

POLICE INTEGRITY COMMISSION

SPECIAL REPORT

PURSUANT TO SECTION 98 OF THE POLICE INTEGRITY COMMISSION ACT 1996

REGARDING PUBLICATION OF COMPLAINT REPORTS BY THE INSPECTOR OF THE POLICE INTEGRITY COMMISSION

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The Hon Don Harwin MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon Shelly Hancock MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Dear Mr President and Madam Speaker

In accordance with section 98 of the *Police Integrity Commission Act 1996*, the Commission hereby furnishes to you a Report regarding Publication of Complaint Reports by the Inspector of the Police Integrity Commission.

I particularly draw your attention to the Introduction on page 1 of the Report.

Yours faithfully

The Hon Jerrold Cripps QC
Acting Commissioner

September 2011

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ABBREVIATIONS

ICAC	Independent Commission Against Corruption (NSW)
NSWPF	New South Wales Police Force
PIC	Police Integrity Commission
PIC Act	*Police Integrity Commission Act 1996*
PJC	Parliamentary Joint Committee on the Office of the Ombudsman and Police Integrity Commission

1. INTRODUCTION

1.1. This report is made to the Parliament of New South Wales pursuant to section 98 of the *Police Integrity Commission Act 1996* (PIC Act). It addresses concerns held by the Commission concerning reports published by the Inspector of the Police Integrity Commission. It is furnished to the Parliament with the request that it be considered concurrently with the Inspector's Annual Report for the year ended 30 June 2011 and that its contents be taken into account before Parliament determines the question of whether parts of the Inspector's Annual Report, in particular reports dealing with complaints investigated by him, should be made public.

2. BACKGROUND

2.1. The Hon. Peter J Moss QC was appointed to the position of Inspector of the Police Integrity Commission on 22 November 2006. In his time as Inspector he has made strident criticisms of the Commission particularly in the context of assessing complaints received or initiated by his office in connection with three Commission investigations:

Operation Whistler;

Operation Rani; and

Operation Mallard.

2.2. In the overwhelming majority of matters, the Commission has informed the Inspector that it does not agree with his conclusions or his application of the law. That view is buttressed by the opinions of Senior Counsel whose advices the Commission has sought and conveyed to the Inspector.

2.3. The Inspector has adopted a practice of uploading complaint reports to his website and publishing his conclusions to the world at large. Apart from concerns about the contents of these reports and the conclusions expressed therein the Commission considers the practice of publishing reports without first presenting those reports to Parliament to have been unauthorised.

2.4. After expressing doubts about his legal entitlement so to do the Inspector later sought to justify making public his reports by claiming they were merely advance notice of what would later appear in his Annual Reports. Again the Commission took the view that he was not authorised to publish advance parts of his Annual Report without the authority of Parliament.

2.5. The number of reports published by the Inspector and the uniformly condemnatory nature of each has resulted in damage to the Commission and its public reputation. Most concerning, they have given rise to a mistaken perception outside the Commission that it is an organisation which routinely exercises its powers in a manner that is unfair, unbalanced and contrary to the requirements of natural justice.

2.6. In October 2010 the Inspector provided the Commission with a draft report for comment concerning a complaint made by former NSWPF officer Bradley

George Hosemans. The Commission advised the Inspector that it disagreed with his conclusions but that, having regard to the divergence of views, had sought advice from Senior Counsel and would await such advice before providing a formal response to the draft report

2.7. In December 2010, before the advice was received, the Inspector forwarded copies of his report to the Ministry and to the Parliamentary Joint Committee on the Office of the Ombudsman and Police Integrity Commission (PJC), and thereafter uploaded an electronic copy to his website. Media coverage adverse to the Commission ensued.

2.8. The advice requested by the Commission was received in March 2011. That advice confirmed that the actions of the Commission complied with its relevant legal obligations and were appropriate in the circumstances.

2.9. In an attempt to restore a measure of balance to the public record, which had been weighed heavily against the Commission by virtue of the continual publication by the Inspector of his damaging reports, the Commission determined that the advice of Senior Counsel, together with an earlier advice from the same counsel, Mr Peter Hastings QC, about the same investigation, should be posted on the Commission's website. A copy of both advices is appended to this report as Appendices A and B.

2.10. The Inspector has been provided with the relevant advices. They appear to have had no influence on his views.

2.11. On 11 March 2011 Acting Commissioner Cripps wrote to the Inspector pointing out that, in the opinion of Acting Commissioner Cripps, he was legally in error in his understanding of the doctrine of procedural fairness and apprehended bias as those doctrines should be understood in the context of the relevant legislation. It was also pointed out to the Inspector what was considered to be the harm done to the Commission by the publication of his reports. A copy of this letter is annexed to this Report as Appendix C.

2.12. Since the publication of the report concerning Hosemans' complaint the Inspector has provided to the Commission for comment further draft reports in which he has stated his intention to uphold complaints that have been made against the Commission by former Inspector Timothy O'Neill and Detective Inspector Paul Yervan Jacob. Those draft reports were received by the Commission in March and August 2011 respectively. Essentially, they repeat all previous criticisms made by the Inspector in respect of the practices of this Commission in its investigations codenamed Whistler and Rani and also make new criticisms.

2.13. At the Commission's request, the Inspector undertook not to post his O'Neill report on his website until the opinion of Mr Bret Walker SC was obtained as to his legal entitlement to do so. That advice has now been received and is discussed below. (Ordinarily the Commission would have obtained the opinion of the Crown Solicitor about such a matter but as the Crown Solicitor had accepted instructions to act for the NSWCC in litigation commenced in the Supreme Court of NSW by the Crime Commission against this Commission that option was no longer available.)

2.14. On 26 August 2011 the Commission was advised by letter from the Inspector that he intended to present his Annual Report to Parliament in the next couple of weeks and that he would include in his Annual Report a separate report by him into a complaint against the Commission by former Inspector Timothy O'Neill.

2.15. In the circumstances, the Commission determined that it was both timely and apposite to present this Report to the Parliament concerning the actions of the Inspector with respect to his complaint reports. In making this Report, the Commission requests that it be considered concurrently with the Inspector's Annual Report for the year ended 30 June 2011 (together with any reports attached thereto concerning complains against the Commission) and that its contents be taken into account before any direction is made by the Parliament to publish so much of the Inspector's Annual Report as deals with complaints investigated by the Inspector.

3. THE ABILITY OF THE INSPECTOR TO PUBLISH COMPLAINT REPORTS

3.1. HISTORICAL CONTEXT

3.1.1. Before the appointment of the present Inspector, The Hon James Wood AO QC as previous Inspector recommended amendments to the *Police Integrity Commission Act* 1996 to clarify the circumstances in which the Inspector could make and publish his reports and to make provision for the Inspector to report to Parliament.

3.1.2. The current Inspector commenced his term in November 2006. In his Annual Report for the year ending 30 June 2008 he expressed the view that it was not clear from the legislation that the PIC Act gave the Inspector power to publish his complaint reports so they became public reports. Having regard to the relevant provisions of the Act he identified certain problems in the application and meaning of sections 89, 101 and 102. Of some significance is the fact that the Inspector did not believe he had the power to publish his reports so that they became public reports. In particular the Inspector expressed the clear view that he was only empowered to release complaint reports to the complainant and the Commission and to a limited number of other people such as the Commissioner of Police. He sought support for the view that he should have a wider discretion.

