POLICE INTEGRITY COMMISSION

REPORT TO PARLIAMENT
OPERATION BANFF

DECEMBER 2006

ABN 22 870 745 340

The Hon Meredith Burgmann MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

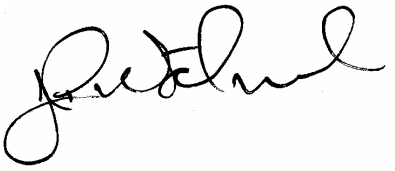
The Hon John Aquilina MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Madam President and Mr Speaker

In accordance with s 96(2) of the *Police Integrity Commission Act 1996* (the Act), the Commission hereby furnishes to you a Report regarding Operation Banff, being a Report in relation to a matter as to which the Commission has conducted a public hearing.

I draw your attention to s 103(2) of the Act, pursuant to which I recommend that this Report be made public forthwith.

Yours faithfully



John Pritchard
Commissioner

December 2006

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EXECUTIVE SUMMARY

On 13 October 2004 Mr Jeffrey Shaw QC was involved in a motor vehicle collision near his home in Birchgrove, Sydney. At the time of the collision he was a Justice of the Supreme Court of New South Wales.

Mr Shaw was taken to Royal Prince Alfred Hospital where a sample of his blood was extracted for the purposes of blood alcohol analysis, in accordance with the relevant legislation.

On 2 November 2004 NSW Police made a public announcement that it had commenced an internal investigation because a vial of the blood taken from Mr Shaw at the hospital, which should have been delivered to the police Blood Sampling Unit (the Police Sample), could not be accounted for.

Following a meeting on 3 November 2004 with senior members of NSW Police, the NSW Ombudsman and the Independent Commission Against Corruption, the Commission took over the investigation into the missing vial of blood.

On 15 November 2004 the Commission commenced a public hearing with the following scope and purpose:

> To investigate the conduct of NSW Police officers and others involved in events arising from a motor vehicle accident at Louisa Road, Birchgrove, on 13 October 2004 at approximately 2330 hours.

The hearing ran for three days and received oral evidence from nine witnesses. Following the conclusion of the evidence written submissions were made by Counsel Assisting the Commission and counsel for the various witnesses. On 24 December 2004 Mr Shaw commenced proceedings in the Supreme Court of New South Wales seeking to limit the matters in respect of which the Commission could report to Parliament. Those proceedings were resolved in the Court of Appeal in July 2006.

There was no direct evidence of what happened to missing vial of blood however, based on the circumstantial evidence, the Commission is of the opinion that:

- Shortly after the extraction of the blood and its division into separate vials, Mr Shaw removed a bag containing the Police Sample and its paperwork from the trolley on which it had been placed by the doctor;
- Mr Shaw left the hospital against medical advice and took the bag containing the Police Sample and paperwork to his chambers at the Supreme Court of New South Wales.

Pursuant to s 16 of the *Police Integrity Commission Act 1996* (the Act) the Commission is of the opinion that:

- There was no police misconduct on the part of any police involved in the matter;

- There was no misconduct on the part of any of the hospital staff involved in the matter;
- Mr Shaw engaged in misconduct in removing the blood vial from the hospital.

Pursuant to s 97(2) of the Act the Commission is of the opinion that consideration should be given to:

- The prosecution of Mr Shaw for a specified criminal offence, namely, Doing an Act with Intent to Pervert the Course of Justice contrary to s 319 of the *Crimes Act 1900.*

CHRONOLOGY OF EVENTS

DATE	TIME	DETAILS
13 October 2004	11:30pm	Motor vehicle accident at Louisa Road Birchgrove.
14 October 2004	1:00am	Mr Shaw admitted to Royal Prince Alfred Hospital.
	1:50am	Police attend RPAH.
	2:15am	Dr Hill takes blood sample from Mr Shaw.
	2:27am	Mr Robertson telephones Mrs Shaw.
	2:30am	Mr Shaw attempts to leave hospital but is stopped by Nurse Grant.
	2:30-3:00	Mr Shaw leaves the hospital.
	3:04am	Mr Shaw enters Supreme Court chambers.
	3:30am	Mrs Shaw arrives at RPAH.
	4:42am	Mr Shaw departs Supreme Court chambers.
	5:35am	Mr Shaw recorded as back at RPAH.
	5:35-9:20	Mr Shaw given Patient Sample and pink patient copy of certificate.
	9:20am	Mr Shaw discharged from RPAH.
16 October		Mr Shaw departs for China.
17 October 2004		Police blood sample box collected from RPAH.
19 October 2004		Police blood sample box opened at BSU.
2 November 2004		D/CoP Madden makes public statement re missing vial and police investigation.
3 November 2004		Meeting between PIC, ICAC and NSW Ombudsman.
		Mrs Shaw gives plastic bag to Mr Searle.
4 November 2004		PIC commences investigation.
5 November 2004		Mr Shaw makes public statement.
		Mrs Shaw attends Glebe Police Station and hands over biohazard bag with single vial and paperwork.
		Mr Shaw's solicitors fax PIC declining interview and advising that Shaw has arranged for second blood sample held by him to be provided to NSW Police.
		Mr Shaw provides unsigned statement to PIC.
12 November 2004		Mr Shaw announces resignation as Justice of the Supreme Court of NSW.
13 November 2004		Mrs Shaw hands over second vial of blood to PIC.
15 November 2004		PIC public hearing commences.

1. INTRODUCTION

1.1 On 15 November 2004, the Commission commenced a public hearing with the following general scope and purpose:

> To investigate the conduct of NSW Police officers and others involved in events arising from a motor vehicle accident at Louisa Road, Birchgrove, on 13 October 2004 at approximately 2330 hours.

1.2 The hearing was held over three days, 15, 16 and 17 November 2004. The following witnesses gave evidence (listed in alphabetical order):

- Matthew Wayne Horsely CARLIN
- Raymond Alan FORREST
- Michael Jonathan GRANT
- Robert Malcolm HILL
- Timothy Frank ROBERTSON
- Gerd SCHMAHL
- Elizabeth SHAW
- Jeffrey William SHAW
- Benjamin Graham WATSON

1.3 Following the hearing written submissions were made to the Commission by Counsel Assisting the Commission and the legal representatives for the witnesses. The preparation of this Report was delayed as a result of proceedings commenced in the Supreme Court of New South Wales in December 2004. Those proceedings, brought on behalf of Mr Shaw, sought to limit the matters in respect of which the Commission could report to Parliament. The proceedings were resolved in the New South Wales Court of Appeal in July 2006.

1.4 Thereafter, further written submissions on behalf of Mr Shaw were made to the Commission in September 2006.

1.5 This Report is prepared pursuant to s 96 of the *Police Integrity Commission Act 1996* which requires the Commission to prepare and furnish to each House of Parliament a report in relation to matters as to which the Commission has conducted a public hearing.

2. BACKGROUND

2.1 On the night of 13 October 2004 at approximately 11.30 p.m., Mr Jeffrey Shaw QC drove his Alfa Romeo vehicle registered number AOQ62E along Louisa Road, Birchgrove. It collided with a parked vehicle, causing damage to both vehicles. At that time Mr Shaw was a Justice of the Supreme Court of New South Wales.

2.2 A number of residents of Louisa Road came onto the street after hearing the collision. Mr Shaw was observed to have cuts to his head. One resident called the police. Another resident took Mr Shaw into her home and later her husband drove him to the Royal Prince Alfred Hospital (RPAH).

2.3 After Mr Shaw was taken to hospital, police from Burwood attended the scene of the collision. They obtained details of the involved vehicles and were told that Mr Shaw had been taken to hospital.

2.4 Mr Shaw was admitted to the Emergency Department of RPAH at approximately 1.00 a.m. on 14 October 2004. He was seen by a doctor who took a sample of blood from Mr Shaw for alcohol testing. Section 20 of the *Road Transport (Safety and Traffic Management) Act 1999* required a medical practitioner attending to a patient admitted to hospital as a result of a motor vehicle accident to take a sample of the patient's blood for the purpose of blood alcohol analysis.

2.5 Following the taking of the sample, Mr Shaw was asked to remain in the hospital for further investigation. Despite this request he left the hospital at approximately 2.30 a.m. and went to his chambers at the Supreme Court, but was subsequently persuaded to return to undergo a CT brain scan. The scan revealed no injury.

2.6 Mr Shaw was discharged from RPAH at approximately 9.20 a.m. on 14 October 2004.

2.7 The police investigation of the accident continued. When the investigating police sought the results of the blood alcohol test from the relevant department of the NSW Police, they learned that the blood sample taken from Mr Shaw at the hospital had not been analysed and could not be accounted for.

2.8 The procedure at that time for blood alcohol testing was as follows:

2.8.1 Once a sample of blood was taken from a hospital patient, it was divided into two vials which were capped and sealed with identical adhesive stickers bearing the same serial number.

2.8.2 The vials and stickers used for this purpose were taken from a Blood Alcohol "kit", a sealed packet issued to hospitals by the Health Department for the purpose of taking such blood samples. Each kit contained a hypodermic needle, a swab, 2 empty vials, 2 stickers bearing the same serial number, a plastic biohazard bag marked with a distinctive yellow triangle and the necessary paperwork. The paperwork consisted of a certificate on white paper and 3 carbon copies, coloured blue, yellow and pink respectively.

2.8.3 The attending doctor was required to complete the top half of the original white certificate by filling in his name and hospital, the patient's name and address, the time the blood was extracted and the serial number of the seal placed around the vials. (The kit also contained a separate certificate with carbon copies for use in cases of marine or rail accidents. That certificate was not required to be completed in the case of road accidents).

2.8.4 Once the paperwork was completed, one sealed vial of blood was given to the patient, with the pink copy of the certificate.[1] The other vial was placed in the biohazard bag, together with the original white certificate and the blue and yellow carbon copies. Each of the certificates was pre-stamped with the same serial number as the adhesive stickers used to seal the vials.

2.8.5 The biohazard bag was then sealed and placed in a locked metal box at the hospital. The box was the property of NSW Police and used exclusively for storing blood samples taken for the purposes of alcohol or drug testing. The police practice was to collect the box from the hospital on average once a week and replace it with an empty box.

2.8.6 The key to the box was kept at the Blood Sampling Unit at Parramatta. Once the box was collected from the hospital, it was transported by the police to the Blood Sampling Unit, where it was opened and its contents removed. The contents were recorded in a log and written confirmation was sent to the hospital of the sample numbers and names of all blood specimens that the box contained. The vials were placed in a refrigerator until they were transferred, together with the white, blue and yellow certificates, to the Division of Analytical Laboratories for analysis. Once the blood had been tested, the analyst completed the balance of the white certificate, retained the yellow copy and returned the white certificate and blue copy to the Blood Sampling Unit. The blue copy was retained by the Blood Sampling Unit and the white original passed on to the investigating police.

2.9 On this occasion, when the investigating police asked for the white certificate, the Blood Sampling Unit had no record of receiving a vial of blood or the accompanying paperwork for Mr Shaw, even though the police box had been collected from RPAH on 17 October 2004 and delivered to the Blood Sampling Unit on 19 October 2004.

2.10 Upon becoming aware that the sample of Mr Shaw was unaccounted for, the police commenced an investigation. On 2 November 2004 the doctor who extracted the blood from Mr Shaw at RPAH gave a statement to police stating he had put the "Police Sample" in the NSW Police box at the hospital. The same day, (then) Deputy Commissioner David Madden of NSW Police made a public

[1] Since 15 April 2005 the legislation requires that, rather than being given an actual sample of blood, a person from whom a sample is taken is to be given a certificate which contains sufficient information to enable the sample to be identified. The person may, within 12 months after the taking of the sample, apply to the prescribed laboratory to have a portion of the sample sent, for analysis at that person's own expense, to a medical practitioner or laboratory nominated by the person: s 23 *Road Transport (Safety and Traffic Management) Act 1999*.

statement about the missing vial and the fact that NSW Police had commenced an investigation.

2.11 On 3 November 2004 senior police attended a meeting at the Commission together with senior officers from the Independent Commission Against Corruption and the NSW Ombudsman. Following that meeting it was determined the Commission would take over the police investigation.

2.12 On 4 November 2004 the Commission commenced an investigation with the following purpose:

> To investigate the conduct of NSW Police officers and others involved in events arising from a motor vehicle accident at Louisa Road, Birchgrove, on 13 October 2004 at approximately 2330 hours.

2.13 On 5 November 2004, Mr Shaw issued a public statement. It said:

> Today I have arranged for the blood sample taken from me following an accident on 13 October 2004 to be delivered to the New South Wales Police. For the past week my priority has been to seek and receive medical treatment. I would like to thank my family and those who have supported me at this difficult time. I have every confidence in the New South Wales police justice system. Like any other honest citizen, I am prepared to face the consequences of my actions. While I can understand that media interest is a fact of life, I do ask that the media now respect the privacy of my family. I have always been dedicated to my work. While this has been to the detriment of my health and personal life, I am confident that my work has not been affected by my health problems and that my judgments will stand up to any scrutiny. I will not be making any further media comment on this matter.

