedural fairness of which he complains (*see* paragraphs 76-98 hereof).

17) It will be apparent that these complaints raise for consideration claims of *serious and repeated breaches of the rules of natural justice* (see: *Schedule* to this Report), and of *apprehended bias* (see: *Schedule* to this Report), against the Police Integrity Commission, so that in order for me to uphold the validity of any of them it would be necessary that that be done on the basis of clear and convincing evidence, on the balance of probabilities (*Briginshaw*). Each of these complaints is examined in detail in this Report.

THE COMPLAINANT'S EVIDENCE

18) When the Complainant gave evidence on 5 June 2006, he was only briefly examined by Counsel Assisting (transcript pp 7-21), such examination touching upon the content of his statement provided to DI Jacob, his evidence that he may have returned to Bathurst on 6 December 2001, rather than the following day, and the recent finding by him of a petrol receipt on which he based his evidence concerning his return to Bathurst on 6th December, rather than 7th December. His examination when he gave evidence on 7 June 2006 was also brief (transcript pp. 217-234), and touched upon the following matters only: the content of his statement to DI Jacob, the finding of the petrol receipt, *his evidence that he had never met or spoken to the missing woman*, and his recollection of what he did on the evening of 6 December 2001. Significantly, in my view, on this latter occasion the following exchange took place between Counsel Assisting and the Complainant (underlining added): Counsel put to him that the petrol receipt was "a piece of paper of considerable significance..." A: "It doesn't suggest I was involved in the disappearance of Ms Vaughan." Q: "I haven't put that to you, Sir. A: "I intend to say that, Sir". Q: "Well, you have said that on more than one occasion already today." Thus, not only was this allegation *not* put to him, but, it follows from the above, that was the result, not of oversight, but the *refusal of Counsel Assisting to do so*.

19) The following matters, each of which was published in the *Rani* Report, are examples of some of the numerous evidentiary subject-matters, *not* put to Mr Hosemans when he gave evidence as a witness before the Commission, either on 5 June 2006 or 7 June 2006, despite the fact that the effect of such publication was to reflect on him in a negative or adverse manner, and was therefore potentially damaging to his reputation and standing in the community (the references in parentheses are to the relevant passages in the *Rani* Report) –

i) The fact of the existence of and the terms of the anonymous allegation (1.7);

ii) The allegation that there was a "substantial allegation" that Mr Hosemans was in breach of his workplace agreement (2.13-2.20: 10.10);

iii) The evidence of Ms De Souza in so far as her evidence concerned Mr Hosemans (3.2–3.8);

iv) *The evidence of Ms Symington in so far as it concerned Mr Hosemans (3.12–3.19);*

v) *The statements of J Vaughan and K Vaughan in so far as they concerned Mr Hosemans (3.20-3.26);*

vi) *The statement of Mr Gibson (3.31);*

vii) *The Waterman interview in respect of RA2 (4.5);*

viii) *The allegation that there was a "substantial allegation" that Mr Hosemans was "involved in Ms Vaughan's disappearance" (10.10, 10.13); Cf T227/34-46 (07/06/06);*

ix) *The allegation that there was a "substantial allegation" that Mr Hosemans deliberately provided Mr Jacob with a false statement in relation to his whereabouts (if this is meant to convey the meaning that the statement was not merely erroneous, but deliberately false to the knowledge of Mr Hosemans at the time the statement was provided); Cf T222- 3/46-4. 8.13; 10.10; 10.11.*

x) *The nature of the criminal charges brought against him, which were later dismissed, was never put to him, nor any adverse observation concerning him by the Magistrate who presided over the proceedings. Despite this, the nature of the criminal charges and adverse comments concerning Mr Hosemans by the Magistrate were put to at least two of the witnesses, namely, Messrs Jacob and Kuiters, as well as being raised in various contexts throughout the report: 1.21; 2.13; 2.17; 2.18; 2.19, 2.20; 4.14; 4.15; 4.35.*

THE EVIDENCE OF THE WITNESS RA1

20) In the statement apparently made by RA1 [at 7.1], there appears two hand written dates, namely, 11 April, 2006, and 10 May, 2006, and it appears that RA1's signature was witnessed by a Commission investigator on 10 May, 2006, as a notation on the last page of the statement would appear to verify.

21) However at 7.1 of the Rani Report it is stated that "On 10 May, 2006 the witness, codenamed RA1, provided a statement to her solicitor." The statement became Exhibit 91 in the evidence before the Commission. Whatever the situation was as to the relevance of these dates, it is clear that the Commission was in possession of RA1's statement prior to Counsel Assisting's opening remarks referred to above.

22) That statement does not appear to have been put in evidence during either the hearing on 14 June, 2006 or the subsequent hearing on 22 August, 2006, the two occasions when RA1 gave evidence during private hearings, although it was referred to during the evidence given by RA1 on 14 June. It would thus appear that the statement was not put to RA1 during those hearings and was <u>not</u> the subject of any examination by the Commission, or otherwise, during those hearings.

23) The Commission appears to have treated RA1, vis a vis RA1's status as a witness, in a manner different to the treatment that would usually be expected to be accorded to a witness before the Commission, and which may give rise to the impression of a <u>lack of objectivity</u> on the part of the Commission. Particularly when the treatment accorded to RA1, including the suppression of her identity, for reasons unexplained in the Report, continued even though her evidence was ultimately held to be unreliable, is compared to the treatment accorded by the Commission to the Complainant, as identified in this Report.

24) For example during RA1's evidence on <u>14 June, 2006</u> (at a private hearing in the absence of the Complainant and his Counsel) commencing at T14/36 the presiding Commissioner is recorded as saying (emphases added): *"….. this is a very big matter for us …. we need to be careful that we don't expose you for no good purpose.*" And at T18/18: "….. if we put you into public hearings there will be lawyers who will want to

ask those same questions, and they will be attempting to protect their clients. *They won't be nice about it, and it will be important for them to try to make you look like a loony or a completely unreliable witness* ….. That is why we are asking you now, just to see how you manage the answers to questions like 'Will your husband say that you imagine things all the time?' And at T22/13: "Have you had any problems with depression or any of the things you might be questioned about *by lawyers for, say, Mr Hosemans*?" And at T24/10: *"If we are not prepared for them, we can't look after you and of course we don't get the job done*."

25) It is also clear from Transcript 15/31 that RA1 prior to her giving evidence, had been informed by the Commission that portion of her statement [purporting to identify a "small red car": see second and third paragraphs of that statement at 7.1 of the *Rani* Report] could not be correct, because of the result of the enquiries made by Commission investigators (see *Rani* Report 7.5-7.6). This *forewarning* thus deprived the Commission of the opportunity to observe RA1's demeanour when faced with this evidence had this matter been put to her for the first time during her evidence. In Counsel Assisting's written submissions (at 120; as to criticisms of these submissions, see below) it was submitted that the giving of this evidence by RA1 "casts some doubt upon the accuracy of RA1's evidence", and not only has this been omitted in the Report, but material has been substituted which tends to obscure the submitted criticism of that evidence: see 7.6 of the Rani Report, noting in particular the sentence commencing: "However, when this apparent contradiction of her evidence was put to her . . . ". What it is clear, however, is that the factors nominated in the Report for the ultimate rejection of the evidence of RA1 as unreliable, were available to the Commission *prior* to the public release of that evidence. It should also be noted, in my opinion, that notwithstanding the submission of Counsel Assisting referred to above as to the unreliability of the evidence, which he had adduced from RA1 on 14 June 2005, he strongly submitted to the Commission, at the conclusion of the hearing on 22 August 2005, that the evidence should be publicly released.

26) In respect of RA1 and her evidence, several significant questions thus seem to arise including the basis on which RA1's evidence was released by the Commission on 23 August 2006, immediately following the hearing the previous day, to the media as a public document, given the very damaging nature of the allegations contained in it

concerning Mr Hosemans, that its content was highly improbable and that it was completely uncorroborated. No doubt the fact that that material was released publicly by the Commission, as a media release, would have suggested to the recipients, or those who read it as a result of its release, including members of the missing woman's family, that the Commission had satisfied itself that it was proper to release such material, and therefore regarded it as containing credible evidence. There is no discussion in the transcript relating to the public release of RA1's evidence, given its graphic and shocking details, of the consternation and distress such release was likely to cause, and to continue to cause, to the family of the missing woman.

27) Further, as to why this evidence was never put to Mr Hosemans on the occasions when he gave evidence, or why he was not re-called so that it could be put to him following the appearance of RA1 before the Commission. The question also seems to arise as to the basis on which the Commission could have justified the public release of such evidence without giving Mr Hosemans the opportunity to refute it?

28) A further question that seems to arise is as to what was the purpose in calling RA1 *twice* during private hearings to give similar evidence, on each occasion in the absence of Mr Hosemans, even though on the second occasion Mr Hosemans' Counsel was present, and why the Commission excluded Mr Hosemans from the hearing on this latter occasion?

29) The statement made by RA1 (Exhibit 91), apparently in the presence of her solicitor on 11 April 2006, is substantially re-produced at 7.1.of the Rani Report. (Although 7.2 of the Report states that "the contents of her statement were confirmed" with RA1 "at two private hearings", it does not appear from a reading of the relevant transcript (Exhibits 89 and 90) that the statement was put to her at any time during those hearings.) Despite the dramatic scenario depicted by her statement: <u>in broad daylight between 7-8 am on a public street on a Friday or Saturday morning, a very distressed woman, whose hands appeared tied together with baling twine, her hair standing on its end, seated in a car driven by Mr Hosemans, frantically trying to get RA1's attention</u>, RA1 "*thought nothing of it*" and got on with her day. "*It did not occur to me that there was a problem with those circumstances….*". That statement does not specify a date when this incident allegedly occurred other than the vague and imprecise reference to "<u>*shortly after*</u> the

disappearance of Janine Vaughan." Her evidence on 14 June was just as imprecise in this regard. At 1.49 of the Rani Report the words "*close to the time* Ms Vaughan disappeared" have been substituted by the Commission for the actual words appearing in the statement.

30) What the statement omits entirely is the fact that according to RA1 the latter told nobody of this incident until April 2006 some four-and-a-half years later, when she told her husband with whom she said she had a close relationship, and with whom she had been living during the entirety of the relevant period, and that she had never met either Ms Vaughan or Mr Hosemans.

31) However when she gave her evidence on 14 June 2006 (T11/20) in the absence of and without notice to the Complainant and his Counsel, her evidence was that the woman was "*frantically trying to get my attention and I thought 'what the?' and just kept going*." Later, in her evidence, and contrary to having "thought nothing of it" and it not having occurred to her that there was a problem with "those circumstances", she gave a *significantly different version* of her perceptions of the incident. She agreed that what she had described was "out of the ordinary" T12/24; T13/8 (when she gave evidence on 22 August, T15/19: "quite extraordinary"); and that she "was just shocked and scared of what I actually saw that I kept it to myself" T17/40-41; and that she had "consciously decided not to tell anyone" about what she had seen because she was scared and she thought there was "something wrong" "because of the frantic woman that was sitting in the car.": T20/24-40. During her evidence on 22 August she said she "was concerned for my safety and the safety of my family. That is why I believe I didn't say anything for a long time." T19/22-25. See also 7.4 of the Report for yet another version.

32) She also gave evidence about subsequently being treated for depression but did not inform her treating doctor of the incident even though "it would have been" relevant: T22-23/ 43-3; she "chose not to bring it forward" even though he was someone that she trusted: 22 August T21/1-22.

33) During her evidence on 22 August 2005, she was asked (by Counsel for Mr Hosemans) when she first became aware of Ms Vaughan's disappearance. Her answer was: "As

best I can recall, it was about mid-December 2001." She had become aware of that as a result of the content of television and radio broadcasts to the effect there was a woman missing in the Bathurst area: T5/30-41. Her evidence was that that the incident she saw happened "around the same time shortly after" she became aware of the disappearance of Ms Vaughan (T14/26-30; 43-44) "around the time": T15/14. "I thought it was strange that she was in the car with Brad Hosemans and she was a missing person . . . . .": T16/27-29. Given that her evidence was that the incident she saw took place on a Friday or a Saturday morning, and that Ms Vaughan was last seen on Friday 7 December 2001, it would appear to follow that the earliest date to which RA1's evidence could relate was the Friday or Saturday occurring a week after the 7 December (i.e., 14 or 15 December) assuming there was such a broadcast during that period, a matter not brought out in her examination. It would appear that the Commission *at no stage* attempted to follow up with the Complainant such obvious matters as his whereabouts on Friday and Saturday mornings during the period relevant to this evidence, or whether or not he had access to a small red car, described in some detail by the witness, at that time.

34) Only brief reference is made in the *Rani* Report to RA1's sworn evidence: see 7.2-7.7 of the Report. Thus there is no indication in the Report of the inconsistencies between that evidence and her statement, referred to above, or to the additional evidence not contained in her statement. If anything, 7.4 tends to obscure the significantly different accounts RA1 gave as to why she waited four-and-half-years to come forward with her allegations, by not revealing that "her explanation", therein referred to, was only one of a number of inconsistent "explanations" she gave in her statement and in her sworn evidence. Nor is there any reference in the Report to the reason RA1 was called twice to give similar evidence, or why Mr Hosemans was excluded on each occasion RA1 gave evidence, indeed was not informed by the Commission of the fact that RA1 had given evidence on 14 June 2005, until the transcript of that hearing was served on his Counsel some months later, and was excluded from the hearing when RA1 gave evidence for a second time on 22 August 2006, despite the fact that his Counsel was permitted to participate in that hearing, without any explanation for such exclusion appearing on the transcript record, or in the Rani Report.

35) Although 7.2 refers to RA1's evidence being "subsequently released publicly", there is no reason given for such a course having been adopted by the Commission, despite the objection by Mr Hosemans' Counsel at the hearing on 22 August 2006, and above all there is no indication that Mr Hosemans was never at any time afforded the opportunity to refute the evidence of RA1 prior to its public release, in that not a word of that evidence was put to him when he appeared as a witness before the Commission, even though the Commission was in possession of RA1's statement at that time. Nor is there any indication in the *Rani* Report as to the extent of the public release of that material in the media, or whether there was any relevant response so far as the Commission is concerned.

THE RELEVANCE OF THE SERVICE OF THE SUBMISSIONS OF COUNSEL ASSISTING ON THE COMPLAINANT

36) In this case the Commission followed what appears to be its usual practice of causing the *entirety* of Counsel Assisting's written submissions, formulated after the conclusion of the evidence, to be served on each person nominated in those submissions as an "Affected Person". It is apparent that the Commission considers that by so doing it complies with those rules relating to procedural fairness which require the Commission to give clear and adequate notice to any person likely to be the subject of evidence given in public hearings containing adverse opinion or comment concerning that person, or to be published by the Commission in a public Report, with the probable consequence that such publication will cause damage to that person's reputation, and to provide that person with a full and fair opportunity of refuting such material, *before* a decision is come to concerning that material by the Commission.

37) Those submissions which, in effect, took the form of a Draft Report, comprising *164* numbered paragraphs, absent any ready guide to the contents thereof, such as a Table of Contents, were dated 3 May 2007, and apparently served on the relevant persons, including the Complainant, shortly thereafter. Each such person so served was apparently expected to read the whole of the document, including material which did not relate to that person, in order to pick up every reference to the particular person. For example, there are dozens of paragraphs containing references to the Complainant scattered throughout the submissions commencing at paragraph 2 and finishing at paragraph 159. To make matters more confusing there was virtually no cross-referencing. By choosing to take the course of serving the submissions in this way, it follows that the Commission was intending to indicate to the relevant persons that it was likely to adopt those submissions (which included the adverse opinions, conclusions and comments concerning the Complainant which later appeared in the Report) and publish them as part of the Commission's forthcoming Report to the NSW Parliament, subject to a consideration of submissions received in response. It was also a clear indication, of course, that the Commission would not publish adverse material concerning the Complainant, other than that clearly notified by the submissions, in the absence of further clear and adequate notice to the Complainant.

38) The procedures adopted by the Commission in respect of these hearings in Rani relevant to the issue of the Commission's obligation to accord procedural fairness to the Complainant, included the following in, particular. The Complainant gave evidence on two occasions, namely, on 5 and 7 June 2006, being only the first and third days of the hearings, which then continued later in June and extending into August and November, the final hearing date being 14 November 2006. Witnesses were called subsequent to 7 June, whose evidence concerned the Complainant in the absence of and without notice to the Complainant or his solicitor.

39) The evidence of the witnesses called before and after 7 June 2006, in several instances was used by the Commission as the basis for adverse opinions, comments or criticisms concerning the Complainant published in the Rani Report (see paragraph 21 hereof). Although at the conclusion of his evidence on 7 June he was informed by the Commission that he was not released from his summons to attend, and would be recalled to give further evidence, he was in fact never re-called to give evidence. The evidence of the witnesses referred to above was never put to him at any time when he gave his evidence.

40) The Commission, it follows, saw and heard from the witnesses, and assessed their evidence concerning the Complainant, but did not see and hear the Complainant in response, and thus did not give him the opportunity of being seen and heard by the Commission in dealing with the adverse evidence of the witnesses who had been seen and heard by the Commission in giving that evidence. Further, Counsel Assisting in formulating, and the Commission by relevantly serving, the written submissions, expressed detailed and firm opinions concerning this evidence, and purported to identify the Complainant as an "affected person", *without* having provided the Complainant with the opportunity to be heard in relation to those matters.

41) The Commission offers <u>no explanation</u> for implementing such grossly unfair procedures, and claims it was not obliged to put to the Complainant while he was in the witness box evidence on which it based adverse opinions or criticisms of him. Instead, the Commission submits that the fact that the Complainant was served with the written submissions of Counsel Assisting some months after the close of the evidence was

sufficient to accord procedural fairness to him in all the circumstances, despite the adoption by the Commission of the procedures referred to in the preceding paragraphs.

42) As mentioned above, such submissions were served upon the Complainant's Counsel in May 2007, some 12 months after the Complainant had given evidence. I have already made reference to the randomness of those submissions, provided without index, table of contents, or other guidance, and purporting to cover the whole of the evidence, including that relevant to persons other than the Complainant who had been nominated as "affected persons" in those submissions.

43) These submissions (nor did the covering letter that accompanied them (see below)), offered no explanation for the inordinate delay in providing them 12 months after the Complainant had given his evidence, no explanation for the fact that he had not been recalled in order that relevant evidence concerning him referred to above could put to him and for him to have an opportunity to deal with it, including calling evidence which he may have wished to place before the Commission (despite having been informed by the Commission that he would be recalled), and no explanation as to why he had been excluded by an the Order of the Commission from being present during the evidence of RA1, despite the very damaging potential it had to blacken his reputation, and no explanation as to why he was not given an opportunity to refute that evidence in the witness box. (The content of the Rani Report merely reproduced each of these serious defects and made no attempt to clarify any such matters.)

44) The written submissions of Counsel Assisting were forwarded by the Commission to the Complainant's Counsel under cover of letter dated 8 May 2007 signed by "A/Director Operations", which was in the following terms (absent the deletions) —

> i) Re Operation Rani – Bradley George Hosemans
> ii) I enclose by way of service the submissions of Counsel Assisting the Commission, ……..…., in relation to Operation Rani. The submissions are confidential and should be discussed only with your client.

iii) Also enclosed is a list of further public exhibits tendered in the Operation Rani proceedings. Copies of these exhibits can be provided to you on request.

iv) Please provide any submissions in reply by Friday 8 June 2007.

v) If you have any enquiries please contact ……..….. on …….…….