3.1.3. It is unnecessary to deal further with the history of the matter beyond pointing out that advice sought by the Parliamentary Joint Committee from the Crown Solicitor through the Clerk of the Legislative Assembly resulted in the Crown Solicitor's unequivocal advice to the effect that the Inspector was unable to make public his complaint reports under the legislation as it then stood. Although legislative changes were suggested, none were made.

3.1.4. The current Inspector observed, in effect, that he would not be afforded any protections under the *Defamation Act 2005* were he to publish a complaint report under the purported authority of section 89(1)(b). He noted as follows in respect of clause 28(1)(c) of that Act, which provides the PIC Inspector with absolute privilege in respect of the publication of a matter in his capacity as Inspector:

'if the Inspector published a document which the Inspector had no power to publish, an issue might arise as to whether the Inspector in so doing, could be said to have been "acting in his or her capacity as Inspector."'[1]

3.1.5. The Inspector gave evidence before the PJC that the *only* possible way he could make complaint reports public was to provide summaries of the same in his Annual Reports.[2]

3.1.6. In light of those problems, the Inspector is reported to have 'argue[d] strongly for legislative amendment'. In that vein, he argued that reports upholding substantial complaints about the Commission should be placed in the public domain:

3.1.7. The PJC sought advice from the Crown Solicitor through the Clerk of the Legislative Assembly to clarify whether:

- **explicit statutory authority is required to enable the Inspector to furnish reports on his investigation of a complaint to interested parties and persons adversely mentioned in the report;**
- **the Inspector can use s. 101 of the [PIC] Act to furnish reports to Parliament on complaint investigations generally;**
- **the [PIC] Act as presently constructed enables the Inspector to use his discretion to determine to whom he may furnish reports made pursuant to his function under s. 89(1)(b) of the Act, as well as the level of confidentiality attaching to those reports.**[3]

3.1.8. The Crown Solicitor's advice unequivocally supported the position that the Inspector is unable to make public his complaint reports under the current legislation.[4]

3.1.9. The PJC accordingly wrote to the Minister requesting that the PIC Act 'be amended to clarify that the Inspector is able to report to any party, including Parliament, at his discretion in relation to any of his statutory functions', and made a recommendation to that effect.[5]

3.1.10. No legislative changes were made to implement this recommendation.

3.2. REPORTS PUBLISHED BY PREVIOUS INSPECTORS

3.2.1. Prior to the appointment of the present Inspector, previous Inspectors had published only two reports (these Inspectors were The Hon Mervyn Finlay QC and The Hon Morris Ireland QC). Neither of these reports was a complaint report and neither set a precedent that the Inspector publish a complaint report.

3.2.2. The first report was published by former Inspector Mervyn Finlay QC. That report was into an episode of the 'Four Corners' program on the Commission's

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[1] Committee on the Office of the Ombudsman and the Police Integrity Commission 2009, Report on the Ninth General Meeting with the Inspector of the Police Integrity Commission, Report No. 6/54 – March 2009, p.7.

[2] Ibid p. 11

[3] Ibid p. 12

[4] Ibid p. 12

[5] Ibid p. 12

Operation Florida, which went to air in November 2001.[6] Inspector Finlay provided his preliminary report on the program to the Director General of the NSW Ministry for Police, to all members of the NSW Parliament and to the PJC, pursuant to section 56(4)(c) of the PIC Act. Later, he provided copies to the libraries of the NSW Parliament and the Attorney General.[7]

3.2.3. Section 56 of the PIC Act is a secrecy provision. Subsection 56(4)(c) allows the Inspector (as well as the PIC Commissioner) to divulge information acquired in the exercise of his powers if he 'certifies that it is necessary to do so in the public interest'.

3.2.4. Inspector Finlay was originally of the view that it was not necessary, given that it had already been distributed, to table the report in Parliament. However, in June 2002, in response to a request for clarification from the PJC about the report's status, Inspector Finlay certified that it was in the public interest that the contents of the report be divulged to the public at large. The PJC subsequently appended his report to its report on the *Sixth General Meeting with the Commissioner of the Police Integrity Commission*.[8]

3.2.5. The second public report was made by former Inspector Morris Ireland QC. That report was on the practices and procedures of the Commission with respect to the formality and length of its hearings and functions, and was undertaken pursuant to a Ministerial request.[9] As per the terms of reference, it was required to be furnished under Part 6 of the PIC Act.

3.2.6. At the current Inspector's Ninth General Meeting with the PJC in March 2009 some debate surrounded the publication of those two reports. What was clear, however, was that neither was a complaint report. It was noted that neither set a precedent that would enable the Inspector to publish a complaint report.[10]

3.3. COMPLAINT REPORTS PUBLISHED BY CURRENT INSPECTOR

3.3.1. The Inspector has published the following 'complaint reports' on his website:

1.	Detective T Briggs (1)	11 December 2007
2.	Detective T Briggs (2)	12 March 2008
3.	Sergeant A Brazel	23 February 2009
4.	Ms S Young	6 March 2009
5.	NSW Police Association	28 January 2010
6.	Officer J Philpott	9 June 2010
7.	Officer A Deissel	9 June 2010

[6] Inspector of the Police Integrity Commission 2001, Report by the Inspector of a preliminary investigation re: 'Four Corners' program: 8 October 2001, 8 November.

[7] Committee on the Office of the Ombudsman and the Police Integrity Commission 2009, Report on the Ninth General Meeting with the Inspector of the Police Integrity Commission, Report No. 6/54 – March 2009, p. 8

[8] Ibid p. 8

[9] Inspector of the Police Integrity Commission 2003, Report on the practices and procedures of the Police Integrity Commission, June, pp. 3-4.

[10] Committee on the Office of the Ombudsman and the Police Integrity Commission 2009, Report on the Ninth General Meeting with the Inspector of the Police Integrity Commission (June 2006), Report No. 6/54 – March 2009, p. 9

8. Officer M Jennings 9 June 2010

9. Mr B Hosemans 22 October 2010 (since removed)

10. Quenten & Michelle Roberts 1 February 2011.[11] (since removed)

3.3.2. Additionally, the Inspector has tabled and published a Special Report to Parliament, pursuant to section 101 of the PIC Act in April 2009. Included as part of the report were the four complaint reports concerning Detective T Briggs (2 reports), Sergeant A Brazel and Ms S Young.

3.3.3. In the introduction to his section 101 report, the Inspector said that he was urged by the Chair of the PJC to make a Special Report to the Parliament arising out of those four reports.[12]

3.3.4. However, it would appear from the following terms of the correspondence passing between the Inspector and the Chair that he was urged only to prepare a 'generic' report:

> **While noting your view, expressed to the Committee on a number of occasions, that section 101 contemplates special reports of a 'one-off nature' and not individual complaint reports, the Committee is strongly of the view that evidence of systemic problems within the PIC, such as a pattern of failing to accord procedural fairness, is the sort of matter that is properly the subject matter of a special report under section 101. It is, in the Committee's view, clearly a "matter affecting the Commission". It has the potential to seriously affect the Commission's credibility and, therefore, its operational effectiveness. The Committee envisages that such a report would be generic in nature, dealing with substantive matters and not the details of individual complaints.**[13]

3.3.5. Since the publication of his Special Report, the recent practice of the Inspector has been to publish his complaint reports on his website shortly after they are finalised, the justification being that it is a forerunner to his Annual Report.