2.14 On the afternoon of 5 November 2004, Mr Shaw's wife attended Glebe Police Station and handed in a biohazard bag containing a vial of blood and the original white certificate with the blue, yellow and pink carbon copies. The white certificate had been completed by the doctor who took the sample at RPAH on 14 October 2004, but the section for recording the result of the blood analysis was blank. The serial number of the certificates and the sticker sealing the vial was 501534. Mrs Shaw declined a request to be interviewed. The police provided the bag and its contents to officers from the Commission the same day, in the presence of Mrs Shaw.

2.15 The same afternoon a Commission officer contacted Mr Shaw's solicitor and requested to interview Mr Shaw. Later that day Mr Shaw's solicitor faxed to the Commission a letter in the following terms:

> Pursuant to his statutory obligation, my client now provides particulars in relation to his motor vehicle accident on 13 October 2004. You will note the statement is unsigned. My client will provide a signed copy in due course.
>
> My client has also arranged for his second blood sample held by him following the procedure at Royal Prince Alfred Hospital to be provided to police.
>
> My client does not wish to be interviewed in relation to this accident nor does he wish to submit to any form of questioning from any person in authority. He will, of course, comply with all his statutory obligations.

2.16 Forwarded with the above letter was a short, typed, unsigned statement which confirmed that Mr Shaw was the registered owner of the vehicle which had been involved in the collision on Louisa Road Birchgrove on 13 October 2004 at

about 11.15 p.m. The heading on the statement referred to Clause 30 of the *Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999* (which required a driver involved in a motor vehicle accident to provide certain particulars to police).[2]

2.17 On 7 November Commission officers conducted an interview with the nurse who had cared for Mr Shaw in the Emergency Department on the night in question. On 8 November Commission officers interviewed the attending doctor.

2.18 On Monday 8 November 2004 the Commission wrote to Mr Shaw's solicitor and asked for clarification about what was meant in his letter of 5 November by the expression "*second blood sample held by him*".

2.19 On 9 November the Commission received a reply which said, in response to that inquiry:

> "Second blood sample held by him" refers to the second of two samples taken one, "the second" being provided to my client.[sic]

2.20 On 9 November 2004 Commission officers delivered to the Division of Analytical Laboratories at Lidcombe the vial of blood and the certificates which Mrs Shaw had produced on 5 November. The blood alcohol analysis was performed the same day and on 10 November the Commission received the result. The bottom half of the white certificate had been completed by the analyst in the spaces provided and stated that the sample had been analysed on 9 November and the concentration of alcohol present in the sample was not less than 0.225 grams of alcohol per 100 millilitres of blood.

2.21 On 11 November 2004 Mr Shaw's solicitor accepted service of a summons requiring Mr Shaw to attend to give evidence at the Commission the following Monday.

2.22 On Friday 12 November 2004 Mr Shaw publicly announced his resignation as a Justice of the Supreme Court of New South Wales. Later that day Mr Shaw's counsel sent to the Commission by facsimile transmission a draft, unsigned statement of Mr Shaw regarding the events which followed the accident.

2.23 On the same day counsel for Mrs Shaw contacted the Commission and advised that Mrs Shaw wished to deliver something to the Commission. Arrangements were made for Commission officers to meet with Mrs Shaw the following day.

2.24 On Saturday 13 November 2004 Mrs Shaw attended the Commission with her legal representative and handed in a second vial of blood, sealed with an identical adhesive sticker to the one handed to Glebe Police on 5 November. She declined to make a statement.

2.25 On 15 November 2004, the Commission commenced a public hearing, having determined the previous week that it was in the public interest to do so.

[2] A signed version was subsequently supplied to the Commission and became Exhibit 3.

3. THE EVIDENCE

THE COLLISION

3.1 There was no dispute that Mr Shaw was the responsible driver in the collision between his vehicle and a stationary vehicle at around 11.30 p.m. in Louisa Road, Birchgrove on 13 October 2004. No other person was involved in the collision.

3.2 Ms Francesca Davis, one of Mr Shaw's neighbours, took Mr Shaw into her home at 100 Louisa Road, Birchgrove. In her statement to the Commission,[3] Ms Davis said:

> I walked closer to the man and heard him say that he would be prepared to pay for the damage to the other car. When someone told him the police had been called he said words to the effect of "No, there's no need to call the police I will pay for the damage to the car". At this point I thought I recognised the man as Jeff Shaw, but I was not certain as it was dark and the man looked different from my recollection of Jeff Shaw and did not look well to me.

MR SHAW IS TAKEN TO HOSPITAL

3.3 Subsequently Ms Davis' husband, Mr Tim Robertson SC, took Mr Shaw to Royal Prince Alfred Hospital (RPAH). Mr Shaw was first seen by the triage nurse, Ms Sara Casey, for assessment. Nurse Casey's notes disclose that Mr Shaw denied "ETOH", which is an abbreviated reference to ethanol or alcohol.[4]

3.4 Mr Shaw was admitted to the Emergency Department at approximately 1.00 a.m. and was first assessed by Nurse Michael Grant. When asked by Nurse Grant, Mr Shaw initially denied that he had been drinking, but on being told he smelt of alcohol admitted to having a couple of drinks.[5]

3.5 On examination Mr Shaw was recorded by Nurse Grant as appearing "*dishevelled, glasses out of shape and superficial wounds to face, bruise to [his] left shin"* and smelling of alcohol. He was amnesic to the specific events.[6]

3.6 Nurse Grant gave evidence at the Commission on 15 November. He said that Mr Shaw's coordination was significantly affected.[7] He said that he was told by Mr Robertson that there had been an accident and police had attended the scene. Because the police had not accompanied Mr Shaw to hospital, Nurse Grant rang Leichhardt Police to ensure the police knew of Mr Shaw's location.

3.7 Mr Robertson stayed with Mr Shaw on the evening of 13 October 2004 and the morning of 14 October 2004 until approximately 2.00 a.m.[8] He also gave evidence to the Commission on 15 November 2004:[9]

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[3] PIC Exhibit 22.
[4] PIC Exhibit 6.
[5] PIC Transcript, M J Grant, 15 November 2004, p. 68.
[6] PIC Exhibit 6.
[7] PIC Transcript, M J Grant, 15 November 2004, p. 73.
[8] PIC Transcript, T F Robertson, 15 November 2004, p. 50.

> Q:— Can I just go back in time to the point at which you attend with Mr Shaw and he is seen by the triage nurse. Were you able to observe his general demeanour at that time? How did he seem to you?
>
> A:— That was 20 minutes, maybe half an hour, after we'd arrived at the hospital. He was speaking reasonably clearly. He had filled in a form earlier. I didn't watch him fill it in and I don't know what it contained, but having myself been to an emergency, I know the sort of questions that are asked. He was very quiet, even timid, I thought, at that stage. Yes – he was lucid.

3.8 Mr Robertson gave evidence that they had discussed a number of topics including the recent general election, the pleading of imputations and the law of defamation and, in particular, a decision of the Full Court of the Supreme Court of Victoria.[10] According to Mr Robertson:[11]

> … he was getting better as the night wore on.

3.9 Mr Robertson gave further evidence the following day. He agreed that Mr Shaw appeared to be detached, defenceless, ashamed and subdued.[12] With one exception, Mr Robertson also agreed that his conversations with Mr Shaw at the hospital had been *"... a rather one-sided affair"*.[13] As to the exception, Mr Robertson gave the following evidence:[14]

> Q:— What was the one exception where the conversation wasn't one-sided?
>
> A:— I failed to recall yesterday that another topic of conversation concerned section 7A of the Defamation Act, which requires a jury to sit to determine defamation and meaning, but not other issues in defamation trials. Mr Shaw said to me that he was constantly being blamed by the profession for introducing this measure, whereas it was a previous Attorney-General who had done so. This was a conversation that arose after our discussion concerning the complexity of pleading defamatory imputations under different jurisdictions in multi-State defamation proceedings. That was the only matter that Mr Shaw proffered, if I might say so, off his own bat. Otherwise it would be fair to say that I initiated the other conversations.

3.10 That conversation took place between 12.30 a.m. and 1.30 a.m. on 14 October 2004.[15]

THE POLICE ATTEND RPAH

3.11 Some time around 2.00 a.m., but before 2.15 a.m. on 14 October 2004, officers from NSW Police attended the hospital.

3.12 Those officers were Constable Carlin and Constable Watson from Burwood Police.

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[9] PIC Transcript, T F Robertson, 15 November 2004, p. 53.
[10] PIC Transcript, T F Robertson, 15 November 2004, p. 53.
[11] PIC Transcript, T F Robertson, 15 November 2004, p. 54.
[12] PIC Transcript, T F Robertson, 16 November 2004, p. 110.
[13] PIC Transcript, T F Robertson, 16 November 2004, p. 111.
[14] PIC Transcript, T F Robertson, 16 November 2004, p. 111.
[15] PIC Transcript, T F Robertson, 16 November 2004, p. 112.

3.13 According to Nurse Grant, he was sitting at the nursing station when he was approached by two police officers.[16] After asking Nurse Grant to identify Mr Shaw, the police officers approached Mr Shaw.[17]

3.14 Nurse Grant recalled that the police officers subsequently came back to the nursing station. He gave the following evidence:[18]

> Q:— And did you have a further conversation with them?
>
> A:— I did. They asked me about Mr Shaw, about his injuries. I told them that it was hard to make a thorough assessment as the doctor hadn't seen him yet, but my impression was that he had a superficial head injury, had minor injury to the leg, smelt of alcohol. I can't remember much else.
>
> Q:— Did one of the officers ask you whether a blood sample had been taken?
>
> A:— Yes, he did.
>
> Q:— And what did you tell him?
>
> A:— I said no. I indicated that the doctor would take the blood sample. He then asked me if – he indicated to me that he was after a specific blood sample number, so I then went to the area on the map – in between where I have written A and B is a section called "equipment bay".

3.15 Nurse Grant said that he obtained a blood testing kit from the equipment bay. He then sat down at the nursing station and read to the police officers the number upon one of the stickers which would be used to seal the vials.[19] He recalled that one of the officers wrote down the number in a small notebook.[20] His impression was that the police officers then left the hospital.[21]

3.16 Constables Carlin and Watson both gave evidence on 16 November 2004. Constable Carlin told the Commission that he and Constable Watson attended the scene of the accident and were told that Mr Shaw had already been taken to hospital. They went first to Balmain Hospital and then ascertained that Mr Shaw was in RPAH so they went there. He estimated they arrived at RPAH at about 1.50 a.m.[22]

3.17 Constable Carlin told the Commission that upon arrival he was directed to Mr Shaw, who was in a bed in the subacute area, with Mr Robertson near him. He asked Mr Shaw for his version of events but Mr Shaw did not recall anything.

3.18 Mr Robertson said in evidence that when the police asked to see Mr Shaw's driver's licence he assisted by finding Mr Shaw's wallet amongst his clothes, which had been placed in a plastic bag beside Mr Shaw's bed.[23]

3.19 Constable Carlin wrote down the details of Mr Shaw and Mr Robertson in his notebook then had a conversation with the treating nurse. Constable Carlin told the Commission he followed the standard practice and inquired about Mr Shaw's

[16] PIC Transcript, M J Grant, 15 November 2004, p. 74.
[17] PIC Transcript, M J Grant, 15 November 2004, p. 75.
[18] PIC Transcript, M J Grant, 15 November 2004, p. 75.
[19] PIC Transcript, M J Grant, 15 November 2004, p. 76.
[20] PIC Transcript, M J Grant, 15 November 2004, p. 76.
[21] PIC Transcript, M J Grant, 15 November 2004, p. 78.
[22] PIC Transcript, M W H Carlin, 16 November 2004, p. 166.
[23] PIC Transcript, T F Robertson, 15 November 2004, p. 56.

injuries and asked for a blood vial number. He said he was 90 per cent sure the nurse showed him a blood vial in a plastic bag with the number on it. He wrote the number in his notebook and handed the vial back to the nurse. He and Constable Watson then left the hospital and proceeded to Glebe Police Station, where they gave a briefing to the Sergeant.[24]

3.20 The notebook of Constable Carlin confirms that he recorded the details of Mr Shaw, Mr Robertson and Nurse Grant, and the blood sample number as being "501534".

3.21 Around the time the police departed, Nurse Grant also observed Dr Malcolm Hill approaching Mr Shaw's bed, being Bed 1A.[25] He took the blood testing kit which he had obtained from the equipment bay and put it on the cannulation trolley beside Mr Shaw's bed, so that the doctor could use that kit when he took Mr Shaw's blood alcohol sample.[26]

THE BLOOD SAMPLE IS EXTRACTED

3.22 Dr Hill was the medical practitioner assigned to Mr Shaw in the emergency department on the morning of 14 October. He was aware that it was mandatory for him, as Mr Shaw's attending doctor, to take a blood sample because Mr Shaw had been involved in a motor vehicle accident. He gave evidence that some time after Mr Shaw was admitted, he established intravenous access by putting a cannula into one of Mr Shaw's veins. The blood he extracted for the alcohol testing was divided into two identical vials. According to the certificate completed by Dr Hill, the blood was taken at 2.15 a.m.[27]

3.23 Dr Hill gave evidence that it was also necessary to obtain blood for the hospital to *"... exclude bleeding and other problems that he might have."*[28] This included a full blood count, urea electrolyte, liver function test and coagulation profile.[29] This hospital sample was divided into three test tubes.