45) The "list of further public exhibits" referred to comprised references to 32 Exhibits. The letter gave no indication as to their context or whether the Commission was of the opinion any of them were seen to be relevant to the Complainant, and if so, in what way. It would appear written submissions on behalf of the Complainant were faxed to the Commission on 8 June 2007, the last day stipulated by the Commission for that purpose, and were in the following terms –

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INVESTIGATION RANI

SUBMISSIONS ON BEHALF OF BRADLEY HOSEMANS

1. It is noted that Counsel assisting the Commission submits that there is insufficient evidence for the Commission to express the opinion that consideration be given to Hosemans being charged with a criminal offence arising from Janine Vaughan's disappearance or the subsequent police investigation. No issue is taken with this submission.

2. Hosemans takes issue with any suggestion that he knowingly gave Inspector Jacob a false alibi in December 2002 for his whereabouts at the time of Janine Vaughan's disappearance. He was asked twelve months after the disappearance to explain his movements at that time. His lack of precise independent recollection is unremarkable. He had been on leave and thus did not have access to contemporaneous police records. He found a bank statement indicating 7 December 2001 as a date on which he had bought petrol in Wyong on the New South Wales Central Coast. This was consistent with his recollection of returning to Bathurst after spending some days with his mother in Newcastle. There is nothing unusual in reliance being placed on a bank statement to accurately reflect the date, time and place of an electronic transaction. Having located such a primary record, unless it were to reveal an obvious discrepancy or error, there would be nothing unusual in not seeking further corroboration or support.

3. In preparation for the PIC hearing, which would be expected by Hosemans to focus on the allegations again being circulated that he was responsible for Ms Vaughan's disappearance, he again went through records and found a small receipt for the purchase of petrol, indicating that he in fact had purchased petrol at Wyong on 6 December 2001, contrary to his bank statement. This conflicted with what he had told Jacob about his whereabouts at the time of Vaughan's disappearance. Indeed, as pointed out by counsel assisting, it conflicted with what he had recently been telling journalists about his whereabouts at the time of her

disappearance. It was calculated to bring into question his alibi and his credibility. He brought it to the attention of the Commission. This is to his credit.

4. At paragraph 133 counsel assisting draws a link between Jacob's and Hosemans' knowledge of the falsity of the alibi which is not justified.

5. No issue is taken with counsel assisting's submission concerning the evidence of RA1. The witness was "strong but wrong" and her evidence is unreliable.

6. Hosemans repeats in these submissions his denial of any involvement in the disappearance of Janine Vaughan.

46) Thereafter the written submissions of Counsel Assisting were substantially adopted by the Commission and in effect became the *Rani* Report. Despite the fact that the matters referred to in paragraph 21 hereof (as well as other matters) had never been put to him by the Commission when he gave evidence, Counsel Assisting, and the Commission, had prior to service of those submissions formed *firm and detailed opinions and conclusions* about such matters, and their relevance to the Commission's investigation, as indicated in the written submissions, and as later appearing in the Rani Report. It was this material, not merely an account of the evidence of relevant witnesses, in respect of which the Commission's letter requested submissions by 8 June, if any were to be made.

47) The Commission, in its submissions to me in the course of my investigation into this complaint, has raised the fact that the Complainant was represented by Counsel in the proceedings, and, in particular, has referred to the content of the submissions of Counsel's written submissions in response (as to which, see above). The issue here, in my opinion, is whether the conduct of the Complainant's Counsel generally, and in responding to the Commission's letter and the submissions of Counsel Assisting in the way that he did, could be said to have abrogated or diminished the Commission's obligation to accord the Complainant procedural fairness in relation to putting to him all relevant evidence and providing him with the opportunity to be heard in response thereto, including the opportunity to place such further evidence before the

Commission as he may have wished to do *prior* to the formation of the opinions and conclusions contained in the written submissions.

48) The Commission's obligation to give the Complainant a fair hearing did *not* depend on the exercise of a discretion by the Commission. The Complainant had a *right* to be heard by and to be accorded procedural fairness by the Commission (*Lieschke, Pantorno:* see: *Schedule* to this Report). Fundamental to this right in the present context, in my opinion, was that he be provided with adequate notice of all evidence on which the Commission proposed to rely concerning him, especially that which was to be the basis of adverse opinions criticisms or comment, and provided with an opportunity to deal with such material, *before* a decision was made by the Commission based on such material. As is plain from the detailed content of Counsel Assisting's written submissions, which the Commission served on the Complainant thereby indication its interim adoption of those submissions, definite and detailed opinions had already been formed on each of the relevant subject-matters *without even hearing any evidence from the Complainant* in respect of those matters or even at that stage offering to provide him with the opportunity of doing so. The Commission's covering letter made no reference to the Complainant's right to be heard on such matters or the fact that he had not in fact been heard on such matters.

49) Bearing in mind the above circumstances, and the limited participation permitted by the Commission to the Complainant and his Counsel, in respect of proceedings where evidence was given concerning the Complainant by some witnesses, in the absence of and without the knowledge of the Complainant and his Counsel, it follows that in my opinion that no aspect of the way Counsel conducted the proceedings on behalf of the Complainant did, and was not capable of, abrogating or diminishing the Commission's obligation to provide the Complainant with a fair hearing in the sense explained above. It should be borne in mind, in my opinion, that I am not dealing with an appeal from the Commission's opinions. I am investigating a complaint that the Commission failed in its duty to accord the Complainant procedural fairness. Highly relevant in this context is my assessment of the way in which *Counsel Assisting discharged the obligation* resting upon him as such to undertake the assessment of the evidence which was to be placed before the Commission and to exercise control in this respect (see paragraphs 99-102 of this Report).

50) That is not to imply that in my opinion Counsel for the Complainant adequately represented him during the hearings. Nevertheless, Counsel must be seen to have laboured under considerable difficulty because of the relevant unfair procedures identified herein adopted by the Commission towards his client.

THE COMMISSION'S RANI REPORT

51) As noted above, one of numerous matters not raised with the Complainant when he gave evidence, was the allegation that there as a "substantial allegation", according to the Commission's Report (2.13-2.20; 10.10), that the Complainant had breached his workplace agreement, with the result that there was no evidence before the Commission as to his understanding of the effect of the agreement on his duties at the relevant time. Indeed, a copy of the agreement was not tendered and placed in evidence until *after* the Complainant had completed his evidence on 5 June 2006. The terms of this agreement are set out at 2.15 of the Commission's Report.

52) The Commission's Report purports to summarise the evidence relating to this matter at paragraphs 2.13-2.20 under the heading "*Hosemans' Work Place Agreement*." At 2.14 it is asserted that the agreement was "signed by [Inspector] Borland on behalf of [Superintendent] Kuiters", despite the fact that the Commission then reports as a fact that the former "had never seen the agreement." It follows that if that evidence is accepted, as it was by the Commission, he could *not* have signed the agreement. It was not put to Inspector Borland when he gave evidence on 6 June 2006 that he had signed the agreement, nor was the witness shown a copy of the agreement even though it had been tendered on 5 June 2006 as Exhibit 4, and was thus available to be shown to the him. Nor was Superintendent Kuiters asked to identify the signatures on the agreement when he later gave evidence. This is an illustration, in my opinion, of the type of unsatisfactory and incoherent procedures which are apparent throughout the Commission's hearings and then reflected in the content and structure of the Commission's Report.

53) That portion of the agreement said to be relevant was clause 4: "…. *Is not to have any contact with members of the public*." Obviously that restriction has to be qualified by reference to the nature of the "work" particularised in the agreement. In 2.16 in respect of the evidence of Superintendent Kuiters, given on 21 August 2006, the following appears: "He agreed that Hosemans' involvement in direct dealings with the public was clearly outside the terms of the restricted work agreement." However a reference to the relevant transcript (page 335) shows that what was relevantly put to him by Counsel Assisting was as follows: "Q. Does it surprise you then that there's been

evidence called before the Commission which shows that he was involved in dealings with members of the public directly." "A. Well, it's clearly outside the guidelines that I set down." Thus his evidence merely accepted the proposition put to him by Counsel Assisting, based on an assumption in the form of the question, that such evidence had in fact "been called before the Commission". In my opinion there has thus been a significant mischaracterization by the Commission of the evidence in that regard, to the clear detriment of the Complainant.

54) Further at 2.20 the following is published: ". . . . . the evidence before the Commission was that Hosemans exceeded the restricted duties he was permitted to perform under the agreement…" *No such evidence is specified anywhere in those paragraphs.* (Note also that the details published in 2.13 appear to breach a non-publication Order made by the Magistrate.) At 10.11, reference is made to "breaches" of the workplace agreement, *without any such breaches being specified*.

55) Section 8 of the Rani Report is headed: "*The Evidence of Hosemans*." It would not be unreasonable to anticipate finding in this part of the Report a reference to all aspects of the Complainant's evidence found by the Commission to be significant together with a clear indication of its relevance, and whether or not such evidence was accepted by the Commission, or, if not accepted, the reasons for non-acceptance.

56) However, the opening paragraph, 8.1, fails to convey the important fact that when the Complainant gave evidence it was not only not put to him that he was involved in the disappearance of the missing woman, but that Counsel Assisting made it plain that it was the latter's intention *not* to put that allegation to the Complainant.

57) Further, despite the fact that the Commission at 10.6, 10.10 and 10.11 purported to record a "substantial allegation" made against the Complainant arising out of the alleged breaches (never specified) of the workplace agreement, there is nothing in Section 8 of the Rani Report touching upon the workplace agreement. The reason for this is simply that that matter was never raised with the Complainant when he gave evidence.

58) Similarly, there is no mention of his evidence in response to the evidence of RA1, for the reason that he was never given the opportunity to respond to this evidence during his evidence, or provided with an opportunity to do so by recalling him to give further evidence.

59) Two adverse references in Section 8 to the Complainant's evidence seem to have no basis when the transcript of that evidence is consulted: thus "quickly reverted" (8.7), and "ultimately equivocal" (8.11). The Commission stated it "places no weight" on the Complainant's evidence as to the circumstances surrounding the finding by him of the relevant petrol receipt (8.13), without providing any indication of the process of reasoning underlying this conclusion.

60) The Report comprises 90 pages, but it is not until pages 73-74, paragraphs 10.10-10.14, of the Report that the Commission's opinions are stated in respect of the Complainant in his capacity as an "affected person." (A version of these opinions is published in the Executive Summary segment of the Report at page ii, and I will return to that later.) It is noteworthy that the content of these adverse opinions *differs significantly* in some respects from the comparable paragraphs of Counsel Assisting's submissions at 157-159, as served on the Complainant, so that, it follows, these changes have been made *without notice* to the Complainant. Two so-called "substantial allegations" only were dealt with in the submissions in these paragraphs and there was no indication therein of a finding of police misconduct in respect of either. Importantly, 158 contained the sentence: "*There is insufficient evidence available to support an inference that the statement was deliberately falsely made.*" It follows that in preparing the Commission's Report this has been deleted without notice to the Complainant, and a *contrary opinion adverse* to the Complainant expressed, not only in 10.11, but also in 8.13, and the Executive Summary at page ii.

61) At 10.10 of the Report the Commission states its opinion that the Complainant is an "affected person" because "he is the subject of" the three "substantial allegations" set out in that paragraph. However, none of those allegations was put to the Complainant on either occasion when he was called to give evidence before the Commission, nor was he re-called by the Commission in order that they could be put to him.

62) 10.11 then purports to state the Commission's opinion concerning two of the three "substantial allegations" referred to in 10.10. The first of these is "that he deliberately provided . . . . a false statement …" and thereby in the Commission's opinion "engaged in police misconduct." However, even putting aside the partly-exculpatory opinion about that "substantial allegation" appearing in 10.12, and for some unexplained reason not included in 10.11, in the *absence* of a positive opinion that the complainant *intentionally* provided a statement which he knew to be false at the time he provided it, the evidence is incapable of comprising a substantial allegation or police misconduct, because to provide the statement where there was no opinion that the erroneous material therein was known to be so at the time could not amount to either. There is thus no basis for a finding of dishonest or wilful conduct: *Forbes* (p 132) As noted above an important exculpatory sentence which had been included in paragraph 157 of the submissions has been omitted from the Report, and an adverse opinion substituted which is contrary to the material served on the Complainant.

63) The second of the "substantial allegations" as to which the Commission purports to offer an adverse opinion concerning the Complainant in 10.11, is that he was in breach of a relevant workplace agreement he entered into. However, as noted above, this allegation was never put to the Complainant when he gave his evidence to the Commission. Moreover, it is not referred to as a "substantial allegation" in the relevant submissions of Counsel Assisting at 153, 157-159. The Complainant was later acquitted of the charges which apparently led to the existence of the agreement, and, assuming a breach of the agreement (a matter never raised with the Complainant when he gave evidence, and as to which there appears to be no evidence referred to in the Report) there was in any event no evidence referred to in the Report of any consequences of any significance, so that the matter would appear to be clearly incapable of being inflated to the level of a "substantial allegation" as belatedly stated by the Commission.

64) On what basis the Commission ultimately forms the opinion that a particular allegation is in fact "made in the course of or in connection with" a relevant investigation, and meets the criteria inherent in the term "*substantial allegation*" as that expression is used in Section 97 (3), the only provision in the in the *Act* to contain

that expression, as far as I am aware, is not the subject of any discussion in the Rani Report. Indeed, I am not aware of any relevant Report of the Commission's where there has been any discussion which might throw light on the procedures followed by the Commission and the criteria to which regard is had in forming this significant opinion. The initial decision seems to be made by whoever happens to be occupying the role of Counsel Assisting and the particular "substantial allegations" first appear, as such, in the latter's written submissions at the conclusion of the evidence, which are then served on the "affected persons", without any explanation in the submissions as to how that opinion was arrived at, and without the correctness of that opinion being open to argument by any person to whom the allegation is directed. Such opinions simply appear as a "given" in the written submissions of Counsel Assisting, and are typically adopted as such in the Commission's subsequent Report, without any discussion as to the basis for that adoption. Sometimes, it might be thought, the nature of the allegation is such that the basis is obvious, but in my opinion, it is by no means always obvious. In the case of the allegations published as such in **10.6 (b) and (c)** of the Rani Report it is not at all obvious to me on what rational basis such matters could have been seen by the Commission to warrant their elevation to "substantial allegations", given the subject matter, the evidence and the potentially adverse consequences in the case of persons thereafter made the subject of the allegations by the Commission.

65) As mentioned above, for some unstated reason 10.12 then adds the partly-exculpatory opinion that "in the face of the Complainant's denial" that the statement "was deliberately false" consideration should not be given to prosecution of the Complainant for a criminal offence arising out of the provision of such statement. This opinion stated in this form can only be read as meaning, in my opinion, that the Commission at the very least was not persuaded that the denial should not be accepted. Thus, for the reasons already referred to, an opinion stated in that form was not capable of supporting an opinion of police misconduct. Again, as noted above, it is inconsistent with and contrary to the exculpatory material referred to above which the Commission chose to serve upon the Complainant.

66) 10.13 then purports to state the Commission's opinion concerning the reliability of the evidence of RA1, but this is limited to the evidence of *identification* as to which the

opinion is expressed as to there being "substantial difficulties" associated with the acceptance of that evidence, which evidence, by implication must be taken to have not been accepted by the Commission. However, as indicated above, in respect of RA1's evidence, there are several aspects apart from that going to identification, which in my view, made the evidence of RA1 less than credible, indeed, bizarre, and the Commission in fairness to the complainant, ought to have made that abundantly clear, but instead omitted any reference to such evidence.

67) 10.13 also states the Commission's opinion as being that there was *no other evidence* "to corroborate RA1's allegation." However, what also appears from the wording of 10.13, is that apart from the unreliable evidence of RA1, there was *not a shred of evidence* to implicate the Complainant in the disappearance of Ms Vaughan. By implication, this must also be read as a reference to the *anonymous allegation*, that is, as meaning that there was no evidence to support any of the elements comprised in the anonymous allegation, despite that document having given rise to the Commission's investigation commencing in September 2005 and concluding with the delivery of the Rani Report in December 2007, some 2 years and 3 months later. Thus, what also emerges from this material, as well as the submissions of Counsel Assisting (at 157) is that the Commission, at some stage and without any acknowledgment or account of its investigation into these anonymous allegations to the extent they are published in the Commission's Report, concluded that there was *no* evidence to support *any* of the allegations in the anonymous letter, and thereafter proceeded on the basis that the "substantial allegation" that the Complainant was involved in Ms Vaughan's disappearance was *based solely* on the evidence of RA1. Significantly, no reference is made to the "anonymous allegation" in either Counsel Assisting's relevant submissions (at 157-159) or by the Commission in its Report at 10.10-10.13.

68) 10.14 apart from noting that the Complainant was dismissed from the NSW police Force in 2003 in respect of an *unrelated matter*, then continues: "so the question of taking action pursuant to Section 97(2) (b)-(d) of the Police Act does not arise", which might imply that but for that circumstance there may have been some basis for the making of such recommendations concerning the Complainant In effect, that is a reference to recommendations by the Commission that consideration be given to the taking of disciplinary action or action under the Police Act concerning a relevant

"affected person." In my opinion, for the reasons expressed above, there was, in any event, no basis for the making of any such recommendation in this case concerning the Complainant.

69) As mentioned above, a version of the material at 10.10-10.14 of the Report appears at page ii of the *Executive Summary*. However, that is preceded by a reference to the anonymous letter "alleging that Hosemans was involved in the disappearance of Ms Vaughan." There is no reference at all to the allegations of RA1, or the fact that 10.13 makes no reference to the anonymous letter or the allegations contained therein, but refers solely to the evidence of RA1 as being the basis for the allegation that the Complainant was involved in the disappearance of Ms Vaughan, and that there was no other evidence found to implicate the Complainant in the disappearance of Ms Vaughan.

70) Page ii then refers to "the following assessments and recommendations" concerning the Complainant. The effect of what is stated there concerning the Complainant is that the latter engaged in *police misconduct* "because he deliberately provided . . . a statement containing false information…", and because of breaches the relevant workplace agreement. I have commented on the unfairness this material above, and those comments are equally applicable here, in my opinion.

71) However, what is completely omitted here is the partly-exculpatory opinion in 10.12 that "in the face of his denial that it was deliberately false" consideration should not be given to the prosecution of the Complainant for a criminal offence.

72) This is followed by the opinion that there "is no reliable evidence linking Hosemans to the disappearance of Ms Vaughan."

73) As noted at the commencement of this Report, the relevant facts appear not to be in dispute. However, those facts seem to give rise to a number of significant questions, none of them answered in the Commission's Report, including the following: *why* was the Complainant not recalled to give evidence so that the matters identified above as being not put to him, and which clearly ought to have been, were raised with him and so that he would thus have had the opportunity to be heard in relation to those matters? *Why* was the objective evidence arising out of the evidence of *Ms Young* as to the

sending and receipt of SMS messages (as to this evidence, see paragraphs 15 and 16 of my Report into Ms Young's complaints, dated 6 march 2009) which may have related to the evening of 6 December 2001 not put to him? Before publishing what appear to be the intemperate remarks of the Magistrate who dealt with the charges of which he was acquitted, the Commission apparently made no attempt to check the transcript of the Complainant's evidence before the Magistrate to ascertain whether he had been accorded procedural fairness by the Magistrate, in particular, that each of the criticisms made of him had been put to him during his evidence, nor did it put these remarks to the Complainant when the latter gave evidence.

74) The overall effect of the *Rani* Report, in substantial part for the reasons referred to above, carried many adverse opinions and comments concerning the Complainant, many of which, as identified above, had never been put to him when he gave evidence, the overall effect of which, upon publication as a public document, would appear to have severely blackened his reputation, yet prior to the commencement of the preparation of that Report the Commission was well aware that there was no credible evidence of any wrong-doing arising out of the disappearance of Ms Vaughan. Why, for example, re-publish the statement of RA1, given the circumstances referred to above, the fact that the Commission had assessed it as not credible and the Commission's opinion at page i and 1.1 that the missing woman had not been "seen or heard of since" 7 December 2001?