3.3.6. The consequence is that his complaint reports have not been presented to Parliament but have been published at a time of the Inspector's choosing. That was procedure adopted by the Inspector in respect of his complaint report on Hosemans and Quenten & Michelle Roberts. (Those two reports were subsequently removed from his website on or about 31 August 2011 for reasons not communicated to this Commission).

3.3.7. The Commission is unaware of any occasion when reports have been physically attached to the Inspectors Annual Report when the document was tabled in Parliament. It may have been the case that the complaint reports were uploaded to the website on the day the Annual Report was tabled. However, that is unclear. They may have been published at some earlier (or later time). But that is unknown. What is clear is they were not tabled in the Parliament.

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[11] The dates associated with the reports are the dates of those reports, not the dates they were published on the Inspector's website. The last two those reports have since been removed from the Inspector's website.

[12] Inspector of the Police Integrity Commission 2009, Special report of the Inspector of the Police Integrity Commission pursuant to section 101 of the Police Integrity Commission Act 1996, p. 2.

[13] Ibid p. 6.

3.3.8. In 2010 the PJC conducted an inquiry into the handling of complaints against the Commission and published a report in April 2010.

3.3.9. After hearing evidence from comparable bodies including the Inspector of the ICAC the PJC suggested certain guidelines for the Inspector to follow. These included a suggestion that the PIC be notified as soon as possible of a complaint and that as a general rule responses to the complaint should be sought from all relevant parties before the preparation of a draft report or recommendation. The Commission has received draft reports from the Inspector for comment but comments to the effect that the Inspector's views were legally incorrect have not been accepted.

3.3.10. Importantly the PJC recommended that the PIC Act be amended so that the PIC Inspector should include the Commissions response as part of his report (presumably to the Parliament). The Inspector subsequently wrote to the PJC rejecting the suggestion and expressed the view that "I do not consider that there is any unfairness to the Commission or in the public interest in not including the Commission's response in the Inspector's report".

3.3.11. Subsequently the PJC made a fresh recommendation to the effect that the Department of Premier and Cabinet consider there would be a presumption that the Inspector's reports on upheld complaints are published unless it would be against the public interest to do so.

3.3.12. It is the Commission's respectful submission that it is against the public interest for these reports to be published because they are legally flawed.

3.4. INSPECTOR'S ELEVENTH GENERAL MEETING WITH THE PJC

3.4.1. The ability of the Inspector to publish complaint reports has arisen at each of current Inspector's general meetings with the PJC since 2008.[14]

3.4.2. At his last general meeting with the PJC in November 2010, the issue was revisited. On that occasion, the PJC noted that its previous recommendation to amend the PIC Act had not resulted in any change. In its report on the meeting, it expected that the current review of the PIC Act being conducted by the Department of Premier and Cabinet would clarify the issue. To that end, it reported that it had made a submission to the review, drawing the relevant Director-General's attention to recommendations it had previously made.[15] The PJC also made a fresh recommendation:

> **That, as part of the current review of the *Police Integrity Commission Act 1996*, the Department of Premier and Cabinet consider there being a**

[14] Committee on the Office of the Ombudsman and the Police Integrity Commission 2009, Report on the Ninth General Meeting with the Inspector of the Police Integrity Commission, Report No. 6/54, March, pp. 2-13; Committee on the Office of the Ombudsman and the Police Integrity Commission 2010, Report on the Tenth General Meeting with the Inspector of the Police Integrity Commission, Report No. 12/54, March, pp. 2-3; Committee on the Office of the Ombudsman and the Police Integrity Commission 2010, Report on the Eleventh General Meeting with the Inspector of the Police Integrity Commission, Report No. 14/54, November, pp.2-3.

[15] Committee on the Office of the Ombudsman and the Police Integrity Commission 2010, Report on the Eleventh General Meeting with the Inspector of the Police Integrity Commission, Report No. 14/54, November, p. 3.

presumption that the Inspector's reports on upheld complaints are to be published unless to do so would be against the public interest.[16]

3.4.3. Apart from generally noting the importance of oversight for agencies with extraordinary powers, and that it should be for the Inspector to decide when publishing a report is in the public interest, no discussion of the reasons for this recommendation appears in the report.[17]

3.5. ADVICE FROM SENIOR COUNSEL

3.5.1. As mentioned above, the Commission has sought advice from Mr Bret Walker SC about the ability of the Inspector to publish complaint reports on his website.

3.5.2. The advice, which was received in August 2011, indicates that there is no legislative authority for the Inspector to self-publish without the direction and superior authority of the Parliament. At the very least, the advice found that the Inspector in self-publishing outside that authority conveys disrespect for the Parliament and unjustifiably departs from the orderly process by which privilege is granted for the matters published in the Inspector's reports. A copy of the advice is appended to this Report at Appendix D.

4. MISAPPLICATION OF RELEVANT LAW

4.1. OVERVIEW

4.1.1. The main criticisms made of the Commission by the Inspector are that the Commission has routinely denied procedural fairness to witnesses appearing before it and, has on occasions, demonstrated actual or perceived bias.

4.1.2. As has been previously mentioned the Commission has received independent legal advice that the Inspector's reasoning is legally flawed. That advice was sought with respect to reports into the complaints of Mr Hosemans and Ms Young. At the present time the Commission is awaiting an opinion from Mr Bret Walker SC concerning the "draft" report furnished by the Inspector in relation to the complaint of Mr O'Neill. That opinion will be made available to the Parliament when received.

4.2. PROCEDURAL FAIRNESS AND COMMISSIONS OF ENQUIRY

4.2.1. The Commission is an investigative agency, which is empowered to conduct investigations and for that purpose may exercise a number of coercive powers including the power to hold hearings and compel witnesses to answer questions.

4.2.2. The Commission is required as a matter of general law to observe the requirements imposed by the rules of natural justice, also known as procedural fairness. What is contested is the content of that duty in the circumstances of the Commission's investigations.

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[16] Ibid p. 4.

[17] Ibid pp. 3-4

4.3. APPLICATION OF THE LAW BY THE INSPECTOR

4.3.1. As previously mentioned the Commission is of the opinion that the Inspector has misapplied the legal doctrines relating to procedural fairness of apprehended bias as it applies to Commissions such as the Police Integrity Commission.

4.3.2. The Inspector has adopted a view, it would seem, that the duty to afford procedural fairness in an investigation by the Commission is the same as that which would apply in courts. He appears to have concluded that the Commission owes a positive and proactive obligation to accord procedural fairness as though the proceedings were a criminal trial. These are matters raised in the letter of the 11 March 2011 referred to above.

4.3.3. The Commission is an investigative body whose principle function is to investigate serious police misconduct. In carrying out that function, the Commission may hold a hearing, either in private or public, for the purpose of furthering an investigation. Such hearing is not analogous to court proceedings. It involves no adjudication of issues. Nor does it provide an occasion to examine witnesses on all the issues that might form part of an investigation. It is well recognised that the nature of the enquiry is such that degree of flexibility is required to enable it 'to respond to the practical exigencies of an investigation.'[18] To quote from a respected source:

> Courts reduce the content of procedural fairness to take account of the statutory objectives of investigative tribunals. Investigative tribunals may follow the evidence where it leads, without the embarrassment of particulars. They do not need to quote chapter and verse when giving notice of the charge against a person and need only disclose the gist of adverse allegations if more detail would lead them to disclose their hand prematurely or close off sources of information.[19]

4.3.4. The Inspector has taken a different view and characterised the work of the Commission has being 'judicial'.[20] Upon that view he has upheld complaints that witnesses have been denied procedural fairness on a number of grounds that are not applicable to the circumstances of the Commission's enquiry. In effect, he has attempted to judicialise the Commission. If the views of the Inspector were adopted they would blunt the effectiveness of the Commission discharging its statutory functions.