3.24 Dr Hill considered that Mr Shaw did not appear to be particularly aware of what was going on around him:[30]

> Q:— When you took the blood, as far as you could see, [Mr Shaw] was not conscious of what was going on around him?
>
> A:— He didn't seem to be terribly conscious of what was going on around him, no. He did seem bewildered and confused, although I didn't speak to him. His mannerisms certainly gave that impression.

3.25 In a signed statement supplied to the police on 2 November 2004, Dr Hill stated that he had placed the Police Sample and paperwork in the blood collection box.

[24] PIC Transcript, M W H Carlin, 16 November 2006, pp. 168-9.
[25] PIC Transcript, M J Grant, 15 November 2004, p. 76.
[26] PIC Transcript, M J Grant, 15 November 2004, pp. 77-8.
[27] PIC Exhibit 14.
[28] PIC Transcript, R M Hill, 15 November 2004, p. 102.
[29] PIC Transcript, R M Hill, 15 November 2004, p. 102.
[30] PIC Transcript, R M Hill, 16 November 2004, p. 159.

However, it became apparent in evidence that he had no actual memory of doing so. He gave the following evidence:[31]

> Q:— Do you have a recollection at all of what you did in relation to the other sample – that is, the one that's not the Patient's Sample?
>
> A:— Do you mean the Police Sample?
>
> Q:— The Police Sample.
>
> A:— No, I can't remember exactly what happened to that, and I've been asked on a number – on a few occasions since this all started. I initially thought that I'd put it into the box and I was reasonably adamant when I was first interviewed that that was the case, but, on reflection, I feel that it is more just a memory based on the routine of what I normally do, and I can't say 100% that the sample went into the box. I certainly remember taking it and labelling it at the patient's bedside, but I may have been called away to another patient, or something like this, I don't know. I don't have a distinct recollection of putting it in the box – in the police box.
>
> Q:— Do you accept as a possibility that it may have been the case that you were called away to another patient?
>
> A:— Yes, could have been.
>
> Q:— And are you saying that if that occurred, it may have been the case that you left the Police Sample somewhere in the vicinity of Mr Shaw?
>
> A:— No – yeah – they would have all – all those, the tests, would have been left on the trolley at Mr Shaw's bedside if I was called away.
>
> Q:— Yes.
>
> A:— But I know that everything was complete, everything was labelled, and everything, I'm certain, was bagged up ready to go.

3.26 The substance of this evidence was repeated by Dr Hill on the second day of the hearing:[32]

> Q:— Doctor, I will just remind you of where we finished up yesterday afternoon. I was asking you some questions about the fact that you had taken a sample.
>
> A:— That's right.
>
> Q:— … which was divided in relation to a blood alcohol sample on the one hand, and a sample which was to be used by the hospital, or samples by the hospital, on the other. We dealt with your recollection concerning what you did with the Police Sample, or the samples of blood taken for the purposes of blood alcohol testing, and you then told me, just before we concluded, that you know that "everything was complete, everything was labelled, and everything, I'm certain, was bagged up ready to go"?
>
> A:— Yeah, but it was still sitting on the trolley by the patient's bed at that stage.
>
> Q:— Alright.
>
> A:— I can't recall doing anything further with the bag from then. I mean, I just don't have it in my memory. Initially I thought, "oh, yes, I put it in the police box, because that's the routine, that's what I have done on every occasion before." It may be that I assumed that I'd done it, if I

[31] PIC Transcript, R M Hill, 15 November 2004, pp. 104-5.
[32] PIC Transcript, R M Hill, 16 November 2004, p. 144.

> didn't see it on the trolley, for example, alright? And that gave me a false sort of idea that I'd put it in the box, when indeed I hadn't.

3.27 As to what he did with the Patient Sample, Dr Hill gave the following evidence:[33]

> Once the blood's in them I put the top on the tubes. I label the tubes with the supplied identifying adhesive labels – they have a number on them. I then fill out the paper – I do this at the bedside, and I'm sure I did it on this occasion. Then I fill out the paperwork that's involved in the procedure, I put the – the part of the sample and the three copies of the form that are required by the police into the supplied biohazard bag and the other sample – that means the patient's sample – with the pink form that is with it, I usually, and I can't remember whether I did on this occasion, but I think I probably did, put it into a separate biohazard bag that I just get from – that I get, a hospital biohazard bag.

3.28 Dr Hill claimed that he was *"pretty confident"* that with the exception of placing the Patient Sample into a separate biohazard bag, his evidence was based on *"actual memory and not just a memory based on routine".*[34] He had no actual memory of placing the Patient Sample and the patient paperwork (i.e. the pink certificate) into a plastic bag.[35]

3.29 Later, when cross examined, he said:[36]

> Q:— You would agree, would you not, that at no stage after taking the blood did you leave it for anything like five minutes?
>
> A:— I don't know. I mean, that's an area - I may very well have been called away at that time of night. I can't say that I was there until I completed the whole process. I would imagine I was there until I at least had it to the stage where it was bagged up and ready to go, but I can't - that's the point, I can't recall then taking it around to the police box.

3.30 Dr Hill denied that he had given the Police Sample together with its paperwork to Mr Shaw.[37] It was suggested to Dr Hill that it was possible that the patient's pink certificate had been placed inside the biohazard bag with the Police Sample. He gave the following evidence:[38]

> Q:— Is it possible that the patient's pink form – do you know what I mean - …?
>
> A:— The pink form, yes.
>
> Q:— … might have been placed inside the biohazard bag with the police form?
>
> A:— Anything's possible, but it would be unlikely. It's a procedure that I'm very familiar with and that I have done on a lot of occasions. I mean, anything's possible, but I wouldn't imagine that it would be likely because you tear off the patient's form, it's the bottom one, and leave it with the patient's sample of blood.
>
> Q:— So you don't discard that as being something which would not have happened, you think it might have happened but it's unlikely?

[33] PIC Transcript, R M Hill, 15 November 2004, p. 104.
[34] PIC Transcript, R M Hill, 15 November 2004, p. 104.
[35] PIC Transcript, R M Hill, 15 November 2004, p. 104.
[36] PIC Transcript, R M Hill, 16 November 2004, p. 153.
[37] PIC Transcript, R M Hill, 16 November 2004, p. 149.
[38] PIC Transcript, R M Hill, 16 November 2004, p. 156.

A:— I said it's possible that it could have happened. It would be extremely unlikely.

Q:— It's possible both vials went into the one bag, isn't it?

A:— No I don't think so.

3.31 Nurse Grant gave evidence of observing Dr Hill filling the two blood alcohol vials with blood from a 10 ml syringe and then sealing the vials.[39] Nurse Grant then looked on the cannulation trolley to see if the required documentation had been completed. It was his intention to take the Police Sample and place it in the blood collection box.[40] As the documentation had not been completed, he walked away and attended to other duties.[41]

3.32 He gave the following evidence:

Q:— So you realise, obviously, that the sample isn't yet in a condition where it can be put into the police blood box, so what did you do?

A:— I walked away.

Q:— Did you then attend to other duties?

A:— I did.

Q:— For what period of time, do you think?

A:— No more than 15 minutes.

Q:— Did you then come back to the area where Bed 1A is?

A:— I did.

Q:— What did you observe when you got there?

A:— I looked at the cannulation trolley, on top of which was left – inside the blood alcohol sample bags, the sealed bags, are two forms. One is for the RTA and one is for the Maritime …

Q:— If it's a boating accident?

A:— Yes. And I observed the plastic bag that is – like the sealed bag, and it was open, and also the maritime form was left there not filled out.

Q:— When you say "the bag", are you referring to the blood alcohol sampling kit bag?

A:— Yes.

3.33 And later:[42]

Q:— Might I have that bag back and I will take the remaining form back as well. When you observed the cannula trolley, were the boating forms within the blood alcohol sampling kit bag?

A:— That's not my memory.

Q:— They'd been taken out, had they?

A:— Yes, the sample bag was ripped open and the marine forms were sitting on the cannulation trolley as well.

Q:— So the marine forms and the blood alcohol sampling kit bag, being what I have just shown you, were sitting on top of the cannulation trolley?

A:— That's my memory.

[39] PIC Transcript, M J Grant, 15 November 2004, p. 79.
[40] PIC Transcript, M J Grant, 15 November 2004, p. 80.
[41] PIC Transcript, M J Grant, 15 November 2004, p. 81.
[42] PIC Transcript, M J Grant, 15 November 2004, p. 83.

…

Q:— Did you observe anything else on top of the cannulation trolley?

A:— Nothing that's of note.

Q:— Right. Did you observe something else somewhere else in the room?

A:— I did. At the head of where I've marked Mr Shaw's bed and placed a B on it, on the form, at the head of that north side is a shelf and on that shelf I saw a sealed vial, full of blood, and the pink patient copy of the RTA form.

Q:— So what was present, as you observed it, within that area apart from what was on the cannulation trolley, was what we can colloquially describe as the patient sample and the patient's pink paper?

A:— Yes.

Q:— And they were on a shelf above Mr Shaw's head?

A:— Yes.

Q:— And he was lying in bed, was he?

A:— Yes.

3.34 And later still:[43]

Q:— Was there any sign within that area at all of the biohazard bag, the other sample and the bits of paper that accompany the police notebook?

A:— No.

Q:— Was Dr Hill within the proximity of Bed 1A when you went back and made these observations?

A:— No.

3.35 Nurse Grant gave the following further evidence:[44]

Q:— Later during that evening did you walk into the area where Bed 1A was located and take the sample and the pink piece of paper

A:— Yes.

Q:— Where did you take it?

A:— I took it back to where I was initially sitting when I spoke to the police, which is at the front of the staff base central monitoring area.

Q:— When you took it back there, what did you do with it?

A:— I held it, looked at it, put it in front of me. I was thinking …

Q:— I will come to what you were thinking in a moment.

Mr Barker I'm sorry, what's he looking at?

Mr Rushton He's looking at a vial of blood with a pink piece of paper – that is, the pink patient piece of paper …

Mr Barker The one on the shelf?

Mr Rushton … which was on the shelf.

Q:— Was there a reason why you took that sample and the pink piece of paper back to the nursing station?

A:— Yes.

Q:— What was that?

A:— I was not sure that Mr Shaw was aware that that was his sample of blood that he was to take home with him.

[43] PIC Transcript, M J Grant, 15 November 2004, p. 84.
[44] PIC Transcript, M J Grant, 15 November 2004, p. 84.

> Q:— Did you take it over to the nursing station to, for example, put it in his pigeon hole, so that when he ultimately signed out somebody would give it to him?
>
> A:— No, I took it back there to decide what I was going to do with it – whether to keep it at the staff base or to place it back with Mr Shaw.
>
> Q:— Can I ask you this: Had you kept it, would you have put it into his pigeon hole?
>
> A:— I'm not sure. I've never kept a sample.
>
> Q:— But his other records were located in his pigeon hole, weren't they?
>
> A:— Yes.
>
> Q:— Now, what do you say you did with the sample?
>
> A:— Not long after I took it back to staff base, I decided that, being the patient's copy, it was important to stay with the patient, so I took it back to the head of his bed. I was not aware of a bag with, like – if he carried a bag, I would have placed it in the bag. I wasn't aware of a bag that he carried, so I just left it at the head of the bed.

3.36 Nurse Grant said that before he took the Patient Sample and patient pink slip back to the nursing station, he had asked Dr Hill whether he had *"filed the blood alcohol sample"* (i.e. the Police Sample) and Dr Hill *"used words to the effect that he had"*.[45]

3.37 Mr Shaw supplied a signed statement to the Commission on the first day of the hearing, prior to the commencement of the evidence, which contained the following, at paragraph 5:[46]

> On 14 October 2004 in the early hours of the morning at Royal Prince Alfred Hospital a blood sample was taken from me by either a doctor or a nurse. I am not sure who it was. After a short time, the doctor or nurse came back into the treating room and provided me with a plastic bag. I was informed by the doctor or nurse that a sample of my blood was being provided to me and that a sample of my blood would be forwarded to the NSW Police for routine testing for alcohol.

3.38 In his evidence on the first day of the hearing, Mr Shaw initially adhered to the above version of events. He believed that the version of events outlined in the above quoted paragraph of his statement was *"correct"*[47]. Later in evidence he moved away from that statement and adopted the position that he was not handed a bag until his discharge from RPAH.

MR SHAW ATTEMPTS TO LEAVE THE HOSPITAL

3.39 Shortly after Nurse Grant had observed the Patient Sample and the pink certificate on the shelf behind Mr Shaw and nothing on the cannulation trolley other than the empty blood sampling kit and the marine paperwork, Mr Shaw attempted to leave the hospital.

3.40 On the first day of the hearing Mr Shaw was questioned about this:[48]

[45] PIC Transcript, M J Grant, 15 November 2004, p. 86.
[46] PIC Exhibit 2.
[47] PIC Transcript, J W Shaw, 15 November 2004, p. 18.
[48] PIC Transcript, J W Shaw, 15 November 2004, p. 21.