75) I have referred above to what may be perceived as a lack of objectivity in the Commission's handling of RA1 and her evidence. That and the various omissions identified above in relation to the Complainant e.g., the failure to give him the opportunity to respond to numerous matters on the basis of which adverse opinions of him are published in the Report (yet which were raised with other witnesses, on some occasions, in the absence of the Complainant), in particular the failure to give him the opportunity to refute the serious and damaging allegations of RA1 before assessing that evidence, or making a decision to make it public, and the failure to make any reference to these omissions in the Report itself seem to me to give rise to a perception of apprehended bias (see: *Schedule* to this Report). There are also the examples referred to above of the omission from the Report of exculpatory material contained in the submissions of Counsel Assisting, and in some cases the insertion instead of

adverse opinions concerning the Complainant, in each case without prior notice to the Complainant. Further examples of the adoption of such practices by the Commission are provided in the next Section of this Report, which comments on the structure of the Commission's Report.

THE PARTICULAR STRUCTURE OF AND EMPHASES IN THE COMMISSION'S REPORT

76) At the stage when the Commission received the written submissions of Counsel Assisting, some months after the close of the hearings, the Commission was aware, or ought to have been aware, of the state of the evidence concerning a number of very significant matters concerning the Complainant and allegations made against him, and of the various procedures which had been adopted by the Commission, discussed in this Report, which had had a marked effect on what was put and not put to the Complainant It was thus to be expected that the Commission would structure and formulate its Report by having careful regard to those significant matters. However, having regard to the aspects of the Commission's Report referred to hereunder, the content of that Report, on the contrary, seems to have been fashioned in a manner likely to cause prejudice to the Complainant, in part by failing to state in the clearest terms that there was no credible evidence before the Commission to support an allegation that he had any involvement whatsoever in the disappearance of the missing woman, and as a result of the matters included therein or omitted therefrom, referred to below.

77) For example, the Commission having investigated the anonymous allegation to the extent its terms are published at 1.7 of its Report, was aware that *no evidence* had been found to support it notwithstanding an apparently thorough investigation by the Commission. Yet there is <u>no reference</u> at all to this crucial finding anywhere in the Report.

78) On the other hand, as noted above, the following highly prejudicial material was included at 5.10: "The information from the telephone records, being inconsistent with Hosemans' alibi, *added considerable weight* to the anonymous complaint….." (italics added.) As the relevant telephone records merely placed the Complainant in Bathurst on the evening of 6 December 2001, their relevance, having regard to the terms of the anonymous allegation to the extent published in the Commission's Report (1.7), was limited to that fact.

79) For the Commission to purport to construe their effect as having "added considerable weight" to the anonymous allegation (as to which there was <u>no evidence</u> before the

Commission involving the Complainant) was not only unjustified, in my opinion, but appears to be another of the several examples, identified in this Report, of the apparent preparedness of the Commission to introduce material into its Report, without justification, with the potential to cause prejudice to the Complainant.

80) Of particular concern is that this particular material does not appear to have been taken from Counsel Assisting's written submissions, so that it appears it was subsequently added by the Commission without notice to the Complainant. Notwithstanding the prejudicial effect of such material in respect of the Complainant, it is included in the Commission's Report in a segment of the Report purporting to deal not with the Complainant or his evidence, but with the evidence of DI Jacob, under the sub-heading: "*Jacob's Response to A/Assistant Kuiters*." This is but one example, in my opinion, lending direct support to criticisms made above concerning the randomness, lack of cohesion and cross-referencing in the written submissions of Counsel Assisting (from which this material has been adopted by the Commission).

81) Second, despite all the evidence gathered, considered and published by the Commission in that regard, *no credible or reliable evidence emerged to contradict* the sworn evidence of the Complainant (8.12) that in respect of the missing woman, *he had never met her, had never spoken to her, and had never sent her flowers.* Again, this is not clearly stated anywhere in the Report.

82) Third, the submissions of Counsel Assisting as adopted by the Commission (10.13) accepted the position as being that the evidence given by RA1 was unreliable, and that as that was the only evidence purporting to implicate the Complainant in the disappearance of the missing woman, there was *no reliable or credible evidence* before the Commission in that regard.

83) Leaving aside for the moment, the identification above of the Commission's unfair procedures and the opinions resulting therefrom, being the opinions expressed by the Commission in respect of the provision by the Complainant of a statement to DI Jacob which contained an erroneous statement as to the date of his return to Bathurst, and the alleged breaches of the workplace agreement (despite the absence of any such

evidence), it ought to have been apparent to the Commission, in my opinion, that neither of these matters was of any relevant moment, of no consequence, and in any event that each was *inherently incapable* of being elevated to the status of a "substantial allegation" within the meaning of Section 97 of the legislation (see: *Schedule* to this Report).

84) The following examples of adverse material concerning the Complainant published in the Commission's Report, with the potential to reflect badly on his reputation, in my opinion, lead to the inescapable conclusion that for some unexplained reason, the Commission (and Counsel Assisting in drafting his written submissions) chose to ignore or overlooked the evidentiary material referred to above, exculpatory of the Complainant, and instead published material which obscured and failed to reflect such exculpatory material, thereby unfairly publishing material with the potential to damage the Complainant's reputation.

85) This unfairness, in my opinion, commences with the structure of the Table of Contents, to the extent the Complainant is referred therein. Although the written submissions of Counsel Assisting were substantially adopted by the Commission, and, consequently, appear as the Commission's Report, neither the Table of Contents, nor the terminology therein, is contained in those submissions, so that the Table of Contents appears to be the work of the Commission.

86) Thus headings and sub-headings such as "Hosemans is linked to Miss Vaughan", "Investigation of Alleged Connection between Hosemans and Ms Vaughan", and "Further Evidence of Connection", seem to imply that there was credible evidence to support the inclusion of such eye-catching material, when as appears from a closer reading of the Commission's Report, and as noted above, *there was no credible or reliable evidence contradicting the Complainant's sworn evidence that he had never met, spoken to or sent flowers to the missing woman*.

87) Further prejudice and unfairness towards the Complainant is reflected, in my opinion, by reason of the inherent vagueness of the terminology such as "linked", "alleged connection", inherently meaningless expressions, and for that reason capable of causing prejudice to the Complainant because appearing in the Table of Contents" in such a

Report, despite the fact that the Commission must have been aware of the evidence referred to above prior to the formulation the Table of Contents.

88) So, too, "Hosemans' Alibi Inconsistent with other Evidence". As there was no credible evidence before the Commission of any wrongdoing by the Complainant in respect of the disappearance of the relevant woman, the insinuation in the sub-heading of the apparent reliance on an "alibi" and moreover one that was "inconsistent with other evidence", again seems unduly prejudicial to the Complainant. Even stronger objection can reasonably be taken, in my opinion, to the sub-heading "A New Alibi for Hosemans". (As to my *prior* criticism of this wording, see paragraph 17 of my Report (posted on the Inspector's website) upholding Ms Young's complaint against the Commission dated, 6 March 2009.) In fact the matter to which that relates, although it contained objective material which might, in my opinion, have provided exculpatory evidence of his whereabouts on the evening of 6 December 2001 (see paragraphs 15 and 16 of the *Young* report, referred to above), was *never put* to the Complainant by the Commission, so that there is no evidence he was even aware that such evidence had been given to the Commission.

89) The result of this, it seems to me, is that the general reader of the Table of Contents concerning or referring to the Complainant, even before getting to the Report itself, might not unreasonably be left with the impression that the Commission having formulated the Table of Contents in that way, intended to imply that in the Commission's opinion suspicion and doubt surround the Complainant in relation to the matters concerning him referred to in the Table of Contents, in that the evidence did not rule out inferences unfavourable to the Complainant. It also follows from the above that the Complainant was given no prior notice that the Commission intended to publish these prejudicial headings and sub-headings in its Report.

90) Then follows such matters as the publication absent any explanation therefore of that part of the crude and potentially very damaging anonymous allegation in 1.7. I have already commented on the unfairness resulting from the publication of this material in the Commission's Report.

91) Later in the Report (3.2--3.26; 4.1--4.11)) there is published summaries of evidence from witnesses who appeared before the Commission, as well as statements of other persons who did not, much of it hearsay, and none of which was put to the Complainant when he gave evidence. Some of this material appears to be *inconsistent* with the sworn evidence of the Complainant that he had never met, spoken to or sent flowers to the relevant woman. Despite this there is no indication of the opinion, if any, formed by the Commission as to the reliability of this evidence, without which its inclusion seems pointless. Merely publishing such evidence, without indicating whether it was rejected or accepted, and bearing in mind the descriptive matter concerning it in the Table of Contents, was a further matter, in my opinion, with the potential to reflect suspicion on the Complainant, as apparently contradicting or casting doubt on his evidence. One of the witnesses whose evidence is referred to in those paragraphs of the Commission's Report is a Ms De Souza. Despite the fact that that witness did *not* identify any person by name in her evidence, summarised by the Commission at 3.2 and 3.3, and the fact that that evidence was *not* put to the Complainant on the last occasion he gave evidence, although that evidence was available to be put to him, the Commission, at 3.3, added the gratuitous comment that that evidence "make[s] it likely, in the Commission's view, that the person being referred to was Hosemans."

92) This air of continuing suspicion inherent in the way the Report has been written, is further evident, in my opinion, in what appears at 4.25 of the Report. The statements referred to therein from third parties were not put to the Complainant when he gave evidence. The reference to the Complainant's having "an alibi to counter any suggestion that he may have been involved in Ms Vaughan's disappearance", makes no reference to the fact that there was no credible and reliable evidence whatever before the Commission that the Complainant was relevantly involved in the disappearance of the relevant woman.

93) In addition, I have already made reference to the very significant deficiencies in the Commission's Report purporting to deal with the workplace agreement and the evidence of the Complainant.

94) It seems to me it is no exaggeration to say that the Commission's Report contains not a single opinion or comment concerning the Complainant which could be seen to be

positive of him or his career up to that point, as distinct from critical or disapproving. The fact that he had risen to the rank of Detective Sergeant in NSW Police, and had been elected Deputy Mayor of Bathurst, on the face of it a noteworthy professional and civic dual achievement, seems not to have been thought relevant by the Commission in weighing the very serious and damaging allegations made against him that he was involved in the disappearance of the missing woman, nor that having achieved such a prominent position in a comparatively small rural town may have made him *a target* for disgruntled and malicious members of that community.

95) There was in fact evidence before the Commission *highly relevant* to this very issue. In Exhibit 51AC (statement of *DI Jacob* dated 5 July 2005) the following appears: "*It was apparent that there were a number of vexatious complaints centred on Mr Hosemans. It appears that the document received by the Commissioners Office is very similar in content, style and nature to those previously dealt with by Professional Standards Command*." Note the reference to similarity in *content*, in particular.

96) This potentially *exculpatory* evidence concerning the Complainant is not referred to in the Commission's Report, and in particular, it is not referred at 1.7, 1.9 or 5.10 of that Report, mentioned above. There is nothing in that Report to suggest it was taken into account by the Commission in considering whether there was any substance to the anonymous allegation. It was not raised with Mr Hosemans when he gave evidence.

97) There was evidence before the Commission that his superior Officers thought highly of him as a police officer, but this evidence is not referred to in the Report.

98) These numerous deficiencies in the Commission's Report, in my opinion, give rise to a disturbing perception of a *distinctly unbalanced, biased and grossly unfair Report*, resulting in severe and continuing damage to the reputation of the Complainant and his standing in the community.

THE ROLE OF COUNSEL ASSISTING

99) The responsibility of Counsel Assisting in this case included advising the Commission on the conduct of the hearings including whether to be heard in private or in public, and ensuring there were sound and cogent reasons for calling evidence in public, and to evaluate whether evidence by which a person will be subject to a damaging allegation has sufficient materiality and probity to justify it being adduced in public proceedings. In particular, to evaluate evidence before it is introduced in a public hearing and to sift the same so as to inhibit the use of scurrilous or irrelevant material, and to give consideration to the use of suppression orders where evidence is shown on examination to amount to no more than suspicion or rumour (*Hall* pp. 678-9).

100) Further, it has been observed by the same author (in an article in *Bar News* Winter 2005 pp.29-35) that a matter of fundamental importance to the inquiry process to which Counsel Assisting must attend is in respect of the identification and application of the principles of procedural fairness during the conduct of the inquiry, in relation to the hearing and also towards the end of the inquiry in relation to possible adverse findings at the report-writing phase. In adducing evidence, the object of Counsel Assisting should be to elicit material in the *fullest and fairest manner*, the latter being under a duty to establish the truth of the relevant facts, and that may include eliciting evidence that tends to support or contradict the particular matter. In some circumstances it may be necessary to *recall a witness* so that additional matters or revised perceptions can be put to him: apart from procedural fairness considerations, *the search for truth* may require that to be done in any event. In some circumstances it may be necessary or desirable in the interests of establishing the true facts to cross-examine a witness or to put matters to a witness.

101) It will be obvious from the fact that I have identified above many areas where it appears that Counsel Assisting has failed to ensure that the Commission accorded procedural fairness to the Complainant that in my opinion there was a significant failure by Counsel Assisting to discharge the relevant obligations cast upon him in that regard, with very severe consequences for the Complainant in terms of damage to his reputation and standing in the community.

102) If the conduct of Counsel Assisting is seen to be unfair to a particular witness, and if the Commissioner appears to condone that conduct, the reasonable observer might reasonably apprehend partiality on the part of the Commissioner, eg., if Counsel Assisting shows an evident and persisting inequality of treatment in respect of particular witnesses, aiding one in his or her account, and frustrating another's account, with the Commissioner appearing to take no action to redress the situation, such a situation would be relevant to an allegation of apprehended bias on the part of the Tribunal: *Firman* paras 27, 28 (see: *Schedule* to this Report).

CONCLUSIONS

103) In view of the detailed nature of the analysis of this complaint and the opinions clearly and unequivocally expressed above of multiple failures on the part of the Commission to discharge the legal obligation which rested upon it at all times throughout the various practices and procedures referred to above to accord the Complainant procedural fairness, and that the same analysis has also established to the requisite degree of satisfaction (based on *Briginshaw* principles) a clear case of apprehended bias (see: *Schedule* to this Report) towards the Complainant, this section of my Report, it seemed to me, called for comparative brevity in simply underlining the principal deficiencies in relation to the Commission's relevant practices and procedures, as found in this Report, and then making recommendations to the Commission arising out of such opinions and conclusions.

104) The *Schedule* to this Report includes references to relevant case-law upon which some reliance has been placed by me for the opinions and conclusions herein, and also comment by me as to the applicability of the cited cases to the facts relevant to those opinions and conclusions, very few of those facts, if any, being in dispute, as noted at the commencement of this Report. By including such material in the Schedule, rather than in this section of the Report, the intention has been to keep this section untrammelled by detail which is better located in the Schedule, to which reference has been be made from time to in this Report.

105) At paragraphs *10) to 16)* inclusive of this Report, there are set out *seven particular allegations* by the Complainant that the Commission breached its relevant legal obligations to him, both in terms of treating him in a manner clearly at add odds with the duty to accord him procedural fairness, and in addition evincing towards him a distinct and unmistakable attitude of apprehended bias. In my opinion, for the reasons referred to in this Report, each of those allegations must be upheld by me as having been clearly and overwhelmingly demonstrated in the analysis of the relevant facts as appearing in this Report.

106) These multiple failures on the part of the Commission, include obvious breaches of the "*hearing rule*" (see: *Schedule* to this Report), as that rule ought, in my opinion, to have been applied to the Complainant, in particular, the unexplained failure to recall him to give evidence so as to give him the opportunity to be heard in relation to the many instances of adverse or negative references to him in the evidence before the Commission, and which found their way into the Commission's Report, prime examples being set forth in paragraph *21*) of this Report.

107) The Commission's treatment of RA1, as a witness, as detailed in this Report, and, in particular, the release of her uncorroborated, evidence, destructive of the Complainant's reputation, because of its shocking content, as a media release, without even providing the Complainant with an opportunity to be heard in relation to it, was in my opinion grossly irresponsible conduct on the part of the Commission, which concluded belatedly, a conclusion expressed in the Commission's Report in too muted a fashion, in my opinion, given the irredeemable damage its public release undoubtedly caused to the Complainant's reputation, that having released such evidence into the public domain, it was in truth unreliable. This conduct on the part of the Commission displayed, in my opinion, a degree of unfairness and bias towards the Complainant the like of which is not found in the illustrations exemplified in the relevant case-law that I am aware of.

108) That bias and unfairness displayed by the Commission towards the Complainant when he appeared as a witness before the Commission, was maintained and continued, unremittingly, in my opinion, by the Commission in its public Report, as has been analysed by me in detail in the relevant sections of this Report, resulting, as noted above, in the Commission's Report giving rise to a perception of being distinctly unbalanced, biased and grossly unfair, thereby causing serious, irredeemable and continuing damage to the reputation of the Complainant and his standing in the community.

109) It follows, in my opinion, that having regard to the relevant opinions expressed by me throughout this Report, that the Complainant was manifestly denied procedural fairness by the Commission and subjected by the Commission to significant and

sustained bias, as detailed in this Report, with the result that there was no authority to produce and publish so much of the Commission's Report as was damaging to the Complainant's reputation unless and until the Commission had accorded him natural justice, and accordingly, the Commission's relevant adverse opinions expressed in the *Rani* Report concerning him should be regarded as *unauthorised and invalid*, in particular, the opinion, or that it was open to the Commission to express the opinion, that he was an "affected person", and the adverse opinions the Commission purported to express concerning him in 10.10-10.14 of the *Rani* Report.

110) Despite my analysis of the relevant facts as appearing herein, and the serious and disturbing questions I have raised as to the Commission's relevant conduct, as set out in detail in this Report, the Commission, in the voluminous correspondence between myself and the Commission that has attended the preparation of this Report, has sought to justify its conduct in all relevant respects, claiming it did accord the Complainant procedural fairness, and denying the allegations of apprehended bias.

RECOMMENDATIONS

(NOTE: Pursuant to Section 89 (1) (b) of the *Police Integrity Commission Act* the Inspector's power to "deal with complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission" is limited to the making of "**reports and recommendations**.")

In accordance with the statutory duty imposed on me as Inspector referred to above to deal with complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission I have investigated this complaint and produced the above Report setting out my opinions and conclusions resulting from that investigation. I have concluded that the Complainant was manifestly denied procedural fairness by the Commission and subjected by the Commission to significant and sustained bias the latter rule with respect to apprehended bias being based not solely on the concept of natural justice, but also on the need to protect and maintain public confidence in the judicial process. I note that the Commission of its own volition although not bound to do so has elected to post a copy of the Rani Report on its website where it may be viewed by all and sundry thereby having the potential to continue to inflict further serious damage on the reputation of the Complainant. In my opinion for the Commission to continue to do so in the face of and despite my Report would be an affront to justice and amount to conduct tending to undermine the judicial process as well as the Inspector's statutory role. I therefore recommend that the Commission forthwith remove the Rani Report from its website. Such a step need not prevent access to the Report in a proper case as an explanatory note could be substituted explaining clearly and fully the reasons for the Report's removal and that in a proper case an application for access thereto can nevertheless be made to the Commission which should thereupon take all reasonable steps to ensure that any such applicant is made aware by the Commission of the existence effect and availability of my Report.