4.3.5. Examples of the Inspector's errors may be noted.

- In the Young matter the witness had provided to the Commission a document suspected of being fraudulent. It was said she was denied procedural fairness because she was not given warning that evidence from an expert about her creation of the document was to be adduced by the Commission prior to her reappearance in the witness box.

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[18] Margaret Allars (1996) 'Reputation, power and fairness: A review of the impact of judicial review upon investigative tribunals', Federal Law Review, Vol. 24, No. 2

[19] Ibid

[20] Inspector of the Police Integrity Commission 2010, Complaint by Mr B Hosemans, 22 October, p. 43.

- In other cases the Inspector has upheld complaints that the Commission had not put every allegation to witnesses during their appearance at the Commission and/or had not recalled those witnesses to give evidence to provide them with the opportunity to refute or comment on the allegations. These complaints were upheld against the background that the witnesses had been represented at the public inquiry.

- In other matters the Inspector has made unsupported findings that the Commission has displayed bias in its treatment of several witnesses. On one occasion it was said that that bias was evident because the Commission had regarded a particular witness with suspicion.

4.3.6. In the first example above the Commission noted that there are legitimate forensic reasons for not forewarning unreliable witnesses of what evidence might be led before their appearance in the witness box. Similar considerations apply to other matters where for strategic reasons evidence may be initially withheld from a person who may be affected by that evidence. To adopt a different course may compromise the effectiveness of an investigation: it would cause the Commission to show its hand precipitately. In any case, there is ample authority for not being required to give witnesses advance notice of evidence in the context of corruption enquires.

4.3.7. In respect of the second example the Commission noted that relevant allegations were communicated to all witnesses prior to the completion of the hearings. In each case, the witnesses were legally represented and were served with the submissions of Counsel Assisting the Commission. In each case, those submissions contained the relevant allegations relating to the witnesses and an opportunity to respond by way of return submissions was provided. The failure, if any, to make a submission in reply is a matter between the witness and his/her legal representatives. The Commission's obligation is to ensure the witnesses are on notice as to the criticisms and opinions that may ultimately be published concerning them and this notice was achieved by the service of the submissions of counsel assisting the Commission.

4.3.8. None of these responses caused the Inspector to vary or change in any way his conclusions.

4.4. ADVICES OF SENIOR COUNSEL

4.4.1. The Commission has not yet received the third advice from Mr Walker SC with respect to the O'Neill matter but when that advice is forthcoming it will be forwarded to the Parliament.

4.4.2. In respect of the circumstances of the first example above from the Young matter, the advice of Mr Hastings QC included the following:

> **35. My general view of the appropriate process for examining Ms Young was that because there were reasonable grounds to suspect that she would not be frank, and that she could be directly or indirectly a party to the "thin blue line" of protection suspected to surround Hosemans, it was proper to question her first without notice in order to commit her to a position, before then revealing the evidence tending to demonstrate the**

contrary by calling Ms Novotny to give evidence of her finding. It was then appropriate to recall Ms Young in order to receive her explanation for the evidence which seemed to be at odds with her earlier account.

36. In that sense, the position of Ms Young was no different to that frequently encountered by the Commission where a police officer is under suspicion and is called to give evidence of his or her explanation, before contrary material, such as electronic recordings from telephone intercepts or listening devices are revealed, which has the result in many cases of the witness "rolling over" when they become aware that their denials are unacceptable. It is not clear that such an approach was pioneered by the Wood Royal Commission, but it has certainly been consistently used for a decade sense then without any adverse findings as to the use of such a strategy.

...

50. In the end result, I do not think that the authorities provide support for the proposition that there was a requirement that Ms Young should have been given notice of the suspicions as to her conduct, or a copy of the report of Ms Novotny which provided the basis for those suspicions. Similarly, I do not think that the authorities require the Commission as a general rule to adopt the practice of providing particulars of possible allegation, or copies of adverse evidence, that a witness is likely to be confronted with at a hearing. Such a procedure would be inimical to the strategies which have been successfully adopted by Royal Commissions and the Commission in exposing police corruption in recent years. The application of such a principle would have the result that, not only Reports of the type prepared by Ms Novotny be supplied, but also adverse evidence in other forms, such as testimony given by previous witnesses in hearings, which would not only create an unacceptable administrative burden, but would also frustrate the proven technique calling upon witnesses to deal with the evidence without an opportunity to reflect upon their position, as approved in Donaldson v Wood.[21]

4.4.3. In relation to other matters dealt with in the second example above, where the Commission did not recall a witness or put all allegations to witnesses while they were in the witness box, the advices of Mr Hastings said as follows:

55. The principles of law relating to procedural fairness have been stated and restated many times over and are to be found in the authorities to which reference has already been made. For convenience, I shall refer to statements of principle summarised in Edwards v Kyle:

> ***"The notion of procedural fairness demands that a person be given notice of what is put against him and be given a real opportunity to be heard. He must be given sufficient particulars of contentious matters to allow home to respond by way of correcting or contradicting the adverse material in a meaningful way" (at 317)***

and

> ***"7. The investigator must decide what is required so as to afford the affected party a real and meaningful opportunity to be heard. The particularity with which the adverse material is to be idnetfied,***

[21] Hastings, Peter QC (2009) Memorandum of Advice: Stephanie Anne Young, 25 May, pp. 14-15, 21-22.

> ***whether the party is entitled to adduce further evidence and whether he or she can insist on cross-examining witness are all decision to be taken in the context of the particular fact situation. No general rule can be enunciated but the gravity of the possible consequence for the party may well dictate the extent of the duty in a particular case"***
>
> **56. The issue arises in a situation in which the fact of the witness being legally represented is very significant. It had the practical consequence that the Commission was entitled to assume that if there was a perception of unfairness or disadvantage that would be brought to the attention of the Commission.**[22]

4.4.4. And:

> **47. Again, for reasons that I have expressed earlier in more detail, I think that the Commission is entitled to proceed on the basis that competent counsel are aware of the significance of adverse findings by the Commission and will, where considered appropriate, take the opportunity to properly protect the interests of their clients. The omission of counsel ... to do so is not a matter for which the Commission should be obliged to accept responsibility.**[23]

4.4.5. It must be borne in mind that counsel appearing for relevant witnesses were told that it was not proposed to recall them. No complaint was made at the time nor had there been any requests made later that the witnesses should be recalled. The submissions of Counsel Assisting were supplied to relevant parties in the manner described earlier with an opportunity to respond by way of return submissions and these, of course, would have included (if their legal representatives thought there was any point to it) an opportunity for their client to put further evidence to the hearing.

4.5. RESPONSE OF THE INSPECTOR

4.5.1. Copies of all the advices obtained by the Commission have been provided to the Inspector as they have become available. The Inspector has not accepted any aspect of the advices. All attempts by the Commission to point out the Inspector's errors to him have resulted in no modification of his views.