Q:— At approximately 2.30 on 14 October, you tried to leave the hospital, didn't you?

A:— I did – I did think I ought to go home, yes. I thought I was sufficiently well to go home.

Q:— You commenced to dress yourself?

A:— Yes.

Q:— And at that point can I suggest you were approached by a member of the nursing staff who tried to explain to you that it wasn't appropriate to leave?

A:— I think that is so.

Q:— Can I suggest that you agreed, you took your shirt off again, put the hospital gown on, and climbed back into bed?

A:— I believe that is so.

3.41 Nurse Grant gave evidence that he had observed Mr Shaw dressing, and had spoken with him:[49]

Q:— Thank you. What's your next memory of having any contact with Mr Shaw that evening, or that morning, rather?

A:— My next memory is of me being in the vicinity of Mr Shaw's bed and seeing him being out of bed, getting changed into his work clothes. I approached him and asked him what he was doing. He told me that he didn't see any reason why he needed to stay in hospital and that he was going home.

…

Q:— In response to his suggestion that he didn't see any reason why he had to stay and he was leaving, did you say something to him?

A:— I think I said that we were intending on scanning his head to see if there were any injuries and it was important that he stay with us so we could observe him to rule out any serious injury to him.

Q:— What happened then?

A:— He then complied and got undressed, took his jacket off and lay down on the bed.

3.42 That conversation was put to Mr Shaw:[50]

Q:— Well can I suggest this to you and obtain your comment, that around half past two you were spoken to by a male nurse, Nurse Grant, and he said that at 2.30 he noticed you were getting up out of your bed and you were getting dressed and appeared to be intending on leaving the Department. He then said this, "I asked him" – that's you – "where he was going. He said to me, my memory is, that he felt fine and that he would like to go home". Does that accord with your recollection?

A:— I think that is so, yes.

Q:— He then says, "I explained to him that we were concerned because he'd had a head injury, that we wanted to observe him for at least four hours, and I think at that time we were waiting for a CT scan for him."

A:— I think that is so.

Q:— So he observes you preparing to leave, you tell him you're feeling fine and you'd like to go home; is that right?

[49] PIC Transcript, M J Grant, 15 November 2004, p. 86.
[50] PIC Transcript, J W Shaw, 15 November 2004, p. 22.

A:— I wouldn't say "fine". I would have thought I would have said words to the effect that I think I'm sufficiently well to go home and go to bed at home.

MR SHAW LEAVES THE HOSPITAL

3.43 Shortly after the above exchange, despite the advice given to him and without notice to any hospital staff, Mr Shaw left the hospital. He did not go home to get some rest but went to his chambers at the Supreme Court building in the city. The evidence indicates that Mr Shaw left the hospital some time after 2.30 a.m. and entered the Court building just after 3.00 a.m.

3.44 Mr Shaw initially told the Commission that he could not recall going to the Supreme Court. His evidence on the first hearing day was as follows:[51]

Q:— But a few minutes later, I suggest, you left the hospital, did you not?

A:— I can't actually recall that.

Q:— Can I suggest to you that at approximately 2.30, or thereabouts, you left the hospital?

A:— I can't actually recall that.

Q:— Well let me refresh your memory perhaps. At approximately 2.30, I suggest to you, Mr Shaw, you left hospital and went to the Supreme Court Building. What do you say to that?

A:— Well I certainly can't recall that.

Q:— I suggest that – sorry, did I cut you off?

A:— No.

Q:— You entered the Supreme Court Building, I suggest, at four minutes past three in the morning?

A:— Well, you might be right, but I have no recollection of that.

Q:— Are you saying on your oath that your recollection is that you never left the hospital that night?

A:— No, I'm not saying that; I'm saying I can't recollect, and I'm saying that my object was to really get home.

Q:— Well if your object was really to get home, it would be unlikely in the extreme, would it not, that you would, particularly after receiving the advice that you did, make your way to your place of work at three o'clock in the morning?

A:— Yes.

Q:— It would be unlikely in the extreme, would it not?

A:— Well, it would be unlikely.

3.45 On the third hearing day the following exchange took place:[52]

Q:— The hospital records indicate that sometime between 2.30 and 3.30 in the morning you went missing from the hospital. Do you accept that that happened?

A:— Again, I can't dispute it, if that's what the hospital records say.

[51] PIC Transcript, J W Shaw, 15 November 2004, p. 22.
[52] PIC Transcript, J W Shaw, 17 November 2004, p. 195.

> Q:— What do you say to the proposition that when you left the hospital, you had the Police Sample with you?
>
> A:— I say that's completely wrong. I did not at any stage handle that Police Sample until I was given the plastic bag upon departure from the hospital, from the Royal Prince Alfred Hospital.

3.46 The Commission obtained security records from the Supreme Court of NSW for the relevant date. The security surveillance system recorded Mr Shaw entering the Supreme Court building at 3.04 a.m., holding in his right hand an object which looked like a plastic bag. The video also recorded him departing the same building at 4.42 a.m. with what looked like a book or a journal in his hand.

3.47 On the third hearing day Mr Shaw was shown the video[53] and a still photo taken therefrom.[54] When questioned Mr Shaw did not dispute that the video showed him entering and leaving the court building.[55] When asked if he could see in the photo what looked like a plastic bag in his hand, Mr Shaw was unable detect it.[56] When asked if he took a book or legal publication with him when he left the court he said he took an Australian Law Journal with him.[57]

3.48 There was evidence from Mr Robertson that Mr Shaw was not carrying anything with him went he first went to hospital. Mr Robertson said that, apart from the plastic bag in which Mr Shaw's clothes were put, he did not see any other bag. [58] Nurse Grant said he could not remember Mr Shaw carrying anything.[59]

3.49 Mr Shaw was asked if he travelled to his chambers and back to the hospital by taxi. He said all of his travel that evening was by taxi. [60]

3.50 Mr Shaw's journey to chambers was made in circumstances where he was at least aware that Mr Robertson had called Mrs Shaw to ask her to come to the hospital.[61]Mr Robertson told the Commission that, after obtaining Mr Shaw's agreement, he telephoned Mrs Shaw from his mobile phone at 2.27a.m. and asked her to come to the hospital.[62]

3.51 Mr Shaw told the Commission that one of the things he had in his mind when he left the hospital was two judgments that had been prepared and that he was to deliver later that morning at 9.30 a.m.[63] However, according to Mr Robertson he (Robertson) had, with Mr Shaw's agreement, assumed responsibility for advising Mr Shaw's associate that Mr Shaw would not be attending Court on 14 October 2004. He said:[64]

> I obtained his consent in that conversation to ring his associate at 9.00 a.m. that morning and ask her to contact counsel appearing in the case to let them know that the Judge was sick and couldn't attend, but the matters would be

[53] PIC Exhibit 17.
[54] PIC Exhibit 16.
[55] PIC Transcript, J W Shaw, 17 November 2004, p. 199.
[56] PIC Transcript, J W Shaw, 17 November 2004, p. 199.
[57] PIC Transcript, J W Shaw, 17 November 2004, p. 200.
[58] PIC Transcript, T F Robertson, 15 November 2004 p. 56.
[59] PIC Transcript, M J Grant, 15 November 2004, p. 67.
[60] PIC Transcript, J W Shaw, 17 November 2004, p. 198.
[61] PIC Transcript, J W Shaw, 17 November 2004, p. 193.
[62] PIC Transcript, T F Robertson, 15 November 2004, p. 50.
[63] PIC Transcript, J W Shaw, 17 November 2004, p. 192.
[64] PIC Transcript, T F Robertson, 15 November 2004, p. 50.

> relisted the following day, and I wrote down the name and telephone number of the associate on a piece of paper in my wallet, which I happen to still have.

3.52 Shortly before 9.00 a.m. on 14 October 2004, Mr Robertson telephoned Mr Shaw's associate as arranged.

MR SHAW IS LOCATED AND PERSUADED TO RETURN

3.53 Nurse Grant told the Commission that he discovered Mr Shaw was missing from the hospital when Mrs Shaw arrived to collect him at approximately 3.30 a.m. Mr Shaw was not in his bed and a search of the area failed to locate him. On asking the triage nurse if she had seen Mr Shaw, Nurse Grant was told that Mr Shaw had been seen walking out of the department in his clothes approximately half an hour beforehand.[65]

3.54 Nurse Grant spoke to Mrs Shaw and told her it was important Mr Shaw be found and returned to the hospital. He asked her to go home and look for him and call him when she got there. An entry in the hospital notes indicates that Mr Shaw had still not been found at 4.20 a.m.[66]

3.55 Nurse Grant called the Shaw home and Mrs Shaw advised that she had not found her husband. Nurse Grant reminded her they were concerned for his health and Mrs Shaw said that she would try him at work.[67]

3.56 Nurse Grant then rang Glebe Police and asked if they could send anyone out to look for Mr Shaw. He was told that it was a busy night and there would not be a car available until 6 o'clock in the morning.[68] Approximately 10 minutes later Mrs Shaw spoke to Nurse Grant again and told him Mr Shaw was at work. Nurse Grant told her they really needed him to return to the hospital and asked her for the work number. She said that she would rather her husband call them and promised that she would call him and ask him to call the hospital to find out why he needed to return to the department.[69]

3.57 Shortly after that Mr Shaw called the hospital and spoke to Nurse Grant. Nurse Grant gave the following evidence of the conversation:[70]

> Q:— Just stopping you there, doing the best you can, can you tell us what you said to him and what he said to you?
>
> A:— I asked him why he had left the department. He said to me that he didn't think that he needed to be there. I said that I thought it was quite important that he was there because we were concerned that he might have a brain injury. He said to me he felt fine. I said, "you might feel fine, that doesn't exclude a brain injury. If you have a brain injury, it would be hard to determine what would be fine for oneself." He indicated to me that he once again, felt fine and that he saw no need to return to the department. I emphasised how important it was and that he could well have a brain injury that's bleeding slowly, and that he might

[65] PIC Transcript, M J Grant, 15 November 2004, pp. 88-9; PIC Exhibit 10.
[66] PIC Transcript, M J Grant, 15 November 2004, pp. 88-9.
[67] PIC Transcript, M J Grant, 15 November 2004, p. 90.
[68] PIC Transcript, M J Grant, 15 November 2004, p. 90.
[69] PIC Transcript, M J Grant, 15 November 2004, p. 90.
[70] PIC Transcript, M J Grant, 15 November 2004, p. 91.

> fall on the floor and be found in the morning dead. He once again said that he felt fine and he didn't think that was going to happen. I then said, "Mr Shaw, if you're worried about us taking a blood alcohol sample, you should not, because we already have taken one". He said, "really?" I said, "yes". He questioned me as to why, or when that was done. I indicated that was done when he first arrived, and at that point he said that he would catch a cab back to the hospital to get a CT scan.

3.58 In his evidence on the third hearing day, Mr Shaw said it was not until that telephone conversation in his chambers that he became aware of the medical risks. He gave the following evidence:[71]

> Q:— You did not want to go back to the hospital, did you?
>
> A:— Well, I didn't see the need to until it was explained to me in rather graphic terms, that despite the fact that you might feel all right, you might have brain damage and you might be dead in the morning. That advice rather dented my ignorance about the matter and I was prepared to take that advice. And if the hospital thought that it was essential, or not even essential, but important or useful in any treatment of me to enable me to survive, I was prepared to accept that advice and to go back to the hospital.
>
> Q:— What do you say to the suggestion that you steadfastly resisted any suggestion to go back to the hospital until nurse Grant said to you, "Mr Shaw, if you're worried about us taking a blood alcohol sample, you should not, because we've already taken one"?
>
> A:— I reject that that was any material part of my thinking. My thinking was only in relation to my health, and that's the reason why I returned to the hospital.

3.59 Mrs Shaw was *"surprised"* that her husband had agreed so quickly to returning to the hospital. Her evidence was as follows:[72]

> Q:— Is it possible that at some point around that time you telephoned the hospital and spoke to a Nurse Grant and indicated to Nurse Grant that your husband wanted to know why he had to come back?
>
> A:— No, not at all.
>
> Q:— Alright.
>
> A:— I was actually surprised that he agreed so rapidly to go back. I was pleased, but a bit surprised. No, that didn't take place at all.
>
> Q:— You had an expectation that he would have gone from the hospital to home?
>
> A:— I did.
>
> Q:— Did he indicate to you at all why it was that he had turned up at work at that time in the morning?
>
> A:— No.

MR SHAW RETURNS TO HOSPITAL

3.60 The Outpatient Notes from RPAH contain an entry made by Nurse Grant at 5.35 a.m. that *"Patient has re-presented to RPA. Awaits head CT"*.

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[71] PIC Transcript, J W Shaw, 17 November 2004, p. 196.
[72] PIC Transcript, E Shaw, 15 November 2004, p. 35.

3.61 At some point prior to Mr Shaw's return Dr Hill took possession of the Patient Sample and pink slip. This is consistent with Nurse Grant's recollection that following Mr Shaw's departure from the hospital some time after 2.30 a.m. and before his re-presentation, he had changed the sheets of Bed 1A but had not then noticed the Patient Sample at the head of the bed.[73]

3.62 Dr Hill made the following entry in the hospital notes underneath the abovementioned entry by Nurse Grant:

> Pt returned to EP. Head CT NAD. Neurologically still mildly decreased sensorium – mildly clouding. Needs Neuro Obs, 4/24.