NOTATION

A draft copy of this Report was provided to the Complainant and his solicitors, the Police Integrity Commission, Counsel Assisting (as he then was), and Counsel who appeared for the Complainant during the Commission's hearings, so as to give each notice of the content of the Draft Report, and thereby to enable them to comment thereon prior to the finalisation of the Report. However, attempts to provide a copy to the Commissioner who presided at the Hearings and whose term of Office expired prior to the completion of the Commission's Report, were unsuccessful due to the inability of my office to obtain details of his current address or other contact details, notwithstanding the assistance of the Commission in that regard . All such comment by the abovenamed recipients has been carefully noted and taken into account prior to settling the final form of this Report. In addition, an extensive correspondence extending over many months between myself and the Commission (and to a lesser extent with the solicitors for the Complainant) has attended the preparation of this Report, and the numerous responses, particularly from the Commission, forming part of that correspondence, have also been carefully noted and taken into account by me.

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

22 October 2010

SCHEDULE TO HOSEMANS' REPORT

As a matter of convenience, the Schedule to this Report has not been included. However, a copy of the Report together with the Schedule thereto is available on the Inspector's website – www.inspectorpic.nsw.gov.au.

Report on Investigation re Mr Q Roberts:Misuse of Telephone Intercept Material

NEW SOUTH WALES

Inspector of the Police Integrity Commission

INSPECTOR'S REPORT

PURSUANT TO SECTION 89(1)(b) OF THE
***POLICE INTEGRITY COMMISSION ACT* 1996**

INVESTIGATION BY THE INSPECTOR CONCERNING THE PUBLICATION BY THE POLICE INTEGRITY COMMISSION OF CERTAIN TELEPHONE INTERCEPT MATERIAL

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OVERVIEW

1) The Police Integrity Commission's Operation Mallard Report was presented to the NSW Parliament in December 2007, and thereupon made a public document, on the recommendation of the Commission.

2) Contained in that Report is a considerable amount of material comprising personal details concerning two persons identified therein as *Quenten Roberts* and *Michelle Roberts*, neither of whom was at any time under investigation by the Commission, nor was either called as a witness by the Commission during the conduct of the Mallard hearings. There is also material concerning a person identified in the Report only, and unceremoniously, as "*Purcell's ex-wife*" who falls into the same category, although such material is confined to one subject matter of narrow compass.

3) In fact, the only reason Mr and Ms Roberts were identified in the Commission's public Report, together with the personal details pertaining to them, was that each participated in *telephone conversations* with, and at the behest of, the then Superintendent *Purcell* of NSW Police, who was under investigation by the Commission at that time, which telephone calls were lawfully intercepted by the Commission pursuant to telephone intercept warrants obtained by the Commission.

4) However, unlike the Roberts, the woman referred to as "Purcell's ex-wife" was not, as will appear below, a party to any such lawfully intercepted telephone conversation, her involvement resting on the even more tenuous basis that she was so-described when mentioned in relation to a lawfully intercepted telephone call between Purcell and another police officer. Nevertheless, personal details concerning her were published by the Commission in its Mallard Report.

5) These personal details were among those also published about these three persons during the Commission's public hearings, which took place on 30-31 May, and, in particular, on 1 June 2007, when the telephone calls between Purcell and each of the Roberts were played in full so as to be audible to those in the hearing room, and the text thereof displayed on a public monitor (subject in each case to deletions made by the Commission relating to other persons mentioned therein), and when portion of the content of the telephone conversation referred to above, in respect of "Purcell's ex-wife", was put to Purcell by Counsel Assisting during Purcell's examination.

6) Transcripts and the audio-tapes relating to the telephone calls involving the Roberts, were then provided by the Commission to the representatives of the Media present in the hearing room. None of this material was at any time sought to be retrieved by the Commission from these recipients, and no restriction was placed by the Commission on the use to which this material might be put by them.

7) In my opinion, the overall effect of the publication of the material in question, both in the public hearing and in the subsequent Report, because of the nature of that material, and the construction that might not unreasonably be placed upon it, was capable of damaging the interests and reputations of the three persons publicly identified in this manner.

8) I was alerted to the fact of this material having been published by the Commission in these circumstances, during my investigation of another complaint concerning other telephone intercept material published in the Mallard Report: see now my Report upholding that complaint -- http://www.inspectorpic.nsw.gov.au/reports/. Accordingly, it seemed to me necessary and desirable that I should (in the absence of any relevant complaint concerning the publication of this material having been received at that time), of my own initiative, enquire into and ascertain the basis on which the Commission, even assuming such material could be seen to be relevant to the Commission's Mallard inquiry, purported to identify these persons and their personal details in public, rather than suppressing their identity, as well as such details as would have readily identified them if published. Each of these persons would appear to fall into the category of being merely members of the public (see: Mallard Report 3.14). A separate issue is whether the use to which any of this material was put by the Commission constituted a breach of the *Telecommunications (Interception and Access) Act* (Cth) (the "*TIA Act*") governing the use of lawfully intercepted telephone calls.

9) The Mallard Report contains references to this material concerning Mr and Ms Roberts in the *Executive Summary* at pages 6 and 7, in the *Introduction* at pages 13 and 14, and extensive references in *Section 3* of the Report at pages 57-59, and in S*ection 4* at paragraphs 4.6 (2), 4.11 (ii), 4.26, 4.35, and 4.36. That pertaining to "Purcell's ex-wife" is contained in paragraph *3.23* of the Report. In addition, Mr Roberts' name is included in the *Table of Contents* (page 3), and in a sub-heading in bold (page 57).

10) Mr and Ms Roberts are repeatedly referred to in this material as being husband and wife (1.26, 1.27, 3.15, 4.36) despite the fact that the evidence was, in effect, that they had ceased to be husband and wife some time prior the Commission's hearings. That evidence was reflected in the written submissions of Counsel Assisting (at paragraph 191), but apparently overlooked by the Commission in preparing its Report.

11) Obviously, having regard to the sensitivity of the context, such an erroneous description has the potential to cause embarrassment and annoyance to the persons so described, as well as being incorrect.

12) The personal information published in the Commission's Report concerning Mr Roberts, in summary, included the following: that there was at that time a police investigation by the Fraud Squad into serious allegations involving fraud and a large sum of money, concerning a hotel (noting that the name of the hotel, and other details pertaining thereto, as well as names of other persons mentioned, were suppressed by the Commission by being edited from the transcript and audio-tape in advance of the tender) previously managed by Mr Roberts, which investigation might include the period when Mr Roberts was Manager of the hotel and therefore might involve Mr Roberts.

13) Further, that "six weeks prior to the [relevant] telephone conversations" Purcell "became aware" (*3.23*) that Mr Roberts had approached a senior NSW police officer in an attempt to obtain (by clear implication, illicitly or improperly) the content of the questions to be put to "Purcell's ex-wife" who was scheduled to be interviewed by the officer the following day "for a promotion" (as a NSW police officer), and that this

attempt was reported by the senior police officer which in turn led to an investigation by NSW Police, in the course of which Mr Purcell was contacted by telephone by the investigating officer, and who thereupon " . . . . *described Roberts in very unflattering terms*". Although not made clear in the Report, this material also had its source in a lawfully intercepted telephone call.

14) During the Commission's public examination of Mr Purcell, he was asked questions as to his assessment of the character of Mr Roberts in the context of his telephone conversation with the senior police officer and his description of Mr Roberts in "very unflattering terms", in response to which he "acknowledged that it was his opinion of Roberts." He was also asked a question as to his opinion of Mr Roberts' "integrity", and responded in a negative fashion. (paragraphs 3.23-3.24).

15) Included in the evidence adduced as a result of questions directed to Mr Purcell at the public hearing on 1 June 2007 by Counsel Assisting the Commission concerning Mr Roberts (and apparently based on the relevant telephone conversation) were the following (underlining added)----(Q): "You suspected that Mr Roberts may have, in the past, been involved in such a fraud, didn't you?" (A): "No, not at all." (Q): "You were trying to contact him at the time when you spoke to his ex-wife in order to give him the heads-up in advance of his being contacted in respect of any possible investigation?" (A): "No, I wasn't. . . .." (Q): "You were contacting him at a time when you thought it may have involved him as an offender, weren't you?" (A): "No, definitely not."

16) The Commission's reference to that portion of Mr Purcell's evidence concerning Mr Roberts as being "in very unflattering terms" was apparently intended as a reference to evidence given by him at the public hearing. At pages 182-184 of the transcript of the public hearing of 1 June 2007, Purcell was questioned by Counsel Assisting concerning his awareness of an alleged approach by Mr Roberts to a senior Police Officer to obtain "the night before" the questions that "Purcell's ex-wife" was to be "asked the following day" in respect of an interview for promotion within NSW Police.

17) That information which Counsel Assisting was referring to in formulating those questions was in fact derived from the content of a lawfully intercepted telephone conversation between the senior police Officer in question, identified at the public hearing as Inspector Lee, and Purcell, which had taken place on 31 January 2007. The transcript containing the content of that telephone call was marked Exhibit 24AC, as a confidential Exhibit, with access limited to Commission Officers, Purcell and his legal representative.

18) Despite the fact that it was marked as a confidential Exhibit, a portion of that telephone conversation was read out by Counsel Assisting and put to Purcell as being his "opinion of Mr Roberts" at the time he spoke to Inspector Lee.

19) The portion of that telephone call that was read out by Counsel Assisting at that public hearing was in the following terms (the speaker being Purcell) –

> *Quenten thought, oh, I'll do the right thing and go and see him under the Good Chums Act, totally oblivious to what, what can*

> *happen and ah, then come, but he's never been in the cops and he just thought he was doing, 'cause mate he is a wheeler dealer. He, he, he try, you know, he, he, he's into everything he shouldn't be. That's right, he's a rorter. So he just thinks that's how the cops work.*

20) In addition, the opinion was expressed by the Commission that, in the light "of his [Mr Purcell's] expressed opinion of Roberts he could have had no faith in Roberts maintaining confidentiality" in respect of the information provided by Mr Purcell (paragraph 3.29).

21) In my opinion, the overall effect of this material concerning Mr Roberts was capable of causing embarrassment to Mr Roberts, and, by association, Ms Roberts, as well as being damaging to their reputations, and in the case of Mr Roberts, at least, potentially damaging to his future prospects of employment, particularly the material asserting an apparently improper approach to the senior police officer in the context of an attempt to elicit questions to be put to "Purcell's ex-wife." As it is not made clear, but is left open, to what extent, if any, the woman referred to as "Purcell's ex-wife" was privy to this alleged attempt, this material was also embarrassing in respect of the latter, and potentially damaging to her reputation, and prospects of promotion, particularly given that she was apparently a police officer at the time the relevant events are alleged to have taken place.

22) As well, some of this material such as that referring to Mr Roberts' "integrity", particularly relating to Mr Roberts' alleged conduct in approaching the senior police officer, and the various references to "Purcell's ex-wife", would appear to me to be wholly irrelevant to the Commission's investigation in Mallard which, so far as relevant was as to: "Whether Superintendent Adam Purcell has been involved in serious misconduct or criminal activity in relation to the release of confidential police information.": *see 4.6(2), 4.11(II), 4.26, 4.29, 4.35(i), 4.36, 4.39,* and *4.40.* However, it was only on 30 May 2007, during the public hearing on that day, that the scope of the Commission's investigation was so amended.

THE ABSENCE OF RELEVANT NOTICE

23) Although there is no reference to the matter in the Commission's Report, despite its obvious significance, it would appear that the Commission made some attempt to give Mr and Ms Roberts notice prior to Purcell's public examination on 1 June 2007 that "evidence may be given adverse to" them. No such steps were taken, however, in respect of the woman referred to as "Purcell's ex-wife."

24) The steps taken by the Commission in this regard were as follows: two letters each dated 31 May 2007 were delivered on that date to the same address in Oatley, one being addressed to Mr Roberts and the other to Ms Roberts, which letters, leaving aside formal parts, were in identical terms, as follows (underlining and comment added) --

> *The Commission is conducting an investigation codenamed Operation Mallard and a public hearing commenced on Wednesday, 30th May 2007. The general scope and purpose of the hearing is to investigate:*
>
> 1. *Whether any current or former police office or any other person has been involved in serious police misconduct or criminal activity in connection with the investigation of the allegation of sexual assault made to Waverley Police on 20 November 2004.* [The inclusion of this particular information, would not only appear to be irrelevant to matters concerning the anticipated adverse evidence relating to the Roberts, but likely to obscure and confuse the purpose of sending this letter to them in the first place.]
> 2. *Whether Superintendent Adam Purcell has been involved in serious police misconduct or criminal activity in relation to the release of confidential police information.*
>
> *It is anticipated that witnesses may give evidence that may be adverse to you. I am advising you in order to give you the opportunity to attend the hearing personally or be represented at the hearing by a legal representative. Independent legal advice in relation to the hearing can be obtained from the Legal Representation Office by telephoning (02) 8238-9200.*
>
> *If you have any further queries concerning this matter please contact (Names deleted by Inspector) on (02) 9321-6700.*

25) No context is supplied as to the nature of the anticipated adverse evidence, and there is no indication that the Commission intended to tender at a forthcoming public hearing (in fact, the next day) and play to the public gallery the terms of particular telephone conversations between each of the recipients and Mr Purcell. It is implicit in the wording of the letter that the Commission had apparently assessed the nature of the anticipated adverse evidence as being sufficiently potentially damaging as to justify the reference to consideration being given by the recipients to seeking legal representation. Although there is a reference to "the hearing", no date is specified, despite the fact that the hearing was to take place the very next day, an important detail omitted from the notice.

26) Given that "the hearing" was in fact to occur the following day, and the lack of specific information provided as to what was the nature of the "adverse" evidence referred to, it seems highly unlikely that the recipients could have made a reasoned judgment about the matter, or could have organised legal representation in the time available, even if they or one of them had wished to do so.

27) It will be noted that the letter contained an invitation to contact a Commission solicitor in relation to "*any further queries*" and a telephone number was provided for that purpose. Despite this invitation, as will be seen from the file note mentioned in the next paragraph, when Mr Roberts apparently contacted the Commission seeking clarification, none was provided.

28) The following material (emphasis and comment added) contained in a file note made by the Commission records a relevant contact by Mr Roberts:

> *OCCURRENCE:*
> *Type:* *Telephone Call*
> *Date:* *31/05/2007*
> *Time:* *1600 - 1730*
>
> *PARTICIPANTS:*
> *RTK* *(Name deleted by Inspector)*
>
> *MENTIONED:*
>
> *NOTE:*
> ***TPC with Quenten Roberts***
> *I spoke to Quenten Roberts who wanted to know what the matter was about. I said that* ***I was unable to tell him*** *but that there may be evidence that will be adverse to him mentioned in the hearing. He asked about representation and I mentioned the LRO. He thought that the LRO was an arm of this office. I assured him that it was not.* [The acronym "LRO" is a reference to the Legal Representation Office (also referred to in the Commission's letter of 31 May 2007), an entity within the NSW Attorney-General's Department, and which may, on application to it, give consideration to providing legal representation to witnesses summoned to appear before the Commission. However, Mr Roberts had not been summoned to appear, and there is no suggestion in this material that the Commission had previously approached the LRO in respect of arranging representation for either Mr or Ms. Roberts in the particular circumstances.]

29) It is apparent from the telephone response of Mr Roberts, as noted in the file note, that he had received the Commission's letter earlier on that same day, and, indeed, responded to the invitation contained therein; although, despite the terms of the letter, it would appear to no avail. However, there is no evidence that Ms Roberts received the letter, or any evidence that she would have been residing at the same address as Mr Roberts, given the evidence that the marriage had ended some time previously. Indeed, Mr Purcell's evidence about that was that at some stage prior to his giving evidence Ms Roberts had ceased to reside with Mr Roberts.

30) On 31 July 2007, the Commission forwarded to a number of people who had not been called as witnesses at the Mallard hearings and who were not at any time under investigation by the Commission, a copy of the written submissions of Counsel Assisting (dated July 2007), comprising 266 numbered paragraphs. Included among those recipients were Mr and Ms Roberts. The submissions, despite their length and complexity, were not accompanied by a Table of Contents or an Index. The first several pages of the Submissions gave a brief profile of the witnesses and another person. There was no reference to Mr or Ms Roberts in those pages. However, in the Mallard Report, the Commission has added a reference to Mr. and Ms. Roberts (without notice to either) under the sub-heading "Other Persons" (at page 13).

31) Accompanying the copy of the submissions addressed to each of Mr Roberts and Ms Roberts at the same address at Oatley to which the Commission's earlier letter had been directed, was a covering letter in identical terms in each case, which terms (formal parts aside) were as follows (underlining added) --

> ***Operation Mallard – Public Hearing***
> *I refer to the Commission's letter of 31 May 2007 and advise that the Commission has completed its hearings in Operation Mallard.*
>
> *As a matter of courtesy I enclose a copy of the submissions of Counsel Assisting the Commission, (Name deleted by Inspector) SC, in relation to the Operation. There are no recommendations in the submissions concerning you. The Commission does not intend to make any adverse comment regarding you in its Report to Parliament.*
>
> *Because the submissions contain material obtained pursuant to the Telecommunications (Interceptions and Access) Act 1979 (The TIA Act) I am providing the information to you pursuant to section 67 of the TIA Act. The submissions are confidential and should not be further discussed or communicated by you. The secrecy provisions of ss 56(5) of the Police Integrity Commission Act 1996 apply.*
>
> *If you have any enquiries please contact (Names deleted by Inspector) on 9321 6700.*

32) There was no response of any kind received by the Commission from either Mr Roberts or Ms Roberts to the written submissions, although it is clear (as noted below) from a subsequent telephone call from Mr Roberts to the Commission, that he did receive the copy of the submissions addressed to him, even if, as also appears, he mistook the submissions for the Commission's Report. Once again, it might be observed, there is no evidence that Ms Roberts received the submissions addressed to her at that address. To what extent Mr Roberts understood the potential significance of the submissions, so far as he was concerned, or whether he even read them, cannot be known with certainty. However, it will be observed that the letter made no attempt to explain what relationship the submissions should be taken to bear, if any, to the Commission's forthcoming Report, in particular, whether the Commission was intending to adopt the submissions in whole or in part. Even though it would have been a simple and obvious step for the Commission to have directed the attention of the recipients precisely to the paragraphs concerning them (or to have provided only

those paragraphs to them) the Commission took no such step. There is no suggestion that the recipients or either of them were lawyers, or in any way familiar with the procedures and practices of investigative Tribunals such as the Commission.

33) Nevertheless, the content of the letters, and the Commission's purpose in sending the letters in that form seems to me to call for comment. First, it is to be observed, the recipient was informed that it is merely a courtesy letter (a qualification absent from the first letter), thereby giving the latter to understand clearly the Commission's position was that it was under no obligation to communicate with the recipient concerning the information adverted to in the letter, and that the submissions, in any event, were confidential and not to be "further discussed or communicated (sic)" by the recipient.

34) The recipients are nevertheless assured that: "*There are no recommendations in the submissions concerning you* [and, by implication, that there would be no such recommendations in the Report]. *The Commission does not intend to make any adverse comment regarding you in its Report to Parliament*." Leaving aside for the moment whether those assurances were accurate and adequate, they may well have had a bearing on the recipients' decision whether or not to read the submissions. In my opinion such assurances, in the circumstances and given the subject matter, especially that relating to the Commission's forthcoming Report, were such as to entitle the recipients to place reliance upon them, and to give rise to an expectation that they would not be departed from, at least in the absence of clear and adequate notice by the Commission.