5. CONCLUSION

5.1.1. The Inspector has caused significant damage to the morale of the Commission and its public standing. His public criticisms have encouraged a view, not founded in fact, that the Commission routinely engages in conduct that is unfair. That criticism is patently wrong and does not have the support of the opinions of eminent Senior Counsel whose advice this Commission has sought. The damage that has been caused by the Inspector is compounded by his unauthorised practice of self-publishing reports on his website. By his actions, he has wrongly conveyed an impression that the practices of the Commission reveal systemic problems.

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[22] Ibid pp. 23-24. Also see: Hastings, Peter QC (2011) Memorandum of Advice: Operation Rani, 2 March, p. 8.

[23] Hastings, Peter QC (2011) Memorandum of Advice: Operation Rani, 2 March, p. 18.

5.1.2. It is the view of this Commission that the Inspector should not be permitted to publish any additional complaint reports unless and until authorised by the Parliament.

5.1.3. Should the Parliament receive a recommendation from the Inspector that the Inspector's Annual Report for 2011 be made public then the Commission requests that this Special Report be considered by the Parliament when determining whether any complaint reports forming part of the Inspector's Annual report should be made public.

APPENDICES

A: MEMORANDUM OF ADVICE OF MR PETER HASTINGS QC, 2 MARCH 2011

B: MEMORANDUM OF ADVICE OF MR PETER HASTINGS QC, 25 MAY 2009

C: LETTER OF 11 MARCH 2011 from Acting Commissioner J Cripps QC to Inspector P J Moss QC

D: MEMORANDUM OF ADVICE OF MR BRET WALKER SC, 29 AUGUST 2011

"A"

PETER HASTINGS QC

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POLICE INTEGRITY COMMISSION:

OPERATION RANI



MEMORANDUM OF ADVICE

Police Integrity Commission,
Level 3, 111 Elizabeth Street,
SYDNEY. NSW. 2000.

Attention: Ms M M O'Brien

2 March 2011

POLICE INTEGRITY COMMISSION: OPERATION RANI

MEMORANDUM OF ADVICE



Introduction

1. I have been asked to advise upon a number of specific issues relating to procedures adopted by the Police Integrity Commission in the course of an investigation known as Operation Rani, in the light of a report by the Inspector of the Police Integrity Commission following a complaint by Bradley George Hosemans, which was highly critical of a number of aspects of the conduct of the investigation by the Commission. The Commission has not accepted that it acted improperly in the manner alleged by the Inspector.

2. It is not my function to adjudicate upon the competing views of the Inspector and the Commission, and I do not propose to conduct an exhaustive review of the proceedings and the evidence, nor record those details with that purpose in mind. My attention will be directed where possible, to the identification of the appropriate principles and procedures by which this, and other investigations of the same character, should proceed.

Background

3. On 25 May 2009 I provided advice in relation to a specific aspect of the conduct of Operation Rani which affected a witness called before the Commission, Stephanie Anne Young, and which had reached a similar impasse as a result of a report by the Inspector criticising the conduct of the Commission, and a rejection of the criticism by the Commission. In the course of that advice I reviewed a number of authorities more relevant than other older and more conventional authorities, to the identification of principles of procedural fairness applicable to corruption

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investigations of the type carried out by the Commission. I will not, except where necessary, repeat my views on those issues.

4. The scope and purpose of the public hearing of Operation Rani announced on 5 June 2006 was to investigate the circumstances surrounding the disappearance of Janine Vaughan from Bathurst on 7 December 2001, and the conduct of the New South Wales Police Force ("NSWPF") involved in the subsequent investigation of her disappearance. The complainant, Bradley Hosemans, was a person of interest as he had participated in the investigation, and was suggested to have had a personal relationship with Ms Vaughan.

5. The report of the Commission was presented to Parliament on 19 December 2007. Notwithstanding that there had been a prospect at various stages of the investigation of a much more serious finding against Hosemans concerning his possible involvement in the death or disappearance of Ms Vaughan, in the end result the report did not make any recommendations against him on that issue but made adverse findings against him in relation to a statement he had provided concerning his whereabouts on the night of her disappearance, and a possible breach of his Workplace Agreement.

6. Hosemans later complained to the Inspector about a number of aspects of the conduct of the investigation. The Inspector distributed copies of the complaint to the Commission and other interested parties and embarked upon a lengthy process of correspondence involving the exchange of views on the issues raised . To cut a long story short, the outcome is that the Inspector has made a number of findings to the effect that the Commission failed to accord Hosemans procedural fairness by an unexplained failure to recall him to give evidence in answer to allegations against him [paragraph 106 of the Inspector's report], that the report gave rise to a perception of being distinctly unbalanced, biased and grossly unfair thereby causing serious, irredeemable and continuing damage to the reputation of the

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complainant [paragraph 108], and that the Commission engaged in grossly irresponsible conduct in the form of a media release of a summary of the evidence of a witness known as RA1 [paragraph 107]. The Commission does not agree with any of those conclusions.

7. The Report of the Inspector has been displayed on his website. The questions that I have been asked to address and my views thereon are as follows:

"Is the Commission in breach of its obligation to accord procedural fairness to a witness if it does not put every allegation to the witness while the witness is in the witness box (assuming the allegations are brought to the attention of the witness in the manner they were here and the witness is given the opportunity to respond in the manner he was here)?"

8. The issue arises because of the position that Hosemans was called at the beginning of the public hearings to give evidence of his involvement with Ms Vaughan and investigation. No allegations were put to him during his appearance on that occasion, although Hosemans volunteered a denial of any involvement with Ms Vaughan or her disappearance. Subsequently evidence was taken by the Commission which significantly affected Hosemans. In particular, an anonymous note was in the possession of the Commission making a serious but general allegation about Hosemans' association with Ms Vaughan, and a witness referred to as RA1 gave evidence which, at its highest, could have been construed as implicating Hosemans in the disappearance of Ms Vaughan.

9. The anonymous allegation was tendered as an exhibit on the second day of the public hearing and was available to Hosemans and his counsel. His counsel, but not Hosemans, was also present at a private hearing when RA1 gave evidence, and cross-examined her. Hosemans' counsel had been asked not to bring Hosemans with him to the private hearing and he did not object to that course being followed.

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10. I am instructed that counsel for Hosemans was informed in the course of his numerous dealings with the Commission in the last week of public hearings that his client would not be recalled to give further evidence and no complaint was made about the proposed procedure, nor was any request made for Hosemans to be recalled to respond to the evidence of any witness.

11. Ultimately a written submission from Counsel Assisting was circulated to interested parties, including the counsel for Hosemans. The submissions indicated that no serious allegations would be pressed concerning any involvement by Hosemans in the disappearance of Ms Vaughan, and, in particular, that evidence provided by RA1 would not be relied upon. The submissions did include criticism of Hosemans in the form mentioned above concerning the veracity of a statement he had initially provided in relation to his whereabouts on the night that Ms Vaughan disappeared, and also that he had acted in a manner subsequently which was in breach of a Workplace Agreement that he had previously entered into by participating in the investigation.

12. A letter of 8 May 2007 from the Commission to counsel for Hosemans forwarding the submissions of Counsel Assisting also enclosed a list of further public exhibits tendered in the proceedings and indicated that copies of the exhibits would be made available upon request. I note that the list includes a number of edited transcripts of private hearings. No request was made for the provision of any copies of further material.