3.63 He gave the following evidence:[74]

> Q:— Did you have any further contact with Mr Shaw after he had re-presented at 5.35?
>
> A:— Well, I would have written that entry after I'd seen him, so I saw him again after his return. To the best of my memory, I gave him at that time his copy of the blood sample. I hadn't given it to him earlier, because he wasn't in a situation mentally to appreciate the advice that needed to be given about storage and this sort of thing, so, as I remember it, I either stuck it to the ring clip in his notes or I put it in the back of his allotted pigeon hole in the nursing station. Then, when he returned, I got it out, went down and gave it to him.
>
> Q:— All right. Did you have a discussion with him at the time of handing it over?
>
> A:— Yes I did
>
> Q:— To the best of your recollection, what did he say to you and what did you say to him?
>
> A:— Okay. First of all, I gave him the sample and I explained to him that this was his sample that had been taken for police analysis. And he said, "Oh I wish you hadn't done that". And I said "Why? It's the law." And he said, "I could have had it done privately."
>
> Q:— And what did you say?
>
> A:— Well, I didn't say anything in answer to that particularly, but I then had a look at the address at the top of the sheet that we have, which lets me know what suburb that he lives in. I noticed that it said Birchgrove. So I had a look at him and asked him what he did for a living. He said he was a solicitor. I looked at his age, and he was about my age, and I said to him, "You are a bit old, and it's a bit of an insult to both our intelligences for me to have to sit down on the bed like this and tell you how you have endangered your life by leaving the hospital before you are fit to do so." That was our conversation. He didn't say anything in answer to that, particularly, that I recall.
>
> Q:— Tell us exactly what you handed over to him.
>
> A:— The vial and his pink copy of the blood sample, the police – you know, the blood alcohol sample. They would have been in a disposable – one of our own hospital disposable bags – sorry, biohazard bags.
>
> Q:— Right. Now, I want to get your comment on something that has been said in the proceedings by Mr Shaw. He has provided a statement to the Commission and he says this, and he's referring to a short time after the sample was actually taken – do you understand that?

[73] PIC Transcript, M J Grant, 15 November 2004, p. 94.
[74] PIC Transcript, R M Hill, 16 November 2004, pp. 148-9.

A:— Yes. What, before he decamps from the hospital the first time?

Q:— Yes. I assume that's what he's saying, because he says:

> "A short time after the sample was taken, the doctor or nurse came back into the treating room and provided me with a plastic bag. I was informed by the doctor, or nurse, that a sample of my blood would be forwarded to the New South Wales Police for routine testing for alcohol."

Q: - Now, first, at some point did you inform Mr Shaw that a sample of his blood would be forwarded to the New South Wales Police for routine testing for alcohol?

A:— I don't recall doing that at the actual time of taking, no.

Q:— But, as you have indicated, you had a conversation with him some time after 5.35?

A:— When he'd been retrieved and returned to the hospital, I had to go down and eyeball him to make sure he hadn't done something further to himself, that his clinical condition was stable.

Q:— Secondly, I want you to assume for the moment that at some point both the Police Sample and the patient's sample came into Mr Shaw's possession. Now will you assume that for me?

A:— All right.

Q:— Doctor, did you give Mr Shaw the Police Sample, together with the paperwork which should have accompanied that Police Sample?

A:— No.

3.64 When Mr Shaw returned to the witness box on 17 November he was asked about his earlier evidence concerning the handing over of the bag by the doctor or nurse: [75]

Q:— What do you say to the possibility that around 5.35a.m. Dr Hill came to see you and handed you the patient sample and the pink slip?

A:— The only recollection I have is the handing over of a plastic bag with certain contents that I didn't at that stage examine.

Q:— Which you say happened shortly after the sample was taken , do you not?

A:— No, I thought it was at or about the time of departure from the hospital.

Q:— You don't say that in your statement, sir. In paragraph 6 of your statement you say quite clearly that shortly after the sample was taken it was handed over to you. Do you want to change that evidence?

…

Q:— I do apologize, paragraph 5, where the witness says:

> "On 14 October 2004 in the early hours of the morning at Royal Prince Alfred Hospital a blood sample was taken from me by either a doctor or a nurse. I am not sure who it was. After a short time, the doctor or nurse came back into the treating room and provided me with a plastic bag."

Q:— Do you want to change that evidence, sir?

A:— No, that may well be right. I had it in my mind that it was at the time of departure. The plastic bag might have been given earlier.

[75] PIC Transcript, J W Shaw, 17 November 2004, pp. 201-2.

> Q:— Wasn't this the case, that what was handed over to you at the time of departure was a sample, but it was the patient's sample and your pink slip?
>
> A:— I don't know what characterisation the material bore.
>
> Q:— Do you accept that something was handed over to you on your departure?
>
> A:— That's my recollection, yes.
>
> Q:— In fact, a doctor came down to explain to you what he was giving you and you expressed some disappointment, did you not, that a sample had been taken?
>
> A:— No, I don't believe so. I think this is what I adverted to before. I expressed some surprise that the sample would be given to the police, but, as it turns out, there was nothing untoward about that.

3.65 Upon his discharge from hospital at approximately 9.20 a.m. on 14 October 2004, Mr Shaw went home with Mrs Shaw. He did not go to Court.

SUBSEQUENT EVENTS

3.66 On 17 October the hospital contacted NSW Police and asked that the blood sample box at RPAH be collected because it was full. Senior Constable Gerd Schmahl of the Traffic Technology Section collected an empty box from his office at Parramatta the same day and travelled to the hospital and changed the boxes over.[76]

3.67 Senior Constable Schmahl gave evidence on 16 November 2004. He said he took the box off the bracket on the wall using a key from the keyring of his police vehicle. He told the Commission the hospital did not have a key for removing the box from the bracket.[77] Senior Constable Schmahl placed the full box in the back of his vehicle where it remained until he delivered it to the Blood Sampling Unit at Parramatta on 19 October. He filled out the necessary particulars and informed someone at the Unit that he changed the box over at RPAH.[78]

3.68 Senior Constable Schmahl did not open the box. He did not have access to a key to do so. He was not able to offer any explanation as to why Mr Shaw's sample was not in the box.[79]

3.69 Constable Raymond Forrest of the Blood Sampling Unit gave evidence on 17 November 2004. He described the procedure for opening the blood boxes which had come from the hospitals. Once the vials were removed and checked against the paperwork and recorded, they were refrigerated until they were transported the next day or day after to a laboratory at Lidcombe for analysis.[80]

[76] PIC Transcript, G Schmahl, 16 November 2004, p. 178.
[77] PIC Transcript, G Schmahl, 16 November 2004, p. 178.
[78] PIC Transcript, G Schmahl, 16 November 2004, pp. 179-80.
[79] PIC Transcript, G Schmahl, 16 November 2004, pp. 180-2.
[80] PIC Transcript, R A Forrest, 17 November 2004, p. 220.

3.70 Constable Forrest signed a receipt for the box from RPAH containing 18 vials which was delivered by Senior Constable Schmahl on 19 October 2004.[81] Mr Shaw's was not among them. When asked by Counsel Assisting whether he took or spirited away a vial from that box Constable Forrest said he did not.[82]

3.71 Mr Shaw said in his signed statement, that sometime between 14 October and before his departure to China for a conference on 16 October he examined the contents of the plastic bag from the hospital. He saw that it contained two vials and a yellow paper and a white paper.[83] He stated that on or about 15 October 2004, he asked Mr Adam Searle, a barrister, to take custody of the plastic bag for *"safe keeping"*.[84] (In his unsigned statement provided to the Commission on 12 November,[85] Mr Shaw did not disclose that he had the samples removed from his home). Mr Shaw gave the following evidence on 15 November:[86]

> Q:— In your statement that you provided to the Commission this morning, you indicate that you asked Mr Adam Searle to take custody of the plastic bag for safe keeping?
>
> A:— Yes.
>
> Q:— Why did you do that?
>
> A:— Well, for a number of reasons. I thought it was important that I had the sample. I assumed the policy purpose of giving the patient the sample, or the person whose blood had been taken the sample, was to enable independent checking. Therefore, I thought it was important to keep that in a safe way. I thought our house was fairly chaotic and filled with books and other items. I felt that I was preparing to go overseas and that, in all the circumstances, he was a person who would safeguard material and preclude any suggestion that the sample had been altered or destroyed.
>
> Q:— How did the plastic bag come into his possession?
>
> A:— I believe my wife took it to him.

3.72 Mr Shaw's evidence was at odds with that of Mrs Shaw and Mr Searle in relation to the date the bag was given to Mr Searle. Mrs Shaw gave the following evidence:[87]

> Q:— Commissioner: How did it get to Mr Searle's Chambers, do you know?
>
> A:— Yes. Adam – on the Wednesday before Jeff went into hospital, Adam came to the house. He was up in the study with Jeff. I was with them for a while. I made them a cup of tea and then I came down again. When I came down, Jeff said that he had given it to Adam for safe keeping and to get (it) out of the house.
>
> Q:— Adam being Adam Searle?
>
> A:— Adam Searle.
>
> Q:— Can you put a date on that, approximately?
>
> A:— That was the Wednesday before he went into hospital, and he went in – I'm sorry, I'm a bit rusty on dates. I could check, if you like.

[81] PIC Exhibit 21C.
[82] PIC Transcript, R A Forrest, 17 November 2004, p. 222.
[83] PIC Exhibit 2, paragraph 6.
[84] PIC Exhibit 2, paragraph 7.
[85] PIC Exhibit 4.
[86] PIC Transcript, J W Shaw, 15 November 2004, p. 26.
[87] PIC Transcript, E Shaw, 15 November 2004, p. 43.

> Q:— If you don't mind, if you are able to.
>
> A:— That was 3 November, the day after Melbourne Cup day.
>
> Q:— Thank you. It was also after the publicity commenced about the sample, do you recall?
>
> A:— Yes.

3.73 Similarly, Mr Searle provided the following evidence in a statement supplied to the Commission:[88]

> 6 My first clear recollection of speaking with Mr Shaw is that I telephoned him on the evening of 2 November 2004 in response to a message he had left earlier in the evening. He told me that he wanted to see me when I was able to do so and that he was at home. In this call he told me that Paul Byrne and Arthur Moses would be acting in any proceedings, but that he wanted to get my advice. Either in this call or when I next saw him, he said to me that given our closeness it would be better if I did not act for him in any legal proceedings. The conversation otherwise discussed his health and well- being and that of my father.
>
> 7 On Wednesday 3 November 2004 at about 11.00 a.m., I attended the home of Mr and Mrs Shaw in Birchgrove. I was admitted by Mrs Shaw and had a brief conversation with her (in which I asked her how she and Mr Shaw were) I was taken to the study. There, I had a conversation with Mr Shaw. Mr Shaw had been looking frail for some time, especially when I saw him on 10 October 2004 (Mr Shaw's birthday). I had not seen Mr Shaw between 10 October and 3 November. I was shocked by his appearance on 3 November. He appeared manifestly ill and distressed … We then discussed the keeping, whilst he was in residential treatment, of the blood sample he had received from the hospital. He asked me whether I would keep it temporarily. I said that it would be preferable if it were with his solicitor (this matter was further discussed after a conference with Mr Byrne and I cannot recall exactly what was said during which conversation). His solicitor is based in Newcastle and he has no Sydney office. I took the package on the basis that it was a temporary arrangement until it could be collected by his solicitor.

3.74 On the afternoon of 5 November 2004, Mrs Shaw delivered the following items within a biohazard bag to Glebe Police Station:

- one sealed vial of blood bearing the number 501534;
- the original white Blood Testing Certificate completed by Dr Hill;
- the yellow carbon copy Blood Testing Certificate being the Government Analyst copy;
- the blue carbon copy Blood Testing Certificate being the Police copy;
- the pink carbon copy Blood Testing Certificate being the Patient copy.

3.75 On 13 November 2004, Mrs Shaw delivered to the Commission a second sealed vial of blood also bearing the number 501534. It was not contained in a bag. She declined to make a statement. The Commission's public hearing commenced on 15 November 2004.

[88] PIC Exhibit 20.

4. ASSESSMENTS AND OPINIONS

4.1 As noted in the previous chapter, Mr Shaw said in two separate statements supplied to the Commission prior to the commencement of the hearing that shortly after the blood sample was taken from him at RPAH the doctor or nurse provided him with a plastic bag and informed him that one sample was being provided to him and one would be forwarded to NSW Police for alcohol testing.

4.2 When questioned in evidence on the first day of the hearing Mr Shaw initially adhered to the above version of events however by the third day of evidence he appeared to adopt the position that he was not handed a bag until his departure from the RPAH later on the morning of 14 October 2004.[89]

4.3 In the Commission's assessment the issues which arise are:

- Was the Police Sample separated from the Patient Sample?
- Was the Police Sample and accompanying paperwork placed in the Police box?
- Did Dr Hill give the Police Sample to Mr Shaw after he completed the paperwork?
- Was the Police Sample mistakenly "bagged up" with the Patient Sample and given to Mr Shaw when he left the hospital?
- Did Mr Shaw take the Police Sample and accompanying paperwork from the trolley?
- Did some other person take the Police Sample and its paperwork?