35) However, in my opinion those assurances were neither adequate nor accurate; indeed, they were inherently *misleading*. First, there were in fact recommendations in the written submissions (paragraphs 189-198; 255(3), 262(i) and 263) substantially adopted by the Commission in its subsequent Report, which necessarily involved a consideration and evaluation of evidence relating to each of Ms and Mr Roberts.

36) "Allegation ii" at **4.26** of the Mallard Report contains an express reference to "*The Quenten Roberts* (sic) *Matter*." (a subheading not contained in the submissions of Counsel Assisting, but subsequently added by the Commission in compiling its Report), and references in the same context to each of the Roberts are also included in **4.35,** and **4.36**, culminating in a *recommendation* in **4.39** that "consideration should be given [by the Director of Public Prosecutions] to the prosecution of Purcell for the common law offence of misconduct in public office in respect of his actions in releasing confidential police information in the matter[s] described as "The Quenten Roberts (sic) Matter….", and a further *recommendation* in **4.40** in respect of the same subject matter that consideration should be given to the taking of action against Purcell [by the Police Commissioner] pursuant to the sub-sections of the legislation therein specified. Such recommendations therefore, in my opinion, clearly contained references to evidence "*concerning*" the Roberts. Indeed, absent such evidence "concerning" the Roberts there could have been no such recommendations. In the event the recommendations or either of them were accepted by the Director of Public Prosecutions, to whom they were directed, it ought to have been obvious to the Commission that the Roberts or one of them may have been required to give evidence in the proceedings thus instituted.

37) Second, as demonstrated by the matters referred to above, the Commission's Report was replete with "*adverse comment*", of a highly prejudicial nature, "*regarding*" Mr. Roberts, and, by association, Ms. Roberts, both in terms of Purcell's published evidence concerning them, the questions of Counsel Assisting flagged above which made their way into the Report (3.23, 3.24, 3.28, 3.29), and the Commission's opinions as to the effect of that evidence, eg., at 3.15, 3.16, 3.21, 3.22, 3.23, 3.24, 3.27, 3.29, 3.30 and 4.36 of the Commission's Report.

38) Somewhat incongruously, what is absent from this letter is any reference to the crucial matter mentioned in the earlier letter to the recipients, which, it would appear, caused the Commission to write that letter in the first place: *there is no mention of any evidence adverse to the recipients.* Clearly, from the evidence referred to above, evidence adverse to the reputations of the recipients had been given at the public hearing, and was referred to in Counsel Assisting's written submissions at paragraphs 189-198; 255(3), 262(3), and subsequently adopted by the Commission as part of its Report. Yet the earlier notice of the anticipated adverse evidence is not followed-up in this letter by notice of the fact of that adverse evidence having been given.

39) Indeed, absent any such notice in this letter of the adverse evidence in fact given, the content seems to me capable of giving the misleading impression to the recipients that no such evidence had in fact been adduced, and that the submissions contained no references to them or to evidence concerning them which could be read as adverse, prejudicial or embarrassing to them, and neither would the Commission's Report, otherwise, it would be reasonable for the recipients to infer, the Commission would have given express notice, in the light of the Commission's previous letter.

40) By letter dated 12 December 2007 the Commission again wrote to Mr Roberts and Ms Roberts, however, on this occasion the respective letters, although in identical terms, were not directed to the previous address but to two separate and different addresses, indicating that at some stage since the sending of the previous letters the Commission had apparently become aware of this information as to the current addresses. The terms of those letters were as follows----

> ***Operation Mallard – Report to Parliament***
> *The Commission intendeds to present its Report on Operation Mallard to Parliament on 19 December 2007.*
>
> *If as the Commission expects the Report is made public the same day, a copy will be available for you to collect after 2.00pm from the Commission's security office on Level 3, 111 Elizabeth Street, Sydney. A copy of the Report will also be available on the Commission's web site at www.pic.nsw.gov.au.*
>
> *If you have any queries, please contact (Names deleted by Inspector) on 9321 6700.*

41) According to a file note made by the Commission, Mr Roberts telephoned the Commission on 14 December 2007 in response to the letter referred to in the preceding paragraph. The terms of the file note are as follows----

> *OCCURRENCE:*

Type: *Telephone Call*
Date: *14/12/2007*
Time: *1604*

PARTICIPANTS:
RTK *(name deleted by Inspector)*
QR *Quenten Roberts*

MENTIONED:

NOTE:

At about 1604 I received a call from Quenten Roberts regarding the letter sent to him yesterday.

He asked whether the report referred to in the letter was the same as the one he had already received. I told him that what he had received before was a copy of the Counsel Assisting's submissions following the public hearing and that the Report referred to in the letter was made by the Commission in accordance with PIC Act after we had conducted public hearings.

He said that he just wanted to know what the report was.

42) It seems reasonable to assume from the fact that Mr. Roberts was recorded as twice contacting the Commission (in response to the Commission's written invitations to do so) in these circumstances, that he was apprehensive as to the nature of the material the Commission might publish concerning himself and his former wife. Despite the Commission's three letters addressed to him, and his telephone calls in response, when he did seek to raise "queries concerning" the matter with the Commission he was given virtually no information by the Commission over and above that contained in the Commission's letters.

43) As mentioned above, from the conversation recorded in the file note, it would appear that Mr Roberts had not understood the relevance of the voluminous documentation comprising the submissions of Counsel Assisting, sent to him under cover of the letter dated 31 July 2007, a fact that ought to have been apparent to the Commission on receipt of his telephone call, misunderstanding instead that it comprised the Commission's Report. Once again the purpose of the Commission in sending the letters dated 12 December 2007 is not apparent, having regard to the imminent publication of its Report (at a time when the Report would, in any event, have been printed).

44) As already noted, despite the obvious significance of this correspondence in regard to the inferences that might reasonably be drawn from its terms in the particular circumstances, especially as to the Commission's apparent awareness, indeed, anticipation, of the likelihood of the emergence of prejudicial material, and Mr Roberts' response thereto, the Commission, inexplicably, in my view, omitted all traces of this material from its Report. It follows that but for my fortuitous investigation into this matter, it would appear these circumstances would never have come to light.

OBSERVATIONS ON SIGNIFICANT ASPECTS OF THIS CASE

45) The inference seems inescapable that the Commission made a decision, prior to the calling of Mr Purcell to give evidence on 1 June 2007, to make public during his evidence the terms of the relevant telephone conversations, and to put to him the subject matter of the police investigation into the alleged fraud involving the hotel where Mr Roberts had previously been employed as manager, and the alleged attempt by Mr Roberts to illicitly obtain in advance the questions in respect of which "Purcell's ex-wife" was to be asked in what was apparently an interview for a promotion as a NSW police officer, and to ask questions based on that material, such as the questions referred to above which were in fact put to Mr Purcell.

46) There is no suggestion in the Commission's Report that the Commission made any enquiry as to the truth or accuracy of these various opinions, impressions and statements emerging from the evidence of Purcell concerning Mr. Roberts, or the woman referred to as "Purcell's ex-wife."

47) The Commission therefore ought to have been aware, in my opinion, that given the subject matter, material embarrassing and prejudicial, and damaging to the character and reputation and integrity of Mr Roberts, and, by association, Ms Roberts, and the woman referred to as "Purcell's ex-wife", would be likely to emerge from the questions put to Mr Purcell about those matters and his evidence in response thereto, as well as the use made of the telephone calls involving the Roberts, and that containing the reference to the woman identified only as "Purcell's ex-wife."

48) Indeed, as mentioned above, there is evidence from which it may be safely inferred that the Commission was well aware of the likelihood of and was in fact anticipating such an eventuality when Mr Purcell was called to give evidence on 1 June 2007, in that on the day before that evidence was to be given the Commission sent the letters to Mr and Ms Roberts each containing the sentence (italics added): "It is *anticipated* witnesses may give evidence that may be *adverse* to you."

49) In these circumstances it might have been expected, in my opinion, that Counsel Assisting or the presiding Commissioner would have raised for consideration prior to, or at the hearing, the giving of directions pursuant to Section 52 of the *Police Integrity Commission Act* restricting publication of the relevant material except in a way that did not identify either Mr or Ms Roberts, or the woman referred to as "Purcell's ex-wife." (No doubt such reference would have been sufficient to readily identify this woman to persons, including, in particular, Police Officers, aware of Purcell's domestic history.) Such a direction is not to be given unless the Commission is satisfied that it is in the public interest to do so, but in the circumstances that proviso would seem capable of being satisfied if such a direction prevented the publication of the identities of Mr and Ms Roberts, and "Purcell's ex-wife", in respect of the damaging material intended by the Commission to be made public concerning them, they being persons not the subject of investigation by the Commission, and who were not to be called as witnesses.

50) During the Mallard hearings the Commission in fact made deletions to, and prior to the tender of, the transcript of telephone conversations in relation to a number of persons for the purpose of protecting their identities from being made public.

Codenames were also allocated for that purpose including the codename Mal 14 to protect the identity of a senior police officer on the sole basis that he was party to a lawfully recorded telephone conversation with Purcell (Mallard Report page 5).

51) In addition, it should not go unnoticed that the Commission had held a private hearing in relation to Purcell at an earlier point in time (on 27 April 2007), and that the Commission took the precaution at the public hearing on 1 June 2007 of suppressing the identities of a number of persons referred to in the telephone conversation involving Mr Roberts, by deleting these from the transcript prior to the tender of that evidence, as well as other details including those which would have identified the name of the hotel previously managed by Mr Roberts and other particulars connected with the police investigation, and also excised such material from the audio tapes of the conversation played during the public hearing.

52) There is nothing in the transcript or the Report explaining the need for those matters to be suppressed, or the basis on which they were suppressed, and deleted from the audio tapes, but it is apparent that the Commission had formed the opinion that it was necessary to protect the identities, of and details relating to, such persons from being made public, and that to publicly identify persons and premises relating to the hotel, might have damaged the interests of those relevantly associated with the ownership and running of the hotel.

53) Alternatively, in my opinion it was incumbent on the Commission to give adequate prior notice to Ms. and Mr. Roberts, and the woman referred to as "Purcell's ex-wife", including providing them with the substance of the personal details concerning them which the Commission might make public, with the opportunity to obtain legal advice, and to object to the publication of such material being made public, or, alternatively, unless their identities were protected from publication.

CONCLUSIONS

(i) AS TO PROCEDURAL FAIRNESS

54) There can be no doubt, in my opinion, that given the circumstances relating to the three persons identified above, the Commission was obliged to accord each of them procedural fairness in *considering* any proposal, or making any decision, to publish, in the public domain, the type of personal information in fact published by the Commission concerning each of them, both during the public hearing, and in the Commission's subsequent Report.

55) That material comprised highly personal information and as such was capable of causing embarrassment if put into the public domain without their knowledge or consent, and, because of its nature, was also potentially prejudicial to their interests, as well as damaging to their integrity and reputations.

56) Those particular circumstances imposed the obligation on the Commission referred to above, as would be the case with any comparable investigative Tribunal exercising similar coercive powers, and at the same time conferred a corresponding right in each of the three persons entitling each to have that obligation observed by the Commission, and if necessary recognised and enforced by a Court of competent jurisdiction.

57) In the case of Ms. and Mr. Roberts, the Commission's action in sending the initial letters addressed to each of them, and the terms thereof, appeared to acknowledge by clear implication the existence of such an obligation, and, generally, the basis on which such obligation rested, namely, the circumstances adverted to in those letters expressed as being anticipated by the Commission. No comparable letter was sent to the woman identified as "Purcell's ex-wife" (although it is not to be doubted that the Commission was at the relevant time in possession of, or could have obtained by enquiry, her identity and contact details). However, the latter's circumstances, as referred to above, in my opinion, clearly brought her within the entitlement to be accorded procedural fairness by the Commission.

58) Further, *and in addition*, in the case of Ms. and Mr. Roberts, the Commission's obligation to accord each procedural fairness was required to take into account and accommodate, in order to discharge those obligations, the effect of the representations and assurances contained in the Commission's letters dated 31 July 2007 addressed to each of them. For the Commission to publish in its Report details concerning them, contrary to the terms of such representations and assurances, as it would be reasonable for the recipients to construe them, even in the absence of evidence that the recipients had placed reliance on such representations and assurances, was, of itself, in the particular circumstances, to deny them procedural fairness.

59) In my opinion, the denial of procedural fairness was exacerbated by the action of the Commission in including (without prior notice) as part of its Report references to Mr. Roberts, in particular, the effect of which was to highlight and draw attention to such material and thereby increase the likelihood of public exposure. As earlier noted, Mr Roberts' name is mentioned in numerous passages in the Report, including in the

Table of Contents (page 3), and in a sub-heading in bold capitals: THE QUENTEN ROBERTS [sic] MATTER (page 57). This latter editorial treatment in effect thus publicly identified Mr. Roberts as the eponymous protagonist in that segment of the Report, which is thereafter repeated in those terms throughout the Report. None of the other comparable telephone call recipients to whom confidential information had allegedly been provided by Purcell was subjected to this editorial attention, nor was their character or integrity suggested as being a relevant issue.

60) As well, the Commission's obligation to accord procedural fairness to each of the three persons was required to take into account and to accommodate in order to discharge those obligations, to the extent the material published by the Commission concerning them was extracted from telephone conversations in which they took part, in the case of Ms. and Mr. Roberts, or based on a telephone conversation in the course of which she was referred to, in the case of "Purcell's ex-wife", in each case sourced to lawfully intercepted telephone conversations, that each was *entitled* to the protection a high degree of privacy provided by the *TIA Act* in respect of those telephone conversations, or any extract thereof, subject only to the tightly-regulated, specified exceptions in the legislation.

61) However, the Commission's basic and initial obligation in order to accord procedural fairness to these three persons was, as stated above, to give adequate prior notice to them, including providing them with the substance of the personal details concerning them which the Commission might make public, the opportunity to obtain legal advice in relation to the Commission's proposed conduct in that regard, and the opportunity to object to the use and publication of such material, or, alternatively, in the event that such material or part thereof could be demonstrated to have relevance to the Commission's investigation, unless their identities were protected from publication.

62) Authority for each of these propositions may be found clearly stated in the case-law and texts cited and the extracts therefrom referred to in the *Schedule* to this Report.

63) In the case of the woman referred to as "Purcell's ex-wife", it would appear that the Commission gave no consideration at all to according her procedural fairness in relation to the Commission's decision to make public the personal information concerning her, either during the public hearing or in the Commission's subsequent Report.

64) In the case of Ms. and Mr. Roberts, despite the Commission's acknowledged anticipation that evidence would probably be adduced by the Commission adverse to them and therefore prejudicial to their interests and reputations, as indicated in the initial letters addressed to each of them, the Commission failed to provide them with adequate and timely notice of the Commission's intention to make public the personal information concerning them, and, on the contrary, made the representations and gave the assurances contained in the subsequent correspondence, the terms of which, for the reasons mentioned above, were inherently misleading.

65) In any case, as mentioned previously, a considerable amount of the published telephone intercept material would appear to have been quite *irrelevant* to the Commission's investigation (as ought to have been obvious to the Commission), the terms of which are set out above, including the whole of the evidence purporting to

refer directly or indirectly to, or capable of being read as disparaging in respect of, Mr Roberts' character or integrity, or Mr Purcell's evidence about such matters, and the evidence referring to "Purcell's ex-wife" and identifying her in those terms, including Mr Roberts' alleged involvement in relation to that subject matter, so that there was, in any event, no justification on any basis for the publication of such personal information, either during the public hearing or as contained in the Commission's Report.

66) The overall result of the Commission's relevant conduct so far as the validity of Commission's Report is concerned, as the case-law makes clear, is that the Commission had *no authority* to produce and furnish so much of that Report as was damaging to the reputations of each of these three persons unless and until the Commission had accorded them procedural fairness, and to the extent that the Report has damaged (and having been published, and, in particular, having been placed by the Commission on its website, may continue to inflict such damage) those reputations or any of them, it has been produced in breach of the Commission's duty to accord procedural fairness to each of them.

(ii) AS TO THE USE MADE OF THE TELEPHONE INTERCEPT MATERIAL

67) I have included in the *Schedule* to this Report a reference to some of the significant provisions of the *TIA Act*, as well as cases, relevant to this issue. From those references it will be seen that the *only* use which the Commission was entitled to make of any extract of the telephone intercept material was for a "permitted purpose" in relation to the Commission, being a purpose, so far as relevant, connected with the investigation by the Commission under the *Police Integrity Commission Act* of police misconduct by the then Superintendent Purcell of New South Wales Police; and the Report on that investigation.

68) The terms of that investigation were: "Whether Superintendent Adam Purcell has been involved in serious misconduct or criminal activity in relation to the release of confidential police information."

69) Thus the issue may be defined, having regard to the words of Kirby P. in *Fairfax* (at page 97), as being whether the use made of the telephone intercept material, during the public hearing, and as published in the Commission's Report, and each and every extract thereof, amounted to "indiscriminate publication otherwise than the Act permits" (at 98), or, alternatively, was "strictly necessary" to advance the Commission's investigation into that allegation, or "strictly necessary" as part of the proof of the alleged offence the subject of the Commission's recommendations to the Director of Public Prosecutions, and, in any event, whether it was open to the Commission to "use" such intercept material in a way which publicly identified the relevant participants, none of whom were at any stage under investigation by the Commission, thereby setting at nought the privacy of the telephone conversations relating to them, and exposing them to negative, prejudicial and damaging publicity, without their knowledge or consent.

70) The Commission, of course, was not confined to only one instance in which the telephone intercept material could be "used" for a "permitted purpose." As the case-law demonstrates, an agency such as the Commission may properly "use" the telephone intercept material at a number of stages of, and for the purposes of, the investigation, including the evaluation of the material intercepted from an evidentiary point of view in order to ascertain what is and is not relevant. Clearly, for example, the Commission did properly "use", through the agency of its officers and, probably, Counsel Assisting, the raw intercept material involving Ms. and Mr. Roberts when it carried out the evaluation which resulted in the numerous deletions therefrom referred to earlier, prior to the tender of the transcript and the playing of the recording at the public hearing.

71) As mentioned above, much of the publicised evidence, at the public hearing and in the Report, flowing from the intercepted telephone calls was quite irrelevant to any "permitted purpose" available to the Commission. However, to the extent any part of the intercept material could be seen to be within the ambit of a "permitted purpose", it was incumbent on the Commission, in order to give effect to the relevant purposes of the TIA which include assisting law enforcement, to confine the use of such to a hearing in private, or, alternatively, if a public hearing could otherwise be justified, to edit out all material which might have identified each of these persons, in like manner as was in fact done by the Commission in respect of several other persons and locations originally contained in those telephone calls.

72) It follows that in my opinion in publishing the telephone intercept material in the circumstances identified in this Report, the Commission did so contrary to the terms and intendment of the *TIA Act*, and in so doing acted unlawfully.

RECOMMENDATIONS

i) That the Commission delete forthwith from the copy of the Mallard Report placed by the Commission on its website all material identified in this Inspector's Report as being unauthorised and in particular which might reasonably identify to a member of the public any of the three persons the subject of this Report;

ii) That the Commission forthwith place a notation on the Commission's website containing an explanatory note referring to the Inspector's findings and recommendations herein and indicating whether or not the Commission has accepted such findings and acted upon such recommendations.