13. Counsel for Hosemans provided a relatively short written submission on his behalf on 8 June 2007. The submission noted that Counsel Assisting submitted that there was insufficient evidence for the Commission to express the opinion that consideration be given to Hosemans being charged with a criminal offence arising from Ms Vaughan's disappearance and the subsequent police investigation, and agreed. The submission went on to dispute the suggestion made that Hosemans had knowingly provided a false alibi in his initial statement, and set out

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various reasons why the inaccurate account provided by Hosemans which was at a time after the incident, was understandable. No issue was taken with the submission of Counsel Assisting concerning the lack of credibility of the evidence of RA1. The submission did not deal with the argument of Counsel Assisting that Hosemans had acted in breach of his Workplace Agreement.

14. The Inspector noted that there were seven particular allegations by Hosemans that the Commission breached its relevant legal obligations to him, and upheld every one of them. He referred to the "multiple failures on the part of the Commission" as including an obvious breach of the "hearing rule" due to the unexplained failure to recall Hosemans to give evidence so as to give him the opportunity to be heard in relation to the many instances of adverse or negative references to him in the evidence and which found their way into the report [paragraph 106].

15. The report of the Inspector included a Schedule which summarised his comments upon relevant case law, and included a section under the heading "The Hearing Rule" [paragraph 10ff] and a related part under the heading "The Necessity for a Hearing" [paragraph 14ff]. In those sections the Inspector referred to a number of authorities dealing with issues associated with procedural fairness in circumstances in which a person did not have the opportunity to give evidence. In particular, reference was made to *Caroll v Sydney CC* (1989) 15 NSWLR 541 where it was held that the obligations imposed by the rules of natural justice are not fulfilled simply because the person affected, if he knew his rights, could make representations. It was said that for a public authority to comply with its statutory duty to give a person affected by the exercise of its powers the opportunity to be heard, the authority must expressly inform the person affected of his rights in that respect (at p 549G). I do not think that the decision has application to the facts of this case. It was concerned with notice being given to individuals likely to be affected by a decision under the *Local Government Act* where it would not be known whether a person would be legally represented and/or be aware of their

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rights under the Act. It does not seem to me to be applicable to a situation in which a person is already involved in the process, and represented by a lawyer experienced with the procedures of the administrative body, and assumed to be aware of his client's rights.

16. The starting point in assessing the appropriateness of each of the aspects of the conduct of this Inquiry under consideration in the context of procedural fairness is that there is no set of fixed rules of procedure applicable to corruption inquiries of the type conducted by the Commission. It is trite to say that the provision of procedural fairness depends upon the circumstance of each investigation. In my experience, corruption inquiries, particularly in relation to the conduct of police officers, rarely fall into a pattern. Even more rarely do they take place in circumstances in which all the adverse evidence against a person of interest is available at the outset of the investigation. They are inquisitorial in character and most often, as was the case with Operation Rani, sufficient evidence was initially available to call for investigation, and the subsequent progress of the Inquiry depends upon material which comes to light thereafter. In that regard, the situation is different to the conduct of the proceedings of a court or tribunal, where the evidence is usually available prior to the commencement of any hearings which then operate by reference to established and published rules for the resolution of the proceedings.

17. I made the point in my earlier advice that flexibility is particularly important in investigating police corruption where there has been a traditional reluctance on the part of the public and other police to come forward with information or evidence. I also referred to authorities which acknowledged that unconventional procedures may be warranted in investigating police corruption. That does not change the fundamental requirement that persons liable to be adversely affected by the findings of the Inquiry are entitled to procedural fairness, particularly the right to be heard before any such findings are made.

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18. In my earlier advice, I also made a point concerning the significance of the fact that persons such as Hosemans appearing before the Commission are usually legally represented, and often by a lawyer from the Legal Representation Office ("LRO"), which is now part of the Attorney Generals Department, with the consequence that there is a reasonable expectation that persons will be properly advised as to their rights without the intervention of the Commission (paragraphs 56ff). I consider that the same point is relevant to the issues affecting Hosemans' complaints. Counsel retained by the LRO who appeared for Hosemans at the Inquiry has had experience in investigations of this type dating back to the Wood Royal Commission where he was one of a team of counsel representing the Commissioner of Police, and is a very competent lawyer who may be assumed to be fully aware of his client's rights.

19. As I have previously observed, there is little point in funding the LRO as a standing body to provide legal assistance to individuals appearing before corruption investigations if it cannot be assumed that its lawyers and those it retains are capable of advising parties of their rights, and that the task is to be fulfilled by the Commission.

20. Counsel for Hosemans had been told that it was not proposed to call Hosemans to give further evidence and was supplied with a copy of the submissions of Counsel Assisting. It would have been abundantly clear that the Inquiry process was at an end and the findings were about to be made on issues which would affect Hosemans, as outlined in the submissions. The opportunity clearly presented itself for the legal representative to ask for an opportunity for Hosemans to give further evidence if that had been his genuine desire, yet written submissions were presented on his behalf without any such request being made. In my view it is an irresistible inference that a deliberate decision was made on behalf of Hosemans to deal with issues in the light of the evidence as it then stood, without any associated risks in Hosemans entering the witness box again.

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21. It should also be borne in mind that there is a widely held belief amongst lawyers who represent persons in corruption enquiries, that the best approach is to endeavour to keep clients out of sight as much as possible. It is well-known that the witness box in the Commission and other anti-corruption bodies can be a hazardous place for clients because they are on oath and can commit offences by not telling the truth, even if they are not found to have engaged in the criminal conduct being investigated. Consequently, it is often an attractive option for a client not to go into evidence but respond from the relative safety of written submissions. They are not at risk of a *Jones v Dunkel* direction which could lead to inferences being drawn more readily because of a failure to give evidence.

22. It is highly likely that such a factor operated in this case. As I shall describe in more detail later, in a prosecution proceeding against him previously, Hosemans had been described by the magistrate effectively as a liar and someone who could not be believed. It would have been a sound forensic decision to avoid further criticism of the same type by allowing him to give further evidence.

23. I do not think that, in the circumstances, there was a lack of procedural fairness in Hosemans not being recalled. He was legally represented. He must be taken to have been advised of his rights. He knew the Inquiry was coming to an end. He took no steps to ask to give evidence.

24. However, what I think should be learnt from the facts of the case is that it is unwise to draw any inference from the inactivity of the legal representatives of affected persons to the effect that a decision has been made that the person does not desire to give further evidence. The more prudent course will be to specifically offer the person of interest an opportunity to give evidence at a time when all evidence is known and before hearings formally close. If the person then specifically declines the offer there can be no room for what seems to me to be the rather opportunistic complaint belatedly made in this matter.

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"Did the Commission display a lack of objectivity in its treatment of RA 1? If so did this give rise to a breach of the obligation to accord procedural fairness to Hosemans?"

25. The question stems from observations made by the Inspector in his Report to the effect that the Commission appears to have treated the witness referred to as RA1 in a manner different to the treatment that would usually be expected to be accorded to a witness before the Commission, and which may give rise to the impression of a lack of objectivity on the part of the Commission. This was said to be particularly so when the treatment continued even though her evidence was ultimately held to be unreliable and when compared with the treatment accorded to the complainant [23].