4.4 In considering these matters the Commission is mindful that the evidence of Dr Hill lacked certainty in some significant respects and must be weighed carefully.

4.5 The evidence of Nurse Grant was detailed and consistent, and given in a clear and credible manner. In the Commission's view it should be accepted.

WERE THE TWO BLOOD SAMPLES SEPARATED?

4.6 That the Police Sample and its paperwork had been divided from the Patient Sample and its paperwork is supported by evidence that the latter was observed separately from the former on more than one occasion, namely:

- Nurse Grant's evidence that he observed the unbagged Patient Sample and patient paperwork on the shelf above Mr Shaw's bed. He also gave evidence of taking and examining the sample and its paperwork at the nursing station before returning them to the shelf. At the time he saw them on the shelf, there was no sign of the Police Sample and paperwork in the area of Mr Shaw's bed or the cannulation trolley;

[89] PIC Transcript, J W Shaw, 17 November 2004, pp.195, 198, 201-2

- Dr Hill's evidence that at some time prior to 5.30 a.m. on 14 October 2004, he took possession of the Patient Sample and either placed it with Mr Shaw's hospital notes or placed it in Mr Shaw's pigeon hole at the nursing station; and
- Dr Hill's evidence that the Patient Sample and its paperwork was handed over to Mr Shaw in a bag some time after 5.30 a.m.

4.7 The Commission is satisfied that following the extraction of the blood sample by Dr Hill from Mr Shaw, the Police Sample and its paperwork were *"bagged up"* by Dr Hill, and the Patient Sample with its paperwork was separated from it and placed on a shelf above Mr Shaw's bed.

4.8 The Commission is also satisfied that Mr Shaw was not given both samples by a doctor or nurse shortly after the sample was taken, as the Patient Sample and its paperwork were observed afterwards by both Doctor Hill and Nurse Grant at separate times.

WAS THE POLICE SAMPLE AND ACCOMPANYING PAPERWORK PLACED IN THE POLICE BOX?

4.9 Dr Hill originally stated to police that he placed the Police Sample and the police paperwork in the metal box, but subsequently conceded he had no actual recollection of doing so. There is no independent evidence that he did so or that any other person did. It was not in the police box when it was opened at the Blood Sampling Unit. It is the Commission's opinion that Dr Hill did not do so and that the Police Sample was never placed in the box.

DID DR HILL HAND THE POLICE SAMPLE TO MR SHAW?

4.10 If Dr Hill handed the Police Sample to Mr Shaw it can only have happened in one of two ways:

- the Police Sample was given to Mr Shaw by Dr Hill shortly after 2.15 a.m. on 14 October 2004 and later, namely, at some time after 5.35 a.m. on 14 October 2004, he also gave to Mr Shaw the Patient Sample with accompanying paperwork; or
- both samples and their respective paperwork were placed in a bag and given to Mr Shaw at the same time after 5.35a.m.

4.11 For the following reasons, the Commission considers both the above alternatives to be highly unlikely:

- Dr Hill was an experienced medical practitioner and had been employed by RPAH for approximately ten years.[90] He had carried out mandatory blood sampling following motor vehicle accidents on many occasions,[91] and was familiar with the process and purpose of filling the two vials,

[90] PIC Transcript, R M Hill, 15 November 2004, p. 99.
[91] PIC Transcript, R M Hill, 15 November 2004, p. 99.

and the paperwork involved. The paperwork itself, being colour-coded, was also visually distinctive and difficult to mistake.

- That being so, the Commission considers it unlikely that, even if Dr Hill had the Police Sample immediately prior to handing Mr Shaw a plastic bag in the morning, he would have mistaken the Police Sample and its paperwork for the other and placed both in the one bag. It is even more unlikely that Dr Hill would have separately handed the samples to Mr Shaw at different times.

4.12 The Commission is satisfied that Dr Hill did not hand over the Police Sample to Mr Shaw in error.

4.13 In the Commission's opinion, what was handed over to Mr Shaw by Dr Hill prior to his departure was the Patient Sample and pink certificate only.

DID MR SHAW TAKE THE POLICE SAMPLE AND PAPERWORK FROM THE TROLLEY?

4.14 There is no direct evidence that Mr Shaw removed the Police Sample from the trolley. There are however a number of matters which support an inference that Mr Shaw came into possession of the Police Sample because he removed it from the cannulation trolley shortly after 2.15 a.m.:

- Without notice to anyone Mr Shaw departed the hospital very soon after the blood sample was taken;
- Although Mr Shaw had previously expressed a desire to go home to get some sleep he did not go home but went to his chambers;
- Mr Shaw knew his wife had been called, the intention being that she would (and in fact did) attend at the hospital shortly after he left;
- There was no pressing need to attend chambers at 3.00 a.m. in relation to the two judgments he wanted to deliver at 9.30 a.m., as those judgments were *"ready to go"*[92], and in any event, Mr Shaw had already agreed with Mr Robertson that his associate would be advised he would not be attending Court on 14 October 2004, and
- Mr Shaw had already attempted to leave the hospital once and had been informed by and apparently accepted Nurse Grant's advice that he should be observed for at least four hours and have a CT scan so as to rule out any serious injury.

4.15 In the Commission's assessment, the most likely inference to be drawn from these circumstances, including the coincidence between his departure and attempted departure some minutes earlier, and the time at which the Police Sample was no longer observed to be upon the cannulation tray by Nurse Grant, is that the bagged Police Sample and paperwork had by then been taken from the trolley by Mr Shaw and this precipitated his departure. It follows that the

[92] PIC Transcript, J W Shaw, 15 November 2004, p. 19.

Commission is also of the view that Mr Shaw was aware that it was the Police Sample and not the Patient Sample.

4.16 The Commission is also unpersuaded by the evidence of Mr Shaw that he was simply unaware of the possible medical risk in leaving the hospital until informed of this by Nurse Grant at his chambers, given the urgency with which he left the hospital, having already received the advice from Nurse Grant before his departure that it was inappropriate for him to leave.

4.17 While Mr Shaw's evidence on the third hearing day was that he did not "*believe*" he was carrying anything from RPAH to Chambers,[93] regard must be had to Exhibit 16, the photograph from the Supreme Court security system, which appears to depict Mr Shaw entering the *"Judge's Entry"* at the Supreme Court of New South Wales carrying an item having a similar appearance to a plastic bag. Mr Shaw did not offer any explanation of what he could have been carrying from the hospital. He was not carrying anything when he first went to RPAH. Accordingly if there was anything in his hand it had to have been acquired by him at the hospital.

4.18 It was submitted on behalf of Mr Shaw that the security photograph did not show Mr Shaw carrying the Police Sample or the Police Sample bag or any identifiable object. The Commission is satisfied that what is depicted in the photo is more likely than not a plastic bag.

4.19 In view of the foregoing, the Commission is of the opinion that the most likely and reasonable explanation for Mr Shaw's departure was to remove what he knew to be the Police Sample from the hospital premises. In forming this opinion, the Commission has given careful consideration to the evidence of Nurse Grant and Dr Hill about Mr Shaw's confused state at the relevant time. The Commission has also had regard to the evidence of Mr Robertson, which suggests that prior to his departure from the hospital Mr Shaw was capable of conversing about matters of some complexity.

4.20 It is the Commission's opinion that Mr Shaw removed the bag containing the Police Sample and paperwork from the trolley and that he agreed *"so rapidly*" to re-present at RPAH because he had managed to secure the Police Sample and, after speaking with Nurse Grant, thought that no further sample would be taken.

4.21 It is the Commission's opinion that when he spoke to Nurse Grant Mr Shaw feigned a lack of knowledge that a blood sample had been taken from him so as to deflect suspicion once it became apparent that the Police Sample had disappeared.

4.22 Furthermore it is the Commission's opinion that as a result of the public declaration by (then) Deputy Commissioner Madden that the Police Sample had gone missing, Mr Shaw, having the Police Sample in his possession and knowing what he possessed, arranged for both the Police Sample and the Patient Sample together with the paperwork to be stored by Mr Searle, away from his home.

4.23 The Commission accepts the evidence of Mrs Shaw and the statement of Mr Searle as to the date the plastic bag containing the samples was given into Mr

[93] PIC Transcript, J W Shaw, 17 November 2004, p. 198.

Searle's possession, namely 3 November 2004. That being so, the Commission rejects Mr Shaw's evidence[94] that his overseas journey on 16 October was the catalyst for the removal of the plastic bag. Immediately after it became public knowledge that the Police Sample had disappeared, Mr Shaw took steps to *"get it out of the house"*. The Patient Sample was also removed.

4.24 It might be suggested that Mrs Shaw's delivery of the Police Sample and paperwork to Glebe Police Station on 5 November 2004 is inconsistent with Mr Shaw taking the Police Sample or having any knowledge of its significance. A number of matters should be considered in relation to this possibility.

4.25 First, it is clear from both Mr Shaw's signed Statement[95] and his oral evidence that Mr Shaw requested Mrs Shaw to deliver no more than "*a vial*" of blood to the Police. His evidence was as follows:[96]

> Q:— What you asked her to do was to collect a vial from Adam Searle?
>
> A:— Yes.
>
> Q:— It was not intended at that point, was it, to in fact hand over the entire package?
>
> A:— Well, we were never asked for that. If the authorities – that is, PIC or the Police – had asked for the whole kit and caboodle, then I would have handed that over at that stage, but what was referred to seemed to be a sample or a vial, and that's therefore what was handed over.
>
> Q:— You asked your wife, as you say in paragraph 11, to collect a vial from Adam Searle. It was not your intention, was it, that she would be collecting the whole kit and caboodle, as you put it?
>
> A:— No, but I wouldn't have minded if that's what the authorities wanted.
>
> Q:— Well, in handing over the complete kit and caboodle on 5 November at Glebe Police Station, she was in fact handing over more than you had asked her to hand over, was she not?
>
> A:— Was she? I thought she handed over one vial, but you may be correct. If she did hand over more, so be it. It was of no consequence to me.

4.26 That Mr Shaw's instructions to his wife were limited to the collection and delivery of a vial of blood was confirmed by Mrs Shaw in her evidence. That evidence was as follows:[97]

> Q:— When you say he asked you to collect it, what was it that he asked you to collect and hand over?
>
> A:— To collect a vial of blood that the Police wanted.
>
> Q:— I think you have said that you'd made an observation in his study that there had been there a plastic bag with two vials and a piece of paper?
>
> A:— Yes.
>
> Q:— On what you've just said, his instruction was limited to handing over the vial of blood, or a vial of blood; is that right?
>
> A:— Yes
>
> Q:— As you understood it, that was to allay concern that he had a sample and the Police did not?

[94] Cited above at paragraph 3.71.
[95] PIC Exhibit 2, paragraphs 11 and 12.
[96] PIC Transcript, J W Shaw, 15 November 2004, p. 28.
[97] PIC Transcript, E Shaw, 15 November 2004, p. 39.

A:— That's right.

4.27 In the circumstances, the Commission is of the opinion that the Police Sample and the police and patient paperwork were handed in at Glebe Police Station on 5 November 2004 not because that is what Mr Shaw intended, but because Mrs Shaw mistakenly exceeded her instructions.

DID SOME OTHER PERSON TAKE THE POLICE SAMPLE AND PAPERWORK FROM THE TROLLEY?

4.28 It was submitted on behalf of Mr Shaw that the Commission ought to consider the possibility of some other explanation for the Police Sample being in possession of Mr Shaw, which did not involve misconduct by any person. The Commission has given careful consideration to this possibility. Such a scenario would involve some other, unidentified person taking the Police Sample and its paperwork after they were placed on the trolley by Dr Hill. However, in the Commission's opinion such a possibility is highly unlikely given the following:

4.29 Both samples ended up in the plastic biohazard bag in Mr Shaw's possession. There was no evidence to suggest that some person other than Mr Shaw put one or both samples in the bag **after** his release from RPAH. Indeed Mr Shaw's evidence on the last hearing day was that he did not *"at any stage handle the Police Sample until he was given the plastic bag upon departure from the hospital"*. It is reasonable to infer that if some person other than Dr Hill put the Police Sample and paperwork in the bag that was handed to Mr Shaw it must have happened at the hospital. It is hard to conceive, firstly, why any unidentified person would do this, and, secondly, how this could be achieved without detection.

4.30 As stated earlier, the Commission is satisfied that Dr Hill separated the Patient Sample and paperwork from the Police Sample and paperwork. The Patient Sample and paperwork were observed on a number of occasions, unbagged, and ultimately ended up in Dr Hill's control, prior to him handing them to Mr Shaw. The opportunities for an unknown person to remove and conceal the Police Sample and paperwork then get access to the bag in which Dr Hill had put the Patient Sample and paperwork, and before he gave it to Mr Shaw, are remote.

4.31 In addition to the evidence led at the public hearing, Commission investigators continued inquiries after the hearing in order to identify all persons present in the Emergency Department of RPAH that morning. They spoke to over thirty individuals, including patients, staff and others. None had any connection with Mr Shaw or any motive for interfering in the taking of blood samples for testing by police. Mr Shaw was the only person with both a motive and opportunity.