POSTSCRIPT TO INSPECTOR'S REPORT

a) Prior to publishing this Report I provided each of the following with a copy of the Report in draft form for their comment: the Police Integrity Commission, Mr Roberts, Ms Roberts, the woman referred to in the Commission's Report as "Purcell's ex-wife" and Counsel Assisting (as he then was).

b) I received responses only from Mr Roberts and the Commission.

c) The response from Mr Roberts was, in effect, that he agreed with the Draft Report and recommendations and sought no additions or amendments.

d) The response from the Commission as contained in correspondence from the presiding Commissioner dated 18 January 2011 was as follows:

> 2. In relation to your draft report I do not consider anything useful is to be gained by any further responses beyond the correspondence which has already passed between us in relation to the issues raised in your draft report. I remain of the view that properly considered the manner in which the Commission dealt with Mr Roberts, Ms Roberts and Mr Purcell's ex-wife was not unfair and did not amount to a breach of procedural fairness. It follows that I do not accept the criticisms contained in your draft report and accordingly I do not intend acting on your first recommendation. In relation to your second recommendation I will cause a notation to be made on the Commission's website, where the Mallard Report appears, drawing attention to your Report, once it is published.

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

1 February 2011

SCHEDULE TO ROBERTS' REPORT

As a matter of convenience, the Schedule to this Report has not been included. However, a copy of the Report together with the Schedule thereto is available on the Inspector's website – www.inspectorpic.nsw.gov.au.

Report upholding complaints by former Inspector T O'Neill

NEW SOUTH WALES

Inspector of the Police Integrity Commission

INSPECTOR'S REPORT

PURSUANT TO SECTION 89(1)(b) OF THE
***POLICE INTEGRITY COMMISSION ACT* 1996**

DEALING WITH COMPLAINTS MADE BY

FORMER (NSW POLICE) INSPECTOR O'NEILL

ARISING OUT OF

POLICE INTEGRITY COMMISSION'S WHISTLER REPORT

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Overview

1) On 4 June 2010 I received a formal complaint in writing from a retired, former NSW Police Inspector, Mr *Timothy O'Neill* (the "Complainant"), who had been a police witness called to give evidence before the Commission during the investigation referred to below. I have provided the Commission with a copy of that complaint and of all subsequent communications from the Complainant. The complaint may be fairly summarised as comprising allegations of unfair treatment, that is to say, a denial of procedural fairness, and (apprehended) bias by the Commission towards the three police officers called to give evidence before the Commission, one of whom was the Complainant.

2) There is no doubt that it would have been preferable, from the point of view of all concerned, for this complaint to have come to light much closer to the relevant events. However, the Complainant has offered by way of explanation, the fact that he was unaware, until comparatively recently, of the existence and role of the Inspector of the Police Integrity Commission. This is consistent with similar statements made by other police officers in relation to complaints of bias and unfairness received and upheld by me in respect of the *Hathaway* section of the Whistler Report.

3) In fact, as the investigation of this complaint is largely confined to what is and what is not published in the Commission's Whistler Report, dealing with the incident referred to below, and the record of the evidence which was before the Commission, on which the Report was based, the effluxion of time does not have the significance it might have done had the investigation of the complaint been primarily dependent on recollections of the events in question.

4) Suffice it to say, at this stage, that so far as the Complainant himself is concerned his complaints related to aspects of the procedures adopted by the Commission during the hearings at which the Complainant gave evidence, and in respect of what was published concerning him in the Commission's Whistler Report. I thereupon undertook an investigation of this complaint which resulted in the production of this Report.

5) Included in the Commission's Operation Whistler Report – www.pic.nsw.gov.au delivered to the NSW Parliament in December 2005 is a segment described in the Table of Contents as "**The Arrest of WH-1**". That segment, Section 8, occupies pages *103-115* of the Report (though, as explained below, for completeness reference must also be made to Section 9). Its subject matter, the circumstances surrounding an incident that occurred in Wagga in the early hours of 16 February 2002, some three years before, and the aftermath thereof, is unrelated to the balance of the Whistler Report, which has been the subject of a number of my Reports upholding complaints of unfairness and bias by the Commission against NSW police who gave evidence in that particular investigation – www.inspectorpic.nsw.gov.au

6) For present purposes, the following would appear to summarise the relevant events, according to evidence before the Commission: *on the eve of 16 February 2002, two young adult males, for some unexplained reason accorded anonymity by the Commission in the Report, and identified only as WH-1 and WH-2, the former,*

according to his evidence, at the time a self-confident, strapping, 20-year old, in training and physically fit, and undertaking a University course, together with WH-2, presumably about the same age, and also undertaking a University course, attended a university function and consumed a considerable quantity of alcohol over a period of some hours, before moving on to Romano's, a hotel in Wagga, arriving there about midnight, at which venue the consumption of alcohol continued until about 2.15 am., by which time WH-1, on his own admission, may have consumed in the order of 20 middies of beer (a like quantity may be assumed in the case of WH-2, given the latter's evidence about the matter), at which point, undoubtedly propelled by the intoxicated condition they were in, the two of them, left those "premises with no clothes on", according to the evidence of WH-1, and in that state walked along a public street until approached and spoken to by Inspector O'Neill, from whom they fled (after hastily putting-on their clothes) with the intention of evading apprehension, and thereafter, with the same intention, also evaded Constable Fiona Duncan who joined in the chase on foot, at which juncture WH-2 made good his escape and was never arrested or charged with a relevant offence. On the other hand, WH-1 was ultimately run-down, and arrested, by Constable Jackson, also on foot, after a confrontation some details of which were said to be in issue on the evidence, especially as to whether the use of a baton by the arresting officer in the course of effecting a lawful arrest was reasonable in the circumstances, and thereafter taken to the nearby police station and charged with two offences: wilful and obscene exposure, to which charge he ultimately pleaded guilty on the advice of his solicitor, and a charge of resist arrest, which was later withdrawn by the police in circumstances which were the subject of comment by the Commission.

7) Although represented by his solicitor throughout the subsequent Court proceedings which dragged on for some months, until the following November, WH-1 never, at any stage, made a complaint to NSW police, or anybody else, including the Commission, that he had been unlawfully assaulted by the arresting officer, and, in particular, never raised any such allegation when the charges were before the Court. As he made clear in his examination by Counsel Assisting, WH-1 made no complaint to any officer while at the police station after his arrest that he had been assaulted by Jackson (T14: 1-3).

8) In fact, until the Commission contacted WH-1 about a month before the Commission's hearings, and thereafter conducted a Record of Interview (the "ROI") with him (neither of these facts being disclosed in the Whistler Report), the incident appeared to be closed so far as WH-1 was concerned. As WH-1 also made clear in his examination by Counsel Assisting he was "more than happy" with the outcome (T35: 9-11; and in his ROI: 35.4).

9) Despite the fact that each of the factual matters referred to above would appear to be directly relevant to an evaluation of the incident, particularly those aspects apparently perceived to be in issue by the Commission, as appearing from the Report, some have been omitted entirely from the Commission's Report (see below). These unexplained omissions necessarily raise questions as to the reasons for those omissions, and as to whether this absent evidentiary material was considered and evaluated by the Commission in reaching the conclusions and opinions expressed in the Report, especially those opinions carrying adverse or negative implications in

respect of the evidence given by the three police witnesses, including the Complainant.

10) In all, five witnesses were called by the Commission to give evidence in relation to this matter. Those witnesses, in order of appearance were the following:

> **7 March 2005**: *WH-1* (commencing 10.30am); *WH-2* (commencing 12:20pm), neither apparently being present when the other gave evidence, but each being represented by the same Solicitor.
>
> **8 March 2005**: Senior Constable Fiona *Duncan*.
>
> **9 & 10 March 2005**: Inspector *O'Neill*.
>
> **11 March 2005**: Constable *Jackson*.

11) There is nothing in Section 8 of the Commission's Report to indicate that the evidence given by WH-1 and WH-2 was in fact given in *private* hearings from which the public was excluded. (In the *Introduction* at **1.60** the statement appears: "WH-1 and WH-2 gave their evidence in private hearings. Edited transcripts of those hearings were later tendered as exhibits in the public hearing." This is followed by the somewhat cryptic statement (at **1.61**): " . . . Evidence from the two private hearings at which WH-1 and WH-2 gave evidence is also discussed where it is relevant to matters considered in the public hearing.")

12) One significant consequence of the decision to hold these hearings in private, apart from the exclusion of the public, including the three police officers, was that although the legal representatives of the three police officers were entitled to be present, they were bound by the secrecy provisions of the *Police Integrity Commission Act*, and were thus prevented from discussing the evidence with their clients, and denied access to the transcript. (An edited public version of this evidence was not released by the Commission until the commencement of the hearings on 11 March 2005.) There is nothing in the Report to explain on what basis the decision was taken to hold the hearings in private. Nor any explanation in the Report as to why the two witnesses codenamed WH-1 and WH-2 were accorded anonymity.

13) No clear explanation is offered in the Report to explain on what basis this incident was investigated by the Commission in the first place, despite the statement of the "scope and purpose" (T4) being to investigate incidents "where it is *alleged*" there had been an improper or excessive use of force by police (a similar statement appears at **1.6** of the Report). Plainly enough, it was not initiated on any complaint made to the Commission by WH-1. WH-1 at no time made a complaint to the Commission that he had been unlawfully assaulted by Officer Jackson, nor did he make such a complaint on the night of his arrest or when he pleaded guilty to the relevant charge before Wagga Court. Indeed, in his evidence to the Commission he expressed himself as having been "more than happy" with the outcome of the incident in the subsequent proceedings in Wagga Local Court.

14) Only an extremely limited, and selective, portion of the evidence of WH-1 is referred to by the Commission in the Report, as is made clear by the relevant footnotes. Inexplicably, no part of the cross-examination of WH-1, by the Solicitor who appeared for the arresting officer, Jackson, is relied upon or referred to, despite its obvious relevance.

15) Although the principal issue apparently sought to be pursued by the Commission was the circumstance in which the arresting officer used his baton on WH-1 in effecting the latter's arrest, scarcely a word of WH-1's evidence about that is referred to in the Report. This is but one of a number of puzzling omissions in the Report. Despite this latter omission, various extracts from the evidence of the police witnesses as to what they observed about that arrest are referred to at some length, with the result that the reader of the Report can obtain no idea of the differences, if any, and their significance, when the evidence of WH-1 is compared with that of the police witnesses, especially the evidence of the arresting officer, Jackson.

16) It follows that the Report does not reveal how the Commission construed and evaluated that evidence given by WH-1, or the extent to which that evidence was accepted or not accepted. For example, it is recorded at **8.8** of the Report, that the statements of Officers O'Neill and Duncan made shortly after the events in question, which were in evidence before the Commission, recorded that each of those officers "*observed behaviour on the part of WH-1 that was consistent with him resisting arrest."* No opinion is expressed in the Report that the Commission did not accept the accuracy of those statements in that regard (**8.15**), and the contrary was not put by the Commission to either officer when the officer gave evidence.

17) Indeed, the evidence of WH-1 himself, although not referred to in the Report, was also consistent with the conclusion that he resisted arrest, at the very least by attempting to evade apprehension by the police, and then, once apprehended, in refusing to obey the directions of the arresting officer, Jackson, to lie face-down on the ground; instead WH-1 "laughed" when initially struck with the arresting officer's baton, and "continued to laugh" (T10:22-27,30-34,36; 27:1-5; 28:15-26; 30:23-24). Nor is there any reference to the conversation which on the evidence took place between WH-1 and Jackson during the confrontation between the two, much of it not in issue.

18) Also omitted **(8.1,** and *Executive Summary*, at page x: "O'Neill stopped the car to talk to them . . .") is any reference to O'Neill's evidence (not denied) that when he first approached the two naked men he informed them they were <u>under arrest</u>. On the other hand, the Report appears to have gratuitously inserted (at **8.1,** *Introduction* **1.58,** and *Executive Summary* page x) the expression "*student prank*", italicised and in quotation marks, despite the fact that it does not appear in the evidence of WH-1 (nor, for that matter, in the evidence of WH-2).

19) There is no mention in <u>Section 8</u> of the Report that WH-1 on his own admission was intoxicated at the time he left Romano's, and that he may have consumed something of the order of 20 middies of beer during that evening, or of the fact that WH-2 was similarly intoxicated, the latter having been drinking for "five to six hours". WH-1 agreed in cross-examination by the solicitor appearing for Officer Jackson that he

was "*intoxicated enough to think it would be a good idea to run through the streets of Wagga without any clothes*", but there is no reference to this evidence in the Report. (In fact that only reference anywhere in the Report to the consumption of alcohol is in the *Introduction* at **1.58**: both were affected "to some degree by alcohol.")

20) Nor is there any reference to the age of WH-1 at the relevant time (20 years of age) or that he was apparently the same size and build as the arresting constable, and at the time physically fit and in training.

21) Also omitted is any reference to the fact that there were members of the public in the vicinity at the time the indecent exposure took place.

22) The order in which the witnesses were called by the Commission (as noted above) resulted in the arresting officer being called last, despite the fact that particular aspects of his conduct in arresting WH-1 were apparently at the centre of the Commission's investigation, and Counsel Assisting put questions to witnesses relating to the arresting officer without having heard, or tested, his evidence about the matters apparently in issue.

23) No witness was re-called to give evidence. This meant that the evidence of a later witness relevant to the evidence of an earlier witness, and which ought, in the interests of fairness, and completeness, to have been put to that earlier witness, was not be put to that earlier witness. One result of this procedure, of particular significance, was that to the extent the arresting officer gave evidence pertaining to the arrest of WH-1 not previously before the Commission, that evidence was not put to any of the preceding witnesses, particularly the witness WH-1.

24) In fact, it appears from a reading of the transcript that Counsel Assisting led evidence from WH-1, and WH-2, without attempting to clear up inconsistencies appearing between the accounts given by WH-1, on the one hand, and WH-2, on the other, or testing such evidence by putting conflicting evidence from the Police statements to either of these witnesses, other than the statement of Jackson, despite the fact that Counsel Assisting was apparently in possession of the statements of the three police witnesses which had been prepared for the anticipated Court proceedings. In fact, when Jackson's statement was put to WH-1 the substance of it was not put in issue by him (T26-30).

25) The fact that each of WH-1 and WH-2 was, on his own evidence, intoxicated to a considerable degree, was never put to either of them by Counsel Assisting to suggest that their recollection of relevant events, and their conduct on the occasion in question, could well have been affected by the amount of alcohol consumed.

26) Indeed, with the exception of the witness, Jackson, the examination of each of the other police witnesses, Duncan and O'Neill, proceeded without any reference by Counsel Assisting to the evidence that WH-1, in particular, had conceded that at all relevant times he was intoxicated, and as though that fact were irrelevant, whether in the context of evaluating the reliability of his recollection as to what occurred on the occasion in question, or as to the extent such intoxication may have had on, indeed,

been responsible for, his relevant behaviour, at the time. Similar considerations apply when considering the brief evidence given by WH-2.

27) In view of these observations concerning the evidence of WH-1, and the apparently selective and limited use of it made by the Commission as appearing from the Report, the meaning to be ascribed to the statement in **8.5** of the Report: "*WH-1 was a careful and compelling witness.*", appears to raise the questions: "in respect of which part or parts of his evidence?"; and whether "careful and compelling" means something other than "truthful?" Nowhere in the Report is the opinion expressed by the Commission that particular evidence of WH1 was accepted, and the police evidence where it contradicted or was inconsistent with that evidence, rejected.

28) Further, a number of witnesses whose evidence would appear to have been relevant in relation to the subsequent Court proceedings were not called to give evidence, and no explanation appears in the Report for their absence.

29) Such witnesses include the police prosecutor in relation to the charges concerning WH-1, and WH-1's Solicitor, Mr Paul, whose correspondence to WH-1, despite the fact that the author was never called, was put in evidence by Counsel Assisting and in some instances relied upon as being evidence of the truth of the events referred to in such correspondence.

30) The Court record, on the occasion when WH-1 pleaded guilty to the offence of wilful and obscene exposure, and the evidence placed before the Court on that occasion, which would probably have included the statements of the three police witnesses referred to above, did not form part of the evidence before the Commission.

31) Among the significant omissions in the Commission's Report, mentioned above, is the absence of any reference to the fact that following the Commission's contacting WH-1 approximately a month before he gave evidence, the Commission in fact conducted a Record of Interview with him. Neither Counsel Assisting nor the presiding Commissioner made any reference to this Record of Interview when WH-1 gave his evidence. There is no suggestion in the transcript that the legal representatives of the three police officers were made aware of the existence of such a document or provided with access to it.

32) Despite this omission, the Record of Interview, dated 9 February 2005, which comprised 39 typed quarto pages, the questions and answers being (un-helpfully) un-numbered, would appear to be relevant to the evidence given to the Commission by WH-1 in that it contained material not reproduced in his evidence or apparently inconsistent with it (see pages 4.4; 6.3; 7.7; 10.5; 12.4; 18.4, and .10; 31.1, and .4-5; 32.10; 37.8).

33) Further, it seems clear from the Record of Interview that WH-1 was in possession of documents to which he referred throughout the Interview to refresh his memory (see pages 4, 5, 10, 12, 16, 20, 21, 25 and 26 thereof). These documents included the statements made by the three police witnesses following the incident, on which he appeared to place particular reliance. When he gave his evidence a month later, he

did so without reference to any of these documents, from which it might be inferred that he had memorised parts of his evidence from that source.

34) Overall, having regard to these inexplicable and significant omissions identified above, one is left with the impression that the procedures adopted by the Commission in relation to the Commission's hearings and subsequent Report, which resulted in these irregularities, were most unlikely to lead to or produce a fair hearing or a balanced and fair Report. Certainly, the account of the incident, as reflected in the evidence and observations mentioned above, is materially different from the account of the incident as reflected in the evidence and observations appearing in the Commission's Report: *see,* for example, **8.1-8.3.**

The Commission's Report: The Arrest of WH-1

35) The Commission did *not* in its Report express an opinion in respect of the three police Officers, including the Complainant, that any of them had engaged in "*police misconduct*" in relation to their involvement in the WH-1 incident: *see below* the analysis of Section 9 of the Report (paragraphs *92-113*). (As acknowledged in **9.6** of the Report, the definition of "*police misconduct*" is such as to comprise serious criminal behaviour as well the most minor disciplinary breaches.) However, there is no indication of such exculpatory opinions in Section 8 of the Report, apart from the rather muted acknowledgment that might be extracted from the final sentence in **8.7**.

36) Rather than expressing this apparent exculpation of each of these three officers in respect of any finding of "police misconduct" in clear and unequivocal terms, the Commission's Report is couched in language which, in my opinion, casts considerable doubt and suspicion on the veracity of the evidence given by these three officers, although the basis for so doing is far from clear. It is this aspect of the Commission's Report, in particular, that is the focus of the Complainant's contention that the Report is unfair and unbalanced.

37) For example, notwithstanding the absence of any opinion of "police misconduct", the Report describes the evidence given by the three officers as "*unsatisfactory*". The gratuitous and damaging comment is then added in respect of all three officers that "*it may have seemed appropriate for the Commission to express the opinion that it was satisfied that police misconduct occurred*." The Report then purports to acknowledge that to express such an opinion would be "inappropriate.": **8.7**.

38) This commentary appears, rather incongruously, under the sub-heading: "The evidence of WH-1 and WH-2.". The statement in **8.7** to the effect that "NSW Police" abandoned the resist charge "on the condition that WH-1 did not pursue an action against Jackson for excessive use of force", is a gross simplification of the evidence, and therefore misleading: *see* below: *The Court Proceedings*.

39) The Report, ultimately, expresses the opinion that the relevant evidence of WH-2 was not reliable for reasons somewhat laboriously explained in the Report: **8.13-8.14**. As is acknowledged there, the evidence of WH-2 contradicted not only the evidence of WH-1, but also that of Officers Duncan and O'Neill. Despite this conclusion, the gratuitous, obviously baseless, and further damaging comment is added, in effect, that *if* the evidence of WH-1 had been accepted, then each of the three officers: "*gave untruthful evidence to the Commission*.": **8.12**.