26. I have not observed any abnormal features in the manner in which the Commission treated RA1, such as to demonstrate a lack of objectivity, or unfairness to Hosemans. Her evidence came to the attention of the Commission as a result of her solicitor sending a statement by her dated 10 May 2006 to the NSWPF, which in turn forwarded it to the Commission. It was in the possession of the Commission when the Inquiry opened on 5 June 2006 but no reference was made to it in opening, nor in the initial questioning of Hosemans. She was then interviewed twice by Commission staff and her allegations were tested in a private hearing on 14 June 2006. A transcript of that evidence was supplied to Hosemans' counsel on 21 August 2006 in order that he could obtain instructions in order to take the opportunity to cross examine RA1 at a further private hearing on 22 August 2006. Because of the fears expressed to the Commission by RA1, counsel for Hosemans was asked not to bring his client to the hearing. No objection was taken to that course and counsel proceeded to cross examine RA1, presumably in accordance with his instructions.

27. There were obvious difficulties in fully accepting the version of events described in the evidence of RA1 given that for a number of years after the incident she had told no-one of her observations. For that and other

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reasons, the submissions of Counsel Assisting did not suggest that her evidence would support adverse findings against Hosemans in relation to the disappearance of Ms Vaughan. It was conceded by Counsel Assisting that, without suggesting that there was any cause to doubt that she genuinely believed that she saw Hosemans and Ms Vaughan in a car together, the difficulties associated with her evidence of identification were very substantial, and it was not submitted that there was sufficient evidence from her or any other source, to support the Commission expressing an opinion that consideration should be given to the prosecution of Hosemans for a criminal offence arising out of the disappearance of Ms Vaughan (paragraph 159).

28. I do not think that the Commission was required to treat RA1 any differently than it did. Her expressions of fear in relation to her initial failure to report the matter and to giving evidence in front of Hosemans, are not unusual for lay members of the public who become involved in investigations of this nature, and needed to be taken seriously. Similarly, the continued references to her by use of the code RA1 is not unusual or inappropriate. It is important that the Commission, if it is to ensure that it can attract public co-operation, has a reputation for treating co-operative witnesses with appropriate sensitivity. It is always necessary to strike a balance in accommodating the sensitivities of the witness and the rights of the person adversely affected, which I think occurred in this case. The manner in which RA1 was treated do not demonstrate inappropriate bias towards her, or against Hosemans. It was the view of Counsel Assisting, at least, that she was genuine in her beliefs and it was not a situation in which she should have been "punished" by public naming for making a mischievous allegation.

29. The position with respect to the public use of the name of Hosemans was entirely different. He was a central figure in the investigation and there would be negligible prospect of attracting further information concerning his possible involvement if he had not been named.

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30. The measures taken to inform Hosemans of her evidence and to allow his counsel to cross examine her provided procedural fairness. There was also an opportunity for his counsel to make written submissions about her evidence, although the subsequent frank appraisal of the shortcomings in her evidence in the submissions of Counsel Assisting meant that such a course was unnecessary. Counsel for Hosemans did not do so, but that was not a product of procedural unfairness.

31. On the question of bias, the Report of the Inspector stated that the report of the Commission did not contain a single opinion or comment concerning Hosemans which was positive of him or his career, and that the Commission had failed to consider that because Hosemans had noteworthy professional and civic dual achievements because he had risen to the rank of Detective Sergeant and had been elected Deputy Mayor of Bathurst, "a comparatively small rural town", he may have been a target for a disgruntled and malicious member of the community [94] . The Report also expressed the opinion that the conduct of the Commission in dealing with RA1 displayed a degree of unfairness and bias towards Hosemans that could not be found in the illustrations in the relevant case law of which the Inspector was aware

32. That may be one view of the situation but I think that it is important to not lose focus on the circumstances in which Hosemans was a person of interest. Janine Vaughan disappeared on the night of 7 December 2001. On 5 November 2001 Hosemans had been charged with offences of obscene exposure, assault, indecent assault and assault occasioning actual bodily harm as a result of an incident involving a female staff member that occurred at the Bathurst Golf Club on 21 October 2001. The charges were heard by the then Deputy Chief Magistrate (later Chief Magistrate) Graham Henson and were dismissed in a judgment of 19 July 2002, which is extraordinary for its gratuitous condemnation of the behaviour of Hosemans, and his credibility. The complainant described in her evidence how Hosemans in a state of intoxication had exposed himself in the Golf Club and physically assaulted her, including touching

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her breasts. The Magistrate accepted her evidence but dismissed the charges on technical grounds. He indicated that if the Crown had so requested, he would have convicted Hosemans of an alternative offence and said "of that no one should be left in any doubt" (p40). He made his views of the character of Hosemans clear by stating that he had rejected him as a truthful person (p41), that it was abundantly clear that he should not be believed on his oath (p42), and that he regarded part of his explanation as "spurious and unbelievable" (p43).

33. After being charged Hosemans entered into a Workplace Agreement limiting his duties to activities within the office. He completely disregarded that agreement by participating in the investigation into the disappearance of Ms Vaughan.

34. Hosemans had been dismissed from the NSWPF in 2003 as a result of the Golf Club incident. Counsel for Hosemans, wisely in my view, did not raise the question of good character on behalf of his client. It would have been an error on the part of Counsel Assisting or the Commission to have raised the issue, particularly when the inevitable conclusion would be that Hosemans was not a person entitled to the presumptions that flow from a person of good character, or a person who was more likely to be telling the truth. With due respect, in my opinion, the adverse comment of the Inspector as to the failure of the Commission in its report to acknowledge positive aspects of the background of Hosemans, was inappropriate. In addition, there was no evidentiary basis for his hypothesis that it was possible that a disgruntled member of the community may have held a grudge against him and be responsible for the dissemination of unfounded rumours, at least not on the basis of Hosemans' high standing in the community.

35. The investigation by the Commission was largely in response to the anonymous note sent originally to the office of the NSW Police Commissioner in which serious allegations were made concerning Hosemans' involvement in the disappearance of Ms Vaughan, and in

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which it was suggested that a number of people were aware of that fact but were too scared to say so. Hosemans had provided a statement originally stating that he was in Maitland on the night of the disappearance of Ms Vaughan but an examination of his telephone records indicated that he was in Bathurst, and not Maitland, at that time. Before the first day of the hearing the Commission was also in receipt of the statement from RA1 which again raised serious implications concerning Hosemans' involvement with Ms Vaughan.

36. In the circumstances, it was appropriate that the Commission regard Hosemans as a person under suspicion, and it was highly improbable that circumstances would call for him to be the subject of positive comments. It was also appropriate that the Commission take the expressions of fear by the witness RA1 seriously and be seen to be providing her with appropriate security and anonymity. From my observation of the conduct of the Inquiry, I cannot identify any matters which I would recommend be done differently, and I do not think that the way the way the investigation was conducted, reflected inappropriate bias.

"Did the Commission breach its obligation of procedural fairness by expressing the opinion in its Report to the effect that Hosemans engaged in police misconduct by deliberately providing a statement containing false information regarding his whereabouts on the night Ms Vaughan disappeared, given that Counsel Assisting had made no such submission but had said that there was insufficient evidence to justify prosecuting Hosemans for any criminal offence in relation to the false statement?"

37. I have paraphrased the question by not repeating the relevant passages verbatim. In my view, this is an aspect of the Inquiry which should have been handled differently. The submissions of Counsel Assisting not only submitted that there was insufficient evidence to justify a recommendation that consideration be given to prosecuting Hosemans for any criminal offence arising out of the supply of the false alibi statement, but went further to suggest that there was insufficient evidence available to support an inference that the statement was

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deliberately falsely made [158]. Consistently, it was not later submitted in the section which dealt with allegations of possible police misconduct , that Hosemans had engaged in police misconduct in providing the statement.

38. The submissions on behalf of Hosemans actually dealt with the issue of whether Hosemans knowingly provided a false alibi notwithstanding the above submission by Counsel Assisting, and submitted that the circumstances were in fact to his credit because he had brought the error to the attention of the Commission [paragraphs 2-4]. The submissions did not deal with the specific question whether the conduct of Hosemans in providing the inaccurate statement amounted to police misconduct, presumably because the matter had not been raised.

39. I think that the preferable course of action would have been for the Commission, once the prospect of expressing an opinion that Hosemans engaged in police misconduct emerged, to have put counsel for Hosemans on notice of that fact in order to provide an opportunity for them to specifically deal with that issue. However, the omission did not in my view amount to a substantial breach of procedural fairness because counsel for Hosemans had put forward a submission on the factual issue of whether the statement had been deliberately false, and even though it was not directed to the question of "police misconduct" in terms, it did set out the relevant matters to that issue, and it is difficult to envisage that anything further would have been said.

"Did the Commission breach its obligation of procedural fairness by describing as a "substantial allegation" in the report the fact of Hosemans involving himself in the investigation in breach of his Workplace Agreement, and further expressing the opinion that the breaches by Hosemans of this agreement amounted to "police misconduct", given that the submissions of Counsel Assisting did not nominate the allegation as a " substantial allegation"?"

40. Again, I have paraphrased the question in the interests of brevity. It arises in part from criticism in the report of the Inspector of the failure of the Commission in its report or elsewhere, to specify the criteria adopted

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for classifying allegations as substantial. The context is that s 97 of the *Police Integrity Commission Act* specifies that reports to Parliament must include, in respect of each "affected" person, a statement as to the opinion of the Commission as to whether certain action to be taken. In ss 97(3) an "affected" person is a person against whom, in the Commission's opinion, substantial allegations have been made in the course of the investigation. No definition of "substantial allegations" is provided.

41. It is true that neither the submissions of Counsel Assisting nor the report of the Commission articulated criteria upon which an opinion as to whether an allegation was "substantial" would be based. I note that the same term is used in s 74A (3) of the *Independent Commission Against Corruption Act* 1988. As far as I can tell, the phrase in either Act has not been the subject of specific judicial consideration . The Inspector has referred to a number of authorities dealing with the meaning which has been given to "substantial" in the context of varied and different legislation, in the Schedule to his Report. In my view, its meaning would seem to be an appropriate subject of the remarks of the Court of Appeal in *Director of Public Prosecutions v Lo Surdo* (1998) 44 NSWLR 618 when it was pointed out that the word "substantial" is an ordinary English word and must be given its ordinary meaning in the context in which it appears. It was noted that a number of cases emphasise that there is no point in endeavouring to ascertain the meaning of the word "substantial" by reference to a number of synonyms. The test adopted in that case was that the reasons "must have substance". It would seem to be an appropriate phrase to use in this context, although it does not shed much light on the meaning of the term in question.

42. The inspector suggests that the meaning of the term in the context of the *Police Integrity Commission Act* is such that it should require "serious criminal and corrupt conduct" [37]. I do not agree that substantial allegations should be limited in that manner, and with due respect, I consider that the Inspector is wrong in forming that view. The

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consequence of the Commission forming the opinion that a "substantial allegation" has been made against a person is that the person is then liable to a recommendation by the Commission pursuant to s 97(2) that consideration should be given to taking one of the four procedures prescribed. Those procedures range from a prosecution for a specified criminal offence to taking reviewable action under s 173 of the *Police Act* 1990 against a police officer. Section 173 allows the Commissioner of Police to take action with respect to a police officer's misconduct or unsatisfactory performance, and the fact that the recommendations available under s 97(2) may apply to taking reviewable action, an administrative procedure, would indicate that it is envisaged that the conduct which may be the subject of an opinion by the Commission, is not limited to serious criminal conduct, but may extend to matters as relatively minor as unsatisfactory performance of duties.

43. I do not think that the failure to include a definition of the term "substantial allegations" in the Report of the Commission constitutes a significant omission, as to do so in the terms referred to above, would add little to the content of the report.

44. I am otherwise of the view that it was open to the Commission to form the opinion that Hosemans was an affected person on the basis that there was a "substantial allegation" concerning Hosemans' conduct being in breach of the Workplace Agreement into which he had entered after being charged with the offences arising from the Golf Club incident. The allegation had substance, and was not ephemeral or nominal, to use terms taken from *DPP v Lo Surdo.*

45. In his written submissions, Counsel Assisting dealt with the question of whether the Commission should form an opinion pursuant to s 16(1) of the Act that police misconduct has or may have occurred. In addressing that issue he submitted that police misconduct had occurred, inter-alia, as a result of the breaches by Hosemans of the Workplace Agreement [152–153]. However, when subsequently making submissions in relation

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to action to be taken by the Commission pursuant to s 97(2) Counsel Assisting did not include a recommendation that action should be taken because there was a substantial allegation concerning a breach of the Workplace Agreement. In its Report the Commission described the issue as a substantial allegation and expressed the opinion that Hosemans' conduct amounted to police misconduct.

46. In my view the omission of Counsel Assisting to include the issue of the breach of the Workplace Agreement as a substantial allegation to be dealt with under s 97 did not amount to procedural unfairness. The matter had been squarely raised in the submissions by expressing the view that the circumstances of breaching the Workplace Agreement amounted to police misconduct. A finding to that effect would have been contrary to the interests of Hosemans and something he would have wanted to have avoided. Counsel for Hosemans, to whom the submissions of Counsel Assisting had been provided, was thereby on notice that there was a risk of an adverse finding and action being taken against his client in relation to that matter. The opportunity then presented itself for contrary submissions to be made but the matter was not addressed in the submissions in reply.

47. Again, for reasons that I have expressed earlier in more detail, I think that the Commission is entitled to proceed on the basis that competent counsel are aware of the significance of adverse findings by the Commission and will, where considered appropriate, take the opportunity to properly protect the interests of their clients. The omission of counsel for Hosemans to do so is not a matter for which the Commission should be obliged to accept responsibility.

48. I also note that the Report of the Inspector is critical of the failure of Counsel Assisting to have witnesses provide formal evidence of the execution of the Workplace Agreement and cites the omission as an illustration "of the type of unsatisfactory and incoherent procedures" which took place throughout the hearings and are reflected in the Report

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[52]. However, there seems to have been no issue that the agreement had been signed by Hosemans. The document was printed so as to show the other party as Superintendent Kuipers, although as executed it purported to have been signed on his behalf by Inspector Borland. Again, this detail does not seem to have been in issue and I do not think that any omission to lead evidence of the formalities surrounding the execution of the agreement can be regarded as an unsatisfactory or incoherent procedure. No point was taken on behalf of Hosemans concerning the admissibility of the document, nor its validity, and what is said to be the evidence overlooked would not have taken the matter any further.

"If the answer to any of the above questions is "Yes", do you consider that any part of the Commission's Rani Report should be regarded as "unauthorised or invalid"?"

49. The question arises from the final conclusion reached in the report by the Inspector, which is to the effect that, because of his opinion that Hosemans "was manifestly denied procedural fairness by the Commission and subjected by the Commission to significant and sustained bias", the result was that there was no authority to produce and publish so much of the Commission's Report as was damaging to his reputation unless and until the Commission had accorded him natural justice, and accordingly, the adverse opinions expressed in the Report should be regarded as "unauthorised and invalid" [109