5. THE COMMISSION'S DUTY TO PREPARE A REPORT FOLLOWING A PUBLIC HEARING

5.1 The Commission is required to furnish a Report to Parliament in matters where the Commission has conducted a public hearing: s 96(2) *Police Integrity Commission Act 1996*, (the Act).

5.2 Following the conclusion of the Commission's public hearing on 17 November 2004, written submissions were prepared by Counsel Assisting the Commission. These were served on the witnesses on 2 December 2004.

5.3 Counsel Assisting the Commission submitted that the following were "*affected persons*" for the purposes of s 97 of the Act:

- Matthew Wayne Horsely Carlin
- Benjamin Graham Watson
- Gerd Schmahl
- Raymond Alan Forrest
- Robert Malcolm Hill
- Jeffrey William Shaw

5.4 Counsel Assisting submitted that the Commission should find that the Police Sample was taken by Mr Shaw from the cannulation trolley to his chambers. It was submitted that there had been no police misconduct and that there had been no misconduct by Dr Hill or Nurse Grant, but that Mr Shaw had engaged in "*other misconduct*" for the purposes of s16 of the Act. Counsel Assisting submitted that the Commission should recommend that consideration be given to prosecution of Mr Shaw for the criminal offences of Doing an Act with Intent to Pervert the Course of Justice and Giving Evidence to the Commission that was False or Misleading in a Material Particular.

5.5 By virtue of s 97(3) of the Act, a person against whom, in the Commission's opinion, substantial allegations have been made in the course of, or in connection with, an investigation, is an "*affected person*". A characterisation of a person as an "*affected person*" in an investigation does not of itself mean that an adverse conclusion has been drawn about that person.

5.6 Nevertheless, s 97(2) of the Act requires the Commission to include in a Report to Parliament a statement in respect of each affected person as to whether or not in the circumstances the Commission is of the opinion that consideration should be given to the following:

> (a) the prosecution of a person for a specified criminal offence,
>
> (b) the taking of action against the person for a specified disciplinary offence,[98]

[98] The power of the Commissioner of Police to refer a departmental charge against a police officer for hearing by the Police Tribunal was repealed on 8 March 1999. Since that date, the powers and obligations

(c) the taking of action (including the making of an order under section 181D of the *Police Act 1990*) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services or otherwise terminating the services of the police officer,

(d) the taking of reviewable action within the meaning of section 173 of the *Police Act 1990* against the person as a police officer.

5.7 In addition the Commission may form opinions as to whether "*police misconduct"*, or "*other misconduct"*, has occurred: s 16(1)(a) of the Act. These opinions help to inform whether any recommendations should be made or opinions expressed as to whether consideration should or should not be given to the prosecution of persons (including police officers) for criminal or disciplinary offences.

5.8 The expression "*police misconduct*" is not specifically defined by the Act. It nevertheless includes the following types of conduct (see s 5 of the Act):

(a) police corruption,

(b) the commission of a criminal offence by a police officer,

(b1) misconduct in respect of which the Commissioner of Police may take action under Part 9 of the *Police Act 1990*,

(c) corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* involving a police officer,

(d) any other matters about which a complaint can be made under the *Police Act 1990*.

5.9 It follows that "*police misconduct*" may encompass not only serious criminal activity such as perverting the course of justice but also minor disciplinary breaches by police, the sanction for which may, for example, be nothing more than additional training and development.

5.10 The expression "*other misconduct*" is not defined in the Act. The ordinary and natural meaning of the word "*misconduct*" is "*unacceptable or improper behaviour*" (Oxford Concise English Dictionary). Accordingly, the Commission is entitled, inter alia, to make assessments and form opinions as to whether unacceptable or improper behaviour has or may have occurred.

5.11 In reply to the submissions of Counsel Assisting the Commission, submissions on behalf of Mr Shaw were served on 22 December 2004. It was submitted that, in the absence of a finding of police misconduct, the Commission had no power to make an assessment of, or to form an opinion on, the conduct of Mr Shaw in relation to the events arising from the accident on 13 October 2004 and that, in the alternative, the evidence was such that the Commission should find that Mr Shaw had not been involved in any misconduct.

5.12 On 24 December 2004 Mr Shaw commenced proceedings in the Supreme Court of New South Wales, seeking orders to restrain the Commission from publishing any opinions or assessments that Mr Shaw was an affected person or had

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of the Commission to recommend or state whether consideration should be given to the prosecution of a person for a specified "disciplinary offence" (subsections 16(1)(b), 97(2)(b) of the Act) has no effective application to police officers. This is so even for police misconduct that occurred before this date.

engaged in misconduct. The Commission agreed to delay the publication of its Report to Parliament until the Court had determined that application.

5.13 On 9 May 2005 the proceedings commenced by Mr Shaw were heard before Young CJ in Equity. On 5 August 2005 Young CJ delivered his reasons and on 26 August 2005 made orders declaring the Commission would be exceeding its jurisdiction if it made an assessment, expressed a conclusion or opinion that Mr Shaw had engaged in misconduct for the purposes of s 16(1)(a) of the *Police Integrity Commission Act 1996*, or made an assessment, expressed a conclusion or opinion with respect to any alleged misconduct of Mr Shaw pursuant to s 97 of the Act. Furthermore, His Honour held that after it had been established that there was no police misconduct, undertaking further investigation was beyond the Commission's functions.[99]

5.14 The Commission lodged an appeal against the decision of Young CJ and on 6 June 2006 the matter was heard by the Court of Appeal (Giles, Hodgson, and Basten JJA). [100] On 30 June 2006 the Court of Appeal allowed the appeal. [101]

5.15 Giles JA, with whom Hodgson JA agreed, held that, for the Commission to properly conduct an investigation, it was sufficient that the subject matter of the investigation was police misconduct and that the conduct of other persons, whether or not misconduct, was relevant to the investigation of police misconduct. His Honour noted that s 16(1) of the Act expressly authorised the making of assessments in respect of "*other misconduct*" and that other functions of the Commission, such as those set out in s 15 of the Act, plainly extended to the conduct of persons other than police officers.

5.16 Giles JA further held that the Commission was obliged, by s 97(2) of the Act, to make a report to Parliament in respect of an "*affected person*" within the meaning of s 97(3) of the Act, and noted that Mr Shaw did not challenge the finding in the Court below that he was such an affected person. Giles JA held that, accordingly, the declaration made by Young CJ in Equity that the Commission would be exceeding its jurisdiction if it was to make a report to Parliament about Mr Shaw's alleged misconduct would controvert the statutory obligation imposed by s 97(2) of the Act. At paragraph 29 of his reasons Giles JA stated:

> …if the conduct is conduct relevant to an investigation of police misconduct there is no proper basis to exclude from a report to Parliament information as to the conduct of persons other than police officers, acquired in the investigation because so relevant. Nor is there a proper basis to exclude from a report to Parliament permissible assessments, opinions and recommendations in relation to that conduct as to misconduct of or action against persons other than police officers.

5.17 Following the decision of the Court of Appeal the Commission proceeded to prepare this Report. Further submissions were made on behalf of Mr Shaw in September 2006 and those submissions were taken into account.

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[99] *Shaw v Police Integrity Commission* [2005] NSWSC 782

[100] In fact both the Commission and the Commissioner were parties to the appeal, as both had been joined as defendants in the original proceedings in the court below. For brevity, only "the Commission" is mentioned in the discussion of the proceedings in this Chapter.

[101] *Police Integrity Commission & Anor v Shaw* [2006] NSWCA 165.

6. AFFECTED PERSONS

6.1 The substantial allegations which have been made in the course of or in connection with the Commission's investigation may be summarised as follows:

- that one or more police officers were corruptly involved in the disappearance of that part of the sample of blood taken from Mr Shaw on 14 October 2004 which was intended to be secured by NSW Police for analysis (the Police Sample);
- that Dr Hill failed to place the Police Sample in the blood collection box located at RPAH;
- that Dr Hill either intentionally or inadvertently gave the Police Sample to Mr Shaw;
- that some time between approximately 2.15 a.m. and 2.30 a.m. on 14 October 2004, Mr Shaw removed the Police Sample from the cannulation trolley where it had been placed by Dr Hill;
- that between 2.30 a.m. and 3.00 a.m. on 14 October 2004, Mr Shaw left RPAH with the Police Sample and took it to his chambers within the Supreme Court Building, Queens Square, Sydney;
- that Mr Shaw recognised that the analysis of the Police Sample would likely incriminate him. His purpose in taking the Police Sample to chambers was to avoid the Police Sample being analysed;
- that on 3 November 2004, Mr Shaw, being aware that he possessed the Police Sample, and that NSW Police had commenced an investigation into its disappearance, arranged for the delivery of the Police Sample and that part of the sample given to him by Dr Hill some time after 5.35 a.m. on 14 October 2004 (the Patient Sample) to a barrister and friend, Adam Searle;
- that Mr Shaw's purpose in arranging for the removal of the Police Sample and the Patient Sample from his home was to limit the risk that they would be recovered by the Police.

6.2 Based on these substantial allegations the Commission is of the opinion that each of the following is an affected person within the meaning of the Act:

- Matthew Wayne Horsely Carlin;
- Benjamin Graham Watson;
- Gerd Schmahl;
- Raymond Alan Forrest;
- Robert Malcolm Hill; and
- Jeffrey William Shaw.

6.3 Each affected person, with the exception of Dr Hill, gave his or her evidence after a declaration had been made under s 41 of the Act. Therefore pursuant to s 40 of the Act, the evidence given by each person in respect of whom a declaration was made is not admissible against him or her in subsequent criminal or civil proceedings, except for proceedings for an offence against the Act, or for contempt, under the Act.

STANDARD OF PROOF

6.4 The Commission does not make binding findings of fact. Nevertheless, the opinions it expresses and, in particular, any opinion as to whether police misconduct or other misconduct may have occurred pursuant to s 16(1)(a) of the Act, may have very serious consequences in relation to the reputation of any person referred to in such an opinion. As has already been noted, pursuant to s 97(1)(a) of the Act, the Commission is authorised to include in its Report statements as to any of its assessments, opinions and recommendations. It is also authorised to include statements as to the Commission's reasons for any of its assessments, opinions and recommendations (s 97(1)(b)).

6.5 Before expressing any opinion that misconduct may have occurred (s 16(1)) or that in all the circumstances it is of the opinion that consideration should be given to the prosecution of any person for a specified criminal offence (s 97(2)(a)), the Commission should be comfortably satisfied of the relevant facts applying the civil standard of proof in the manner suggested by Dixon J in *Briginshaw v Briginshaw.*[102] His Honour said at p 361:

> The seriousness of an allegation made, the inherent unlikelihood of the occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

6.6 The Commission is not bound by the rules of evidence. The Commission can inform itself of any matter in such manner as it considers appropriate (s 20(1)). However, considerations of fairness require that the Commission deal with the evidence before it with great care.

ROBERT HILL

6.7 In respect of Dr Hill, the Commission is satisfied that although he did not place the Police Sample in the police box, he had no involvement in the disappearance of the sample. The Commission is of the opinion that Dr Hill did not engage in any misconduct. The Commission is **not** of the opinion that consideration should be given to the prosecution of Dr Hill for a specified criminal or disciplinary offence.

[102] (1938) 60 CLR 336

MATTHEW CARLIN, BENJAMIN WATSON, GERD SCHMAHL, RAYMOND FORREST

6.8 In relation to each of Constable Carlin, Constable Watson, Senior Constable Schmahl and Constable Forrest, the Commission is satisfied that none of them had any involvement in the disappearance of the sample. It is satisfied that at all times the officers acted entirely in accordance with their duties. The Commission does not consider that there was any police misconduct. The Commission is **not** of the opinion that consideration should be given to the taking of the types of action referred to in ss 97(2)(b), (c) and (d) of the Act.

JEFFREY SHAW

6.9 All of the evidence which might implicate Mr Shaw in misconduct is circumstantial evidence. This does not mean that the evidence is necessarily of lesser quality than direct evidence. The Commission is permitted to assess whether the combination of circumstances taken together point strongly to a conclusion that Mr Shaw was involved in misconduct. In doing so the Commission has taken into account the fact of Mr Shaw's prior good character and lengthy history of public service. At the time of the accident he was also a Justice of the Supreme Court.

6.10 In the Commission's assessment the statements made by Mr Shaw at the scene of the accident and upon presenting to RPAH are consistent with Mr Shaw having a significant, and understandable, concern that involvement of the police or any admission that he had been drinking would likely have embarrassing repercussions.

6.11 Mr Shaw appreciated that there was a risk that he was *"over the limit."*[103] He agreed it was of some concern that the analysis of his sample might come back with a result that put him *"over the limit"*.[104]

6.12 Once the blood was extracted Mr Shaw attempted to leave the hospital. Although warned about the possible medical risks of doing so and agreeing to get back into his bed, he then left the hospital shortly thereafter.

6.13 Despite having indicated to hospital staff that he wanted to go home Mr Shaw went instead to his chambers in the city, in circumstances where he knew his wife was coming to the hospital.