40) Again, somewhat incongruously, that commentary appears under the sub-heading: "A discrepancy in the accounts given by WH-1 and WH-2." As does the significant conclusion that " . . . *it would be inappropriate to make any finding that Duncan and O'Neill could not have observed Jackson's conduct*.": **(8.15).** That conclusion clearly appears to have resolved that issue (if, indeed, there was one on the evidence) in favour of the two police witnesses. Unfortunately, this conclusion and its significance seems to have been overlooked later in the Report, to the considerable detriment of these witnesses.

41) Under the sub-heading: "The Police version of events", the Report describes "the evidence" of all three officers as lacking "*cogency*.": **8.16**. In my opinion, it is not possible to find any justification for this description of that evidence in the Report, or to ascertain which portion of each officer's evidence is being referred to as lacking "cogency."

42) The evidence of the Complainant (and that of officer Duncan) is also described as "*imprecise*.": **8.17**. Only a portion of the Complainant's relevant evidence is referred to in **8.18**, and it is not obvious from that where the imprecision is said to be located and there is no further indication purporting to identify it in the Report.

43) Included in the Complainant's evidence quoted in **8.18**, and also referred to in **8.19**, is a reference to his evidence that his lack of physical condition (overweight and a heavy smoker) at the time was relevant to how he responded in the particular circumstances adverted to in those paragraphs. In each of those paragraphs, doubt is insinuated, in my opinion, as to whether the Commission accepted that evidence: this is particularly obvious from the (rhetorical) question from Counsel Assisting: "Is that a serious answer."

44) It is difficult to see the justification for this apparently derisory treatment of this evidence, let alone for its inclusion in the Commission's Report (or, in the same context, the use of the word "oddly" in **8.19**). The Complainant had given clear evidence as to his lack of physical condition at the time, both in his statement and in his evidence (eg., T616, 617, 666), and that he was trying to climb the levee bank at the time so as to follow Officer Duncan but that he had fallen down and received assistance from that officer (T621, 633); WH-1 himself had commented on the Complainant's lack of condition and its relevance in his ROI (page 31).

45) It is also difficult to see the basis for the inclusion as a factual assertion in Counsel Assisting's final question quoted in **8.18**: "….you were there right behind him". In fact, the witness' unchallenged evidence about that was that he was at no stage closer than 50 metres to where Jackson arrested WH-1. In WH-1's ROI (page 12), this did not appear to be in issue.

46) If (as appears from a reading of the text; and the questions of Counsel Assisting to the Complainant at T640:9-12) the principal purpose of **8.24** is to suggest that there was an issue between WH-1 and the police witnesses on the evidence as to whether Jackson ordered WH-1 to lay face-down on the ground, and whether this was heard or observed by officers O'Neill and Duncan, then it would appear the Commission has seriously misconstrued that evidence. WH-1's ROI (pages 6, 8, 10, 23 and 37), and his evidence (T10, 26, 27 and 30) were unequivocal that Jackson kept yelling at him to lay on the ground, that he initially refused to do so, and that he was not struck a single blow with the baton once he complied with that direction and lay on the ground.

47) The first sentence of **8.26** would also appear to be the result of a misreading of the evidence by the Commission. The evidence referred to there was later corrected by WH-1 under cross-examination by the solicitor for Jackson when he agreed that what he had been required to sign before being released from police custody was a

bail undertaking to appear at Court and *not* the facts sheet as he had earlier sworn (T35, 36). This corrective appears to have been immediately overlooked by the presiding Commissioner (T38, 39), which oversight might explain the misreading of this evidence.

48) The second sentence of **8.26** appears to mis-state the relevant evidence (at T14): WH-1's evidence was that he said to the Complainant, before being released from police custody, that he "*was very disappointed with the actions taken by the police in regards the allegations which were made against myself . . .*". He repeated the effect of that evidence a short time later (at T 16). He had also made a statement to the same effect in his (undisclosed) ROI (at 34.4). That evidence was never put to the Complainant by Counsel Assisting.

49) The first two sentences in **8.27**: *"O'Neill denied in evidence that WH-1 had ever alleged to him that he had been assaulted by Jackson. Despite that denial…"*, would also appear to be objectionable in that the evidence of WH-1 was unequivocal: he made no complaint to any officer within the station that he had been assaulted (T14). In my opinion therefore there was no justification for including those references to "denied' and "denial", which might well give the impression that there was an issue about that matter and that the Complainant had denied the sworn evidence of WH-1 in that regard, and, further, by the use of the words "despite that denial" that there was an inconsistency in the Complainant's evidence, when, in truth, there was no such evidence to deny.

The Court Proceedings

50) Under this subheading is contained the concluding five pages of Section 8 of the Report. Clearly, the subject-matter was intended to provide a summary of the evidence as to what relevantly took place when WH-1 pleaded guilty to the wilful exposure charge only, and the circumstances surrounding the dropping of the resist arrest charge. As observed above, the unexplained absence of any evidence from either the Police prosecutor or WH-1's solicitor, or the production of the Court Record, meant that the evidence was limited to the recollection of WH-1 and the Complainant, each of whom appeared to have participated only to a limited extent on that occasion according to the evidence.

51) The effect of WH-1's evidence was that he attended Court on that day unsure of whether he had been made aware that the resist arrest charge had been dropped beforehand (T23) despite his having received his solicitor's letter dated 31 October 2002 which expressly referred to Jackson's preparedness to drop that charge (see **8.34**). He himself gave no evidence to the Court on that occasion, and made no statement, nor did he "sign anything"(T24) and gave no undertaking either to the Court or the police prosecutor as to his position in the event the resist arrest charge was not proceeded with.

52) His evidence to the Commission was limited to a belief that his solicitor had spoken to the police prosecutor about that. His solicitor "ran this by" him and he went back into Court and pleaded guilty to the wilful exposure charge. "Whether or not" his solicitor had given an undertaking to the police, he was not present at the time (T 26). Only at that stage, *after* the plea of guilty, did he have a conversation, outside the Court, with the Complainant who was in fact the Informant in relation to the two charges. According to WH-1, the Complainant "mentioned" to him that he had given an undertaking not to proceed with any other Court action "in regards to the baton." His response was "no dramas". He was "just happy" that the incident was put behind him (T23-26.). He agreed he could not recall the "precise terms" of the conversation with the Complainant (T38).

53) Portion of the Complainant's evidence about his attendance at the Court on 15 November 2005 is set out in the report at **8.32-8.33.** The evidence of WH-1, above, so far as it goes, appears to be consistent with that evidence. The Complainant's evidence is also consistent with the evidence of Jackson in that regard (see below), who, as mentioned above was the last of the witnesses to give evidence, with the result that that evidence was never put to the Complainant when he gave evidence. Nor was the solicitor's letter of 31 October 2002, the terms of which would appear to support his evidence. There is no evidence to contradict the Complainant's evidence that he was unaware of the prior arrangements apparently come to between Jackson, WH-1's solicitor and the police prosecutor concerning the resist arrest charge, or his evidence that it was only on that day that he became aware that the police prosecutor had previously agreed to the withdrawal of the resist arrest charge, despite the absence of the knowledge or consent of the Complainant as Informant, and without any undertaking from WH-1 as a condition of that withdrawal.

54) The effect of the Complainant's evidence was that on being alerted to this arrangement (which had apparently previously been approved by a police prosecutor

at the behest of Jackson and WH-1's solicitor), on the day of the Court proceedings, and being of the opinion that an adverse inference might be drawn against the police, in the circumstances, as to the withdrawal of the resist arrest charge, he indicated that as Informant he would "push the matter so the charge was re-raised" unless he was satisfied with the outcome, and that as a result of this some conversation took place between WH-1's solicitor and the Complainant to the effect that WH-1 would not in future bring proceedings against police in respect of the use of Jackson's baton at the time of the arrest of WH-1. How such an informal arrangement arising from this discussion could have had any legal effect was not the subject of any consideration in the Commission's reported deliberations.

55) In the light of this brief summary of the relevant evidence surrounding the Court proceedings, and leaving aside for the moment the omission from the Report of some highly significant evidence given by Jackson about the matter, it is instructive to consider how the Commission elected to present the evidence of the police witnesses in this context in its Report.

56) First, and consistently with the earlier part of Section 8, discussed above, the Report continued to express criticisms of the evidence of the three police witnesses, again casting doubt and suspicion on the veracity of that evidence, particularly in the case of the Complainant and Jackson. The content of **8.28** and **8.29** appears to be contrary to the evidence of the three police officers, and WH-1, in that regard.

57) The Complainant's evidence is described as "*unsatisfactory*" (**8.32**) without any indication as to the basis for that adverse opinion, or by what standard it had been measured and found wanting. As mentioned above, there was no evidence to contradict the Complainant's evidence, including that given by WH-1. There is no acknowledgment of the absence of the evidence referred to above, or its potential significance.

58) Jackson's evidence is described as "*even more unsatisfactory than O'Neill's.*", thus reinforcing the impression on the reader of the adverse opinion earlier expressed as to the Complainant's evidence (**8.34**).

59) The evidence of Officer Duncan, whose evidence made it clear she was not present in the Court on that day, and that she had no prior knowledge of the arrangement as to the withdrawal of the resist arrest charge, is described as "*closest to the truth*", the implication being that it was nevertheless not quite "*the truth.*" What the Commission concluded was "*the truth*" and on what evidence that conclusion rested is, unfortunately, not stated in the Report. The Report also appears to imply (despite the fact there appears to have been no challenge to the evidence) that the Commission may not have accepted her evidence that she was unaware the resist arrest charge was not proceeding until after she arrived at Court ("she claimed she was unaware"): **8.37**.

60) Thus the Report must be seen to continue to foster the earlier-implanted suspicion, in my opinion, that in the mind of the Commission there was a conspiracy on the part of the three police witnesses to give evidence which the Commission clearly implies was not "the truth".

61) This negative impression is deepened, in my opinion, by the insertion of the word "*deal*" (in italics and quotation marks) when referring to the evidence of each of the three police witnesses in relation to the plea-bargain instigated by WH-1's solicitor with Jackson which resulted in the dropping of the resist arrest charge (*see* below). The use of that word in that way might suggest that the witnesses either volunteered the word in their evidence, or acquiesced in its use in their examination by Counsel Assisting; the repetition of the word in the commentary might also suggest to the reader that there was something underhand at work in relation to it.

62) In fact the word "*deal*" did not come from the evidence given by any of these witnesses. (In fact it was mistakenly attributed by Counsel Assisting to Jackson T781.) It would therefore appear to have been inserted by the Commission in the Report for its own purposes.

The omission from the Commission's Report of further significant evidence

63) I have referred above to the omission from the Report of what appears to me to have been highly significant evidence given by Jackson. This evidence, which was led by Counsel Assisting (T780), and not challenged or contradicted, would appear to explain the circumstances which led to the withdrawal of the resist arrest charge against WH-1. Jackson was asked whether in relation to the withdrawal of the resist arrest charge, he had had discussions about that with WH-1's solicitor, and in that context his attention was drawn to the terms of a letter (see **8.34**) from that solicitor dated 31 October 2002. Having agreed that he had such a discussion he was asked what was said and gave the following evidence.

64) "*I as actually ringing him in regards to another matter he was handling, and he said . . . words to the effect that he wanted to talk to me about a bargain, a plea-bargain, so to speak, and he said to me that he was a young fellow and he was stupid and drunk and a charge of resist arrest would make his future career prospects a bit hard and he was wondering if he pleaded guilty, I think, to the wilful and obscene, that we'd just run with the one charge instead of two*."

65) Jackson's evidence (which also appeared to be consistent with the terms of the letter of 31 October 2002) was that in that discussion there was no mention of any undertaking being given by WH-1 in the event that charge was withdrawn, and that he then decided that he "would be prepared to drop the resist arrest charges." (T782) subject to the approval of the police prosecutor. He was not asked any questions to establish whether, and, if so, when, he had approached a police prosecutor for approval of the withdrawal of the resist arrest charge, but his evidence was that on the basis of the arrangement come to between himself, the solicitor and, apparently, a police prosecutor, he absented himself from attending Wagga Court on the day fixed for the hearing of the charges.

66) At **8.36** the particular evidence given by Jackson there set out would seem to indicate that his readiness to agree to the proposition suggested by WH-1's solicitor was influenced by the fact that to do so would apparently enable him to make himself available for a more lucrative engagement, in Sydney, instead of being required to attend Wagga Court.

67) In the light of this evidence, it would seem abundantly clear that the motivation for the plea-bargain, came from and was initiated by WH-1's solicitor, being perceived by the latter as being for the benefit of WH-1, and was agreed to by Jackson for reasons which included his own convenience (and financial gain), and without the knowledge or consent of the Complainant, in his capacity as Informant.

68) Thus the Complainant's evidence that he was unaware of any such arrangement until he attended Court on the day ready to give evidence in relation to the two charges appears to be borne out by this evidence, there being no suggestion in Jackson's evidence that he informed the Complainant of the arrangement until the Complainant's phone call to ascertain the reason for Jackson's absence on the day fixed for the hearing.

69) It is at this seemingly inconclusive juncture that Section 8 of the Report concludes, without any attempt to sum up, or explain to the reader the significance of the evidence referred to, or the opinions and commentary included therein, or what overall conclusions (if any) the Commission had come to concerning, for example the existence or absence of "police misconduct.".

70) Bearing in mind the significant conclusion in the Report referred to above, in effect, accepting the evidence of Duncan and O'Neill to the extent that they gave evidence of being in a position to have observed "Jackson's conduct", the absence of any opinion that any of the police officers had engaged in "police misconduct", or had given perjured evidence, let alone that any of them were or would be seen by the Commission as being the subject of "substantial allegations" arising out of the Commission's investigation, it could not reasonably be anticipated, in my opinion, that Section 9 would, out of the blue, as it were, nominate each as an "affected person."

71) This is particularly so in the case of the Complainant, in respect of whom WH-1 had given evidence that he had no complaint arising from the incident, and who had been thanked at the conclusion of his evidence by the presiding Commissioner for his assistance (the only witness accorded this acknowledgment).

Section 9 of the Commission's Report: *Affected Persons*

72) In order to understand the purpose and significance of his Section of the Report, it is necessary to make some brief reference to the relevant provisions of the *Police Integrity Commission Act*.

73) Section 16(1)(a), so far as relevant provides that the Commission may make assessments and *form opinions* on the basis of its investigations *as to whether police misconduct has occurred.* As acknowledged in **9.6** of the Report, the definition of "*police misconduct*" is such as to comprise serious criminal behaviour as well the most minor disciplinary breaches. It follows that for the Commission to express an opinion of "police misconduct" by a police officer without further particularisation, would not only be singularly unhelpful, but patently unfair.

74) Section 97(1), so far as relevant, authorises the Commission to include in its Reports to Parliament statements as to any of its *opinions* and reasons for its opinions.

75) Section 97(2) requires such Reports to include a specified statement in respect of each *"affected"* person, as defined in sub-section (3): an "affected" person is *a person against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation concerned*.

76) Given the subject matter of this Section of the Report and the obvious potential for damage to reputations caused by any lack of clarity or precision of language in dealing with persons mentioned in this context, considerable care seems to be called for in formulating the Commission's opinions and recommendations.

77) However, in my opinion Section 9, so far as relevant, is confusing and unclear, not least because the WH-1 content is not kept separate from the Hathaway content of the Whistler Report. The result is that the whole Section must be scrutinised in order to ascertain its relevance to Section 8 of the Report dealing with WH-1's arrest.

78) Second, in order to understand precisely how the Complainant is dealt with in Section 9 it is necessary, in my opinion, to take into account how the three police officers are each dealt with in this Section of the Report, and this necessarily involves extracting the relevant opinions from the unrelated material in Section 9.

79) According to **9.7** "substantial allegations" were made in the WH-1 investigation against *Jackson*, **(9.7(h))**, and *Duncan* and *O'Neill* **(9.7(i)).**

80) At **9.22(c)** the "substantial allegation" against *Jackson* is (repeated) in the following terms: "*. . . on 16 February 2002 he applied excessive force to WH-1 during his arrest thereby causing him actually bodily harm, namely, bruising and swelling*." It is noteworthy, and significant, in my opinion, that no other "substantial allegation" is made against this witness, particularly that his evidence was untruthful, that is, that he gave perjured evidence.

81) In respect of that "substantial allegation" against *Jackson*, the following appears: **9.23 (second sentence)**: "*The Commission is not in a position to be able to make a*

statement of opinion of police misconduct in relation to his involvement in the arrest of WH-1: subsection 16(1)(a) of the Act".

82) At **9.26** in relation to the same allegation, the following appears: " . . . *the Commission is however not of the opinion that consideration should be given to the prosecution of Jackson for a specified criminal offence.*

83) And at **9.33** (underlining added for emphasis): "… *The Commission has misgivings about the evidence given by Jackson concerning the arrest of WH-1. However, given the evidence of WH-1 the Commission is not satisfied that the events did not occur in the manner that Jackson, and the other police officers gave evidence (sic). Therefore the Commission is not of the opinion that, in relation to this allegation, consideration should be given to the taking of action against Jackson pursuant to subsection 97(2)(a)(b)(c) or (d) of the Act.*"

84) The "substantial allegation" against *Duncan* and *O'Neill* is in identical terms: **9.7(i)**: "*That Duncan and O'Neill knowing or suspecting that Jackson had applied excessive force to WH-1 during his arrest falsely claimed that they had observed the arrest and that Jackson had used his baton appropriately in response to threatening behaviour by WH-1*."

85) **9.19** (underlining added for emphasis): "*The Commission has misgivings about the evidence given by Duncan both in her statement and before the Commission that she observed the arrest of the arrest of (sic) WH-1 and that Jackson's use of his baton was necessary and appropriate. However given the evidence of WH-1 the Commission is not satisfied that she did not make the observations she said that she did.*"

86) **9.20** (underlining added for emphasis): "*Therefore the Commission is not in a position to be able to make a statement of opinion as to whether Duncan engaged in police misconduct in relation to her involvement in the incident: subsection 16(1)(a) of the Act.*"

87) **9.21**: "*The Commission is not of the opinion that consideration should be given to the taking of action against Duncan pursuant to subsection 97(2)(a)(b)(c) or (d) of the Act.*"

88) **9.52** (underlining added for emphasis)**:** "*In relation to the WH-1 incident the Commission has misgivings about the evidence given by O'Neill both in his statement and before the Commission that he observed the arrest of WH-1, that Jackson's use of his baton was necessary and appropriate and* ***that he did not know of the decision to withdraw the resist arrest charge prior to the day of the Court proceedings****. However given the evidence of WH-1 the Commission is not satisfied that he did not make the observations that he said he did."* [Note, the final sentence commencing "However", fails to include any reference to the subject matter expressed in the wording (above) which I have rendered in bold.]

89) **9.53** (underlining added for emphasis): "*Therefore the Commission is not in a position to be able to make a statement of opinion as to whether O'Neill engaged in*

police misconduct in relation to his involvement in the incident: subsection 16(1)(a) of the Act."

90) **9.54:** *"The Commission is not of the opinion that consideration should be given to the prosecution of O'Neill for a specified criminal offence in relation to either incident."*

91) **9.55:** (underlining added for emphasis) *"O'Neill is no longer a serving NSW Police officer. Accordingly the question of taking action pursuant to subsections 97(2)(b)(c) and (d) of the Act does not arise.*

The identification of the three officers as "affected persons"

92) As mentioned above in order to be identified as an "affected person" in a public Report such as this, it is first necessary that the Commission forms an opinion that a person is one *against whom substantial allegations have been made in the course of or in connection with the investigation concerned*.

93) Given that, as noted above, there were no such opinions in respect of any of the three police witnesses expressed in Section 8 of the Report, or any basis stated for such opinions, it follows that it is Section 9, as relevantly set out above, that the reader must examine to see the bases on which the Commission purported to express these opinions that each of the three police witnesses was an "affected person", but neither of WH-1 nor WH-2.

94) In my opinion, there are a number of significant difficulties, when this material is examined, in ascertaining any proper basis for the identification of the three police officers as "affected persons."

95) First, it should be noted that in each case not only was there *no* opinion expressed that any of the officers had engaged in "*police misconduct*", but *instead* the statement appears that the Commission "is *not in a position to be able to make* a statement of opinion *as to whether*" the officers engaged in "*police misconduct*" (**9.20**, **9.23** and **9.53**).

96) (However, this appears to *overlook* the effect of the opinion previously expressed at **8.7** where the Commission expressed the opinion that it would be "*inappropriate*" "to express the opinion that it was satisfied that police misconduct occurred." Surely this amounts to the clear expression of an opinion by the Commission that it was *not* of the opinion that police misconduct had occurred.)

97) This "non-opinion" is *not* an opinion such as that contemplated and authorised by Section 16(1)(a), referred to above. Indeed, it appears that it is not the expression of an opinion at all, but merely a statement indicating a refraining from so doing. I am not aware of any precedent for this in any of the Commissions previous or subsequent Reports. Nor is any explanation offered for this unprecedented omission to express a relevant opinion, one way or the other.

98) For the Commission to have embarked on a lengthy investigation involving private and public hearings, engaged Counsel Assisting in relation thereto, compelled the attendance of the witnesses, to be examined on their oaths or affirmations, and having received that evidence, the written submissions of Counsel Assisting, and the legal representatives of the witnesses, in respect of that evidence, and having published a Report to Parliament of the results of that investigation, but nevertheless to have *withheld* without explanation the *crucial* opinion so far as the police witnesses, and their evidence was concerned, as to whether in the opinion of the Commission "*police misconduct*" had occurred, was not only wholly inexplicable, and illogical, but patently *unfair* to the officers because it left open, by implication, that unspecified "police misconduct" could not be ruled out, thereby necessarily implicating each of the officers.

99) In the Introduction section of the Report, at **1.62**, the following appears: "The Report contains the Commission's assessments and opinions and *expresses a view as to whether or not police misconduct has occurred in relation to each incident examined*." It follows that the Report of this incident manifestly *failed* to achieve the Report's stated objective.

100) The absence of *any* explanation for this unprecedented state of affairs in Sections 8 and 9 of the Report dealing with the arrest of WH-1, is in marked, and baffling, contrast, with the statement that appears in the Introduction to the Report (at **1.9,** second sentence): "*The evidence in relation to this incident was ultimately inconclusive due to an inconsistency in the evidence of WH-1 and WH-2 in one important respect, and the lack of recall of the details by the involved officers.*"

101) Not only is such an extraordinary summation entirely lacking from Sections 8 and 9, but a perception by the Commission of a mere inconsistency between the evidence of WH-1 and WH-2, particularly, as noted above, that such inconsistency was never raised with either witness, nor was either recalled to deal with it, could hardly be put forward as justifying a failure to deal with the evidence as it was, inconclusive or otherwise. In any event, the (untested) evidence of WH-2 related only to the route he claimed to have taken in his endeavour to evade the pursuing police.

102) So too, a mere perception by the Commission of a "lack of recall" of details on the part of the police witnesses, is not mentioned in Sections 8 or 9 of the Report, let alone as having had a significant effect on the Commission's ability to evaluate the evidence. Nor would there appear to have been any "lack of recall" in the officers' statements made shortly after the relevant events, which formed part of the evidence before the Commission.

103) Unfortunately, the difficulties with Section 9 of the Report are not limited to these problems, significant though they undoubtedly are.

104) For example, the so-called "substantial allegation" said to exist against *Jackson* is limited to one aspect of his conduct only, and that relating the arrest of WH-1, namely, the alleged use of "excessive force." There is *no* allegation touching the balance of his evidence, especially his unchallenged evidence that he entered into an arrangement with WH-1's solicitor, and at the suggestion of the latter, to proceed on the wilful exposure charge only, without the knowledge or consent of the Complainant, despite the fact that the latter was the Informant in relation thereto.

105) That evidence, of course, was consistent with the evidence of the Complainant that he had no knowledge of that arrangement until he spoke to Jackson on the telephone on the day the matter came before Wagga Local Court for hearing.

106) Nor should the breadth of the opinion expressed in **9.33** be overlooked: ". . . *the Commission is not satisfied that the events* [concerning the arrest of WH-1] *did not occur in the manner that Jackson, and the other police officers gave evidence*. . . .". Even leaving aside the difficulties inherent in use of the double negative, at the very least this opinion indicates that such evidence was not disbelieved by the

Commission. Indeed, a similar opinion had previously been expressed in the Report at **8.15.** It is therefore difficult to see any basis to justify the Commission's refusal to express a positive opinion in **9.23**.

107) In the light of these exculpatory opinions (and having regard to the Commission's reference to the evidence as being *inconclusive*, in **1.9**) it is extremely difficult to discern the basis on which the Commission was entitled to form the adverse opinions, having regard to the relevant standard of proof, that each of the officers was an "affected person," particularly in the case of the Complainant (and Duncan).

108) Nevertheless the Commission did purport to express such opinions: (**9.7(i)**). Once again, in my opinion, the form of that opinion is <u>inherently unfair</u> to those officers in the use of the alternate expressions "knowing *or* suspecting"; "*falsely claimed*" (without any explanation of what is meant by this, there being no allegation that their evidence was perjured); and the implication that either had given evidence that Jackson had used his baton as "was necessary and appropriate", when in fact neither had given such evidence, their evidence in that regard being confined to the limited observations of the arrest they had been in a position to make, on a dark, wet night, while in foot pursuit of the fleeing WH-2.

109) At **9.19** and **9.52**, respectively, in relation to each of those two officers, the Report includes a similarly-formulated opinion to that expressed in respect of Jackson at **9.33.** Each of those opinions contains elements that are properly the subject of criticism: the use of the word "*misgivings*", a relevantly meaningless expression, indefinably negative, and therefore most unfair in the circumstances, should have no place in such a context in the Commission's Report.

110) Once again its effect can only be to <u>imply suspicion</u>, based on some unstated and therefore unexaminable premise, that the Commission <u>may</u> not have accepted that evidence, or some unspecified portion thereof, and thus to detract from the benefit of the otherwise exculpatory opinion that no relevant action should be taken against the officers.

111) This unfairness is then compounded by being coupled with another unexaminable and unexplained expression: "*However given the evidence of WH-1…*" Once again, it is quite impossible to know what is the evidence being referred to, and whether what is meant by "given the evidence of WH-1" was simply that such evidence was *consistent* with the relevant evidence given by the police officers. Some support for this latter interpretation may be found in **8.14**, where the evidence of these three witnesses was noted as being consistent.

112) A further element of unfairness is that neither of these officers was put on notice when they gave evidence that their evidence was or might be dealt with in the Report in this manner. The service upon them some time later of the written submissions of Counsel Assisting (in effect a Draft Report, containing firm, if tentative, conclusions expressed therein, subsequently adopted by the Commission as such) is no answer to this lack of fairness.

113) The word "*therefore*" in **9.20** and **9.53**, respectively, despite its apparent purpose, clearly fails to refer back to any material which could be seen to justify the Commission's unprecedented statement of non-opinion referred to above.

Problems with the Executive Summary

114) This part of the Whistler Report appears at the very beginning, occupying pages **i-xix**. As the title suggests, it was obviously intended to provide the reader with a summary of the more important opinions and background material contained in the Report itself. Given that that was its purpose, and that it would not seem unreasonable for readers to place considerable reliance upon it, it was obviously important that it presented an accurate summary, did not exceed the opinions expressed in, and was not inconsistent with, the Report itself. Unfortunately, as is demonstrated in the following paragraphs, it was not accurate, did exceed, and was inconsistent with, the Report itself.

115) First, at page **xi**, the authorship of the letter from WH-1's solicitor to WH-1 dated 15 November 2002 (reproduced at **8.30**) has been wrongly attributed to the police: ". . . *a police letter to WH-1's solicitor . . . .*", and the recipient incorrectly identified as the solicitor.

116) Second, in the case of each of the three police officers, the statement appears that the Commission has been *unable* to form an opinion as to whether the officer "engaged in police misconduct in relation to *the arrest* and *prosecution* of WH-1." This is clearly misleading as neither the Complainant nor Duncan was involved in the arrest of WH-1. Nor did any part of the so-called "substantial allegation" against any of them, or the wording of the statement of non-opinion as to police misconduct, include a reference to the "*prosecution*" of WH-1, or contain any suggestion of the existence of "police misconduct" in relation thereto. The wording of the "substantial allegations" and the non-opinions as stated in the Commission's Report have been set out and discussed above.

117) Third, the evidence of each of the officers (which was not disbelieved by the Commission) is described as "*not compelling*", (**xi**), despite the fact that that unhelpful expression is not used anywhere in the Report in relation to their evidence.

118) The evidence of WH-2 despite its rejection by the Commission in the Report is again accorded unjustified and unfair prominence: "*According to the evidence of WH-2…*" (**xi**).

119) The statement appears in relation to the Complainant (at **xi**): "O'Neill denied that WH-1 had made a complaint to him about Jackson's use of the baton but said he knew *that WH-1 was unhappy with the way he had been treated*." The precise evidence given by WH-1 in this context has been referred to above, and the Report's treatment of it commented upon. However, to include the comment as to WH-1's stated *unhappiness* appears totally irrelevant: as Counsel Assisting observed in relation to that (T613), most people who are arrested by police are unhappy about that circumstance.

Problems with the Introduction

120) This segment occupies pages **1-11** of the Commission's Report. Some observations in relation to its content appear in the preceding paragraphs.

121) However at **1.16** and **1.59** respectively, there appear brief summaries of certain aspects of the evidence of WH-1 which cannot be allowed to pass without comment because they appear *seriously to misrepresent the evidence* which they purport to summarise.

122) At **1.16**, in relation to the charge of resisting arrest against WH-1 the following is statement is included: *" . . . When the matter came to Court an agreement was reached between WH-1 and the police that the resisting arrest charge would be dropped in return for WH-1 agreeing not to pursue a complaint against Jackson in relation to the excessive use of his baton.*"

123) In my opinion that patently misrepresents the evidence, and is therefore misleading. As explained above, the unchallenged evidence of Jackson, corroborated by the solicitor's letter of 31 October 2002, was that at the invitation of WH-1's solicitor, Jackson had entered into an arrangement (unbeknown to the Informant, O'Neill), apparently approved by some unidentified police prosecutor, the terms of such arrangement being as summarised in the letter, which arrangement was obviously on foot at latest by 31 October 2005, the date of the letter.

124) There could be no suggestion on the evidence that that arrangement, which was concluded at latest by 31 October 2002, included an agreement between WH-1 and the police that "in return" he would not pursue a complaint against Jackson, or that it was other than for the benefit of WH-1. (*See* above: *The court Proceedings* (paragraphs *50-62*.)

125) Nor did WH-1 ever give evidence which could lend any support for such a proposition. As also explained above, it was only on the date fixed for the hearing of the charges against WH-1 that O'Neill became aware of the arrangement already agreed to, that the resist arrest charge would be <u>unconditionally</u> dropped, and at that point elicited a statement from WH-1's solicitor, to allay the inference which O'Neill thought that might be drawn from the dropping of that charge, that WH-1 would not pursue any action against Jackson in relation to his arrest.

126) Obviously, the plea-bargain arrangement could not be undone on that day, and the resist arrest charge then proceed, if for no other reason than that Jackson's evidence was not available, the latter having absented himself, on the strength of the agreement earlier come to with WH-1's solicitor, on that day.

127) **1.16** is also misleading because of the wording (as though stating a factual finding): *" . . . in relation to the excessive use of his baton.*" In fact, no opinion was expressed in the Report that Jackson in executing the lawful arrest of WH-1 made excessive use of his baton.

128) **1.59:** "*WH-1 gave evidence that he was going to make a complaint about Jackson's use of the baton however he agreed not to make a complaint after NSW Police*

agreed to drop the charge of resisting arrest. WH-2 managed to escape and was not arrested." This infelicitously expressed passage is typical of much of the Report. It appears to have been written without due care and is demonstrably incorrect.

129) First, there is not a scintilla of evidence to support the assertion in first sentence; WH-1's evidence was unequivocal that he at no stage gave his solicitor instructions to take proceedings against Jackson (T31). Second, the plea-bargain that resulted in the dropping of the resist arrest charge was instigated by WH-1's solicitor and was put to Jackson on the basis that it was for the benefit of WH-1 (*see* above paragraphs *63-71*). Further, WH-2 was never in custody, as the second sentence might suggest, but fled from and eluded the police after being told by O'Neill that he was under arrest.

Conclusions and Recommendations

130) Having regard to the overwhelming evidence detailed above, in my opinion the Complainant's grievances of *apprehended bias* and *a denial of procedural fairness* at the hands of the Commission must be seen to be well-founded, and amply borne out by the numerous failings and omissions, enumerated in the preceding paragraphs hereof, in respect of the Commission's procedures adopted by it in relation to the hearings at which the police officers gave their evidence, and the publication in the subsequent Whistler Report of the Commission's adverse opinions and comments reflecting on the officers', in particular, the Complainant's, integrity, veracity and reputation, which appear to be quite unjustified and unsupported by the evidence before the Commission.

131) Over and above these very significant failures and omissions in the Commission's procedures, the analysis of the material as detailed above, also establishes, all too clearly, that the Commission's Report was not only biased and unfair in respect of each of the police who gave evidence, but was in many respects unreliable and inconsistent, and, indeed, incomprehensible.

132) On the strength of the Commission's own unprecedented statement of *inability* to offer an opinion as to whether or not it was of the opinion that any of the officers had engaged in "police misconduct", it was also ultimately *ineffectual*, because of its inconclusiveness in respect of that crucial opinion, but nevertheless, damaging to the integrity, veracity and reputations of the police witnesses.

133) Some of these numerous failings and omissions may in fact have had their origins in the undisclosed assumptions and prejudices on the part of the Commission that appear to have been in play even before the first evidence was called, such as the unexplained decision to investigate the arrest and conviction of WH-1, three years previously, in the absence of any relevant complaint at any time from the latter, the equally unexplained exclusion of the public from the initial hearings (yet permitting WH-1's parents to be present during WH-1's evidence), and the shrouding from public disclosure of the identification of the witnesses WH-1 and WH-2.

134) Unexplained, these covert decisions leave themselves open to inferences of prejudice and prejudgment on the part of the Commission.

135) The Commission is, of course, not bound by the rules of evidence, but this does not entitle it to disregard basic evidentiary principles where to do so would manifestly bring about unfairness and injustice, which appears to have been the result here.

136) The Commission not only failed, again without explanation or acknowledgment, to call clearly relevant evidence, identified above, but then omitted from its Report, significant, indeed critical, evidence before it which supported the overall police version of the events, and, in particular, corroborated the evidence of the Complainant, for example, the unchallenged evidence of Jackson as to his plea-bargain arrangement with, and at the instigation of, WH-1's solicitor.

137) The treatment of the three police officers when each gave evidence was in marked contrast with the treatment accorded WH-1 and WH-2 when each of those witnesses gave evidence. The latter were not only granted the extraordinary indulgences of private hearings and anonymity (decisions apparently taken prior to the commencement of the hearings), without explanation in the Report, but their evidence was left completely untested by the Commission, in that no attempt was made to clarify the belatedly acknowledged inconsistencies between them in their evidence, nor were the police statements effectively put to those witnesses.

138) Their Records of Interview, made at the instigation of the Commission shortly before each gave their evidence, which may, for the reasons identified above, have cast doubt, particularly in the case of WH-1, on the reliability of their recollections, were not disclosed, or made available, to the legal representatives of the police by the Commission.

139) On the other hand, in the case of the three police officers their evidence appeared to be viewed with suspicion throughout, despite their statements made soon after the relevant events being in evidence before the Commission (and presumably, having been part of the police brief before Wagga Local Court on the occasion WH-1 pleaded guilty to the wilful exposure charge), even where there was no issue between the evidence of WH-1 and the police, for example, the evidence that Jackson in the course of a lawful arrest, had repeatedly called for WH-1 to lay face-down on the ground, the conduct of WH-1 in disobeying that lawful direction, and the fact that once the direction was complied with WH-1 was not struck a single blow with Jackson's baton.

140) Although adverse opinions and comments in respect of witnesses expressed or implied by Tribunals such as the Commission, have no legal effect (a concept, in my opinion, not well understood by the general public) the extent of the damage that the publication of such opinions and comments is capable of causing is not in doubt.

141) The Courts have repeatedly acknowledged that such opinions and comments have the practical effect of blackening the reputation of the person the subject of such adverse opinions by diminishing the estimation which these persons stands in the opinion of others.

142) Damaging allegations even when made by ordinary persons may involve "serious imputations against the character of the person in respect of whom they are made" [McDermott v Black [1940] HCA 4] but in the case of a Commission they "have the hallmark of authority": Hallett (180). As that author notes, "the initial allegations" (in that example, allegations of corruption against a high-ranking police officer) may be given more publicity than the ultimate disposal of those allegations (at 182).

143) As Gleeson CJ noted in *Chaffey's Case* (at 28, 29: see *Schedule*) "*The authorities amply demonstrate that potential damage to the reputation of a person who is the subject of a complaint being investigated at a hearing by the [ICAC] Commission enlivens the requirement to observe the rules of natural justice*." In the same case Mahoney J noted that being brought before such a Commission, or merely being named in the proceedings of such a Commission, has the potential to damage the reputation such persons.

144) In the case of the Complainant, he was publicly identified by the Commission as an "affected person", and thus subjected to the potentially adverse consequences of being so identified (and see Hall, at page 164), and, as noted above, his integrity was directly impugned.

145) As the relevant case-law demonstrates unless and until the Commission had accorded the Complainant natural justice there was *no authority for the Commission to publish so much of the Whistler Report as was damaging to the Complainant's reputation and integrity, and the publication of such opinions should be regarded as void and of no effect*.

146) Notwithstanding the opinions expressed in my Report, which, if accepted, expose persistent and unacceptable conduct on the part of the Commission in terms of its failure to ensure procedural fairness and justice to the police witnesses, and to ensure an absence of bias in its proceedings, the action available to the Inspector in such a case as the present is limited to the making of recommendations.

147) The Commission's Report once written and published cannot be re-called and re-written even if the Commission were prepared to take such a course. This limitation points-up the essential obligation on the Commission, to ensure that its procedures are scrupulous and rigorous in respect of ensuring that those who appear before it are treated objectively and fairly, and, in particular, that their reputations are not irretrievably damaged by unjustified adverse opinions expressed by the Commission in public Reports.

148) As with each of the Commission's public Reports, the Whistler Report has been posted by the Commission on its website, where it serves as a constantly available means of access by all and sundry to the adverse opinions and comments contained within it concerning these police witnesses.

149) As with previous Reports by the Inspector upholding similar complaints by witnesses and others claiming bias and a denial of procedural fairness by the Commission, the only practical step available, albeit it may achieve comparatively little in overcoming the damage to reputation referred to above, is a recommendation that the Commission remove such Report from its website, and make plain by notation thereon, that the Report has been the subject of severe criticism in a Report by the Inspector and that the adverse opinions expressed therein have been found to be unauthorised on the basis they are the result of biased and unfair procedures having been adopted by the Commission.

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

9 March 2011