6.14 Mr Shaw was selective in his recollection about the journey to chambers in that, when he was first questioned he denied any recollection of going there however, on returning to the witness box, he had a clear recollection for some aspects of the trip, eg. travelling by taxi and bringing an Australian Law Journal with him when he returned to the hospital.

6.15 When the police announced on 2 November 2004 that the Police Sample was missing and an investigation had commenced, Mr Shaw removed the bag containing both the vials from his house the following day.

[103] PIC Transcript, J W Shaw, 17 November 2004, p. 203.
[104] PIC Transcript, J W Shaw, 17 November 2004, pp. 202-3.

6.16 Mr Shaw told no one involved in the investigation that he had two vials in his possession. He waited two more days and then had Mrs Shaw deliver a vial of blood to Glebe Police on 5 November.

6.17 Mr Shaw's assertions in his evidence that he did not know he was not supposed to receive the two vials of blood are difficult to accept, particularly given the amount of time which elapsed between the police announcement on 2 November and the delivery of the second vial by Mrs Shaw on 13 November. There was ample opportunity for Mr Shaw to ascertain, through his own inquiries or through his legal representatives that the legislation did not provide for the patient to be given two vials of blood.

6.18 In the Commission's opinion there is sufficient circumstantial evidence to support a view that:

- Mr Shaw was aware at the time blood was taken from him by Dr Hill that a sample of his blood would be delivered to the police for alcohol testing;
- Mr Shaw removed the bag containing the Police Sample and its paperwork from the cannulation trolley shortly after Dr Hill had divided the blood into vials;
- Mr Shaw concealed the bag and took it from the hospital to his chambers;
- The only reason Mrs Shaw was asked by Mr Shaw to come forward with the second vial on 13 November 2004 was that, by handing over all the paperwork associated with both vials on 5 November, she had inadvertently signalled that Mr Shaw had at all relevant times been in possession of both of them.

6.19 Having regard to the above matters the Commission is of the opinion that Mr Shaw, in removing the Police Sample from the hospital, engaged in misconduct for the purposes of s 16 (1) of the Act.

6.20 The Commission is of the opinion that consideration should be given to the prosecution of Mr Shaw for a specified criminal offence, namely, the offence of Doing an Act with Intent to Pervert the Course of Justice, contrary to s 319 of the *Crimes Act 1900*.

6.21 The course of justice includes a police investigation which could or might bring about proceedings. An act which has the tendency to deflect the police from prosecuting a criminal offence or instituting disciplinary proceedings before a judicial tribunal or from adducing evidence of the true facts is an act tending to pervert the course of justice and it is unnecessary that the prosecution prove that a particular offence has been committed or that a charge of a given nature is to be laid.[105]

6.22 It is relevant to note that on 18 March 2005 Mr Shaw entered a plea of guilty to a charge of driving under the influence of alcohol. He had previously pleaded guilty to a charge of negligent driving. He was convicted on both charges, fined $3,000,

[105] *The Queen v. Rogerson* (1992) 174 CLR 268.

his drivers licence was suspended for a period of twelve months and he was ordered to pay court costs.

6.23 Mr Shaw had initially been charged with driving with the high range prescribed concentration of alcohol in his blood, pursuant to s 9 (4) of the *Road Transport (Safety and Traffic Management) Act 1999* (High Range PCA). The reading of 0.225 grams of alcohol per 100 millilitres of blood recorded by the analyst on 9 November 2004 was in the "high range" for the purposes of an offence under that section. However the legislation required that the blood sample be taken within 2 hours of the event if the reading was to be taken as the concentration of alcohol in the person's blood at the time of the relevant event.[106]

6.24 In view of the difficulties in relying on the blood analysis the prosecution accepted an offer from Mr Shaw to plead guilty to the lesser charge of Driving Under the Influence of Alcohol if the charge of High Range PCA was withdrawn.

6.25 In the Commission's opinion the fact that this charge was withdrawn or that Mr Shaw was convicted for other driving offences arising out of the accident does not preclude consideration of a charge under s 319 of the *Crimes Act 1900.* That offence is concerned with the intent of the person at the time of commission of the act having the tendency to pervert the course of justice.

6.26 In making its recommendation, the Commission has done so on the basis of its opinion that the evidence is sufficient to establish a prima facie case against Mr Shaw. The Commission has not taken into account discretionary or other considerations as they are, more appropriately, matters left to the prosecuting authority.

[106] s 32 (2) of the *Road Transport (Safety and Traffic Management) Act 1999.*

APPENDICES

APPENDIX 1 – ROLE AND FUNCTIONS OF THE COMMISSION

The Commission was established under the *Police Integrity Commission Act 1996* (the Act) on the recommendation of the Royal Commission into the New South Wales Police Service. The principal functions of the Commission, set out in s 13 of the Act, are:

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

As far as practicable, the Commission is required to turn its attention principally to serious police misconduct (s 13(2)).

POLICE MISCONDUCT

The expressions "*police misconduct*" and "*serious police misconduct*" are not specifically defined by the Act. They nevertheless include the following types of conduct (see s 5(2)):

> (a) police corruption,
>
> (b) the commission of a criminal offence by a police officer,
>
> (b1) misconduct in respect of which Commissioner of Police may take action under Part 9 of the *Police Act 1990*,
>
> (c) corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* involving a police officer,
>
> (d) any other matters about which a complaint can be made under the *Police Act 1990.*

It follows that "*police misconduct*" may encompass not only serious criminal activity such as perverting the course of justice but also minor disciplinary breaches by police, the sanction for which may, for example, be nothing more than additional training and development.

INVESTIGATIONS

In matters where the Commission determines to carry out an investigation (whether or not in the nature of a preliminary investigation), it has a wide range of powers at its disposal in order to acquire information. For example, the Commission may:

- require public officials and public authorities to produce statements of information (s 25);
- require any person (whether or not a public official or public authority) to produce documents or other things (s 26);
- enter public premises (s 29);
- obtain search warrants (s 45);
- obtain warrants under the *Telecommunications (Interception and Access) Act 1979;*
- obtain warrants under the *Listening Devices Act 1984* (s 50); and
- require persons to attend and give evidence before a hearing of the Commission, either in public or in private (s 38).

REPORTS TO PARLIAMENT

When does the Commission Submit a Report to Parliament Regarding an Investigation?

In circumstances where the Commission has conducted a public hearing for the purposes of an investigation, the Commission must prepare a report to Parliament in respect of the matter to which the public hearing related (s 96(2)). The Commission may also prepare a report to Parliament in relation to any other matter that has been, or is, the subject of an investigation (s 96(1)). A report to Parliament must be furnished to the Presiding Officer of each House of Parliament as soon as possible after the Commission has concluded its involvement in the matter, unless it is considered desirable, in the public interest, for the making of the report to be deferred (ss 96(3), (4) and (5)).

Components of a Report to Parliament Regarding an Investigation

A report to Parliament in relation to an investigation will generally contain a number of components. Under s 97(1) of the Act the Commission is authorised to include statements as to any of its assessments, opinions and recommendations, and the reasons for any of its assessments, opinions and recommendations. The Commission must then, in respect of each "*affected person*", make a statement as to whether or not consideration should or should not be given to the prosecution of persons (including police officers) for criminal or disciplinary offences and, in the case of police officers, certain other forms of disciplinary action (s 97(2)). 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*" (s 97(3)).

The Commission's Approach to the Assessment of Information and Evidence

In forming the assessments, opinions and recommendations referred to above, the Commission may not make a finding or form an opinion that a specified person is guilty of, or has committed, is committing, or is about to commit a criminal or disciplinary offence (s 16(2)(a)). The Commission may form opinions as to whether police misconduct or other misconduct may have occurred, is or may be occurring, is or may be about to occur, or is likely to occur (s 16(1)(a)). However it is important to bear in mind that the Commission is an investigative agency, it is not a court or tribunal in the

sense that it may determine whether a person has committed a criminal or disciplinary offence. Accordingly the Act deems permissible opinions concerning police misconduct or other misconduct not to be findings or opinions that the person is guilty of or has committed, or is committing or is about to commit a criminal offence (s 16(3)). That said, the Commission recognises, bearing in mind the definition of police misconduct may include conduct that amounts to criminal and disciplinary offences, that such an opinion may in some circumstances take on the appearance of a finding of a court or tribunal. The Commission's approach is, as far as possible, to avoid the expression of opinions that may be characterised as findings by a court.

The standard of proof applied by the Commission to the formation of an opinion as to whether a person has engaged in police misconduct or other misconduct is the balance of probabilities. Such an opinion will be reached having regard to the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336, that is, the more serious the matters under consideration, the more stringent will be the requisite degree of satisfaction.

Recommendations and Opinions that Consideration be given to the Prosecution of a Person for a Criminal or Disciplinary Offence

If, in the Commission's opinion, the available evidence is sufficient to establish a prima facie case in respect of a criminal or disciplinary offence then, except in one very limited circumstance discussed below, it is the Commission's approach to recommend that consideration should be given to the prosecution of a person for a specified criminal or disciplinary offence.[107] Such a recommendation will be made to the relevant prosecutorial authority, for example, the New South Wales Director of Public Prosecutions. The Commission will not have regard to considerations, such as whether there is a reasonable prospect of conviction, or public policy considerations when deciding whether to make such a recommendation. These, and other discretionary considerations, are appropriately matters for the relevant prosecutorial authority. That said, the Commission may make findings or express opinions as to the veracity of evidence received from individual witnesses.

The circumstances in which the Commission may, in the exercise of its discretion, decline to furnish or defer furnishing a brief of evidence to the relevant prosecutorial authority are:

- where it is considered that to do so is likely to be counterproductive to the Commission's pursuit of its principal statutory functions; or
- where the relevant person has already been considered for or has been prosecuted in relation to the same, or substantially the same, subject matter and evidence, and it would be unnecessary or duplicitous for the Commission to make a recommendation that consideration should be given to additional prosecutions.

[107] The power of the Commissioner of Police to refer a departmental charge against a police officer for hearing by the Police Tribunal was repealed on 8 March 1999. Since that date, the powers and obligations of the Commission to recommend or state whether consideration should be given to the prosecution of a person for a specified "disciplinary offence" (ss 16(1)(b), 97(2)(b)) have no effective application to police officers. This is so even for police misconduct that occurred before this date. Those powers and obligations may however have application to other public officials.

Statements Regarding "Affected Persons"

Subsection 97(2) of the Act requires that:

> The report must include, in respect of each "affected person", a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:
>
> (a) the prosecution of a person for a specified criminal offence,
>
> (b) the taking of action against the person for a specified disciplinary,
>
> (c) the taking of action (including the making of an order under section 181D of the *Police Act 1990*) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services or otherwise terminating the services of the police officer,
>
> (d) the taking of reviewable action within the meaning of section 173 of the *Police Act 1990* against the person as a police officer.

Recommendations and Opinions Regarding Disciplinary Action Against Police

"*Reviewable action*" within the meaning of s 173 of the *Police Act 1990* refers to forms of disciplinary action that would ordinarily apply to more serious breaches of discipline. The available forms of reviewable action are:

- a reduction in a police officer's rank or grade;
- a reduction in a police officer's seniority;
- a deferral of a police officer's salary increment; and
- any other action (other than dismissal or the imposition of a fine) that the Commissioner of Police considers appropriate.

Owing to the seriousness of these forms of disciplinary action, a police officer may appeal the imposition of any of these penalties to the Industrial Relations Commission of New South Wales.

In addition to the requirement to include in a report to Parliament a statement of the Commission's opinions regarding those against whom substantial allegations have been made, the Commission has discretion to recommend that consideration be given to other disciplinary action. This includes "*non-reviewable action*" within the meaning of s 173 of the *Police Act 1990*. Non-reviewable action is disciplinary action available against police officers for less serious breaches of discipline. There is no avenue of appeal to the Industrial Relations Commission against the imposition of a form of non-reviewable action. The available forms of non-reviewable action are:

- coaching;
- mentoring;
- training and development;
- increased professional, administrative or educational supervision;
- counselling;
- reprimand;

- warning;
- retraining;
- personal development;
- performance enhancement agreements;
- non-disciplinary transfer;
- change of shift (but only if the change results in no financial loss and is imposed for a limited period and is subject to review);
- restricted duties; and
- recording of adverse findings.

Other Types of Recommendations and Opinions

If the Commission considers it appropriate in the circumstances, a report to Parliament may also include recommendations for the taking of other action. Such recommendations may, for example, relate to the need for law reform or for changes to policies and procedures affecting the way in which police or other persons carry out their respective duties and responsibilities.

APPENDIX 2 – WITNESS LIST

NAME	DATE OF APPEARANCE
Matthew Wayne Horsley CARLIN	16 November 2004
Raymond Alan FORREST	17 November 2004
Michael Jonathan GRANT	15 & 16 November 2004
Robert Malcolm HILL	15 & 16 November 2004
Timothy Frank ROBERTSON	15 & 16 November 2004
Gerd SCHMAHL	16 November 2004
Elizabeth SHAW	15 November 2004
Jeffrey William SHAW	15 & 17 November 2004
Benjamin Graham WATSON	16 November 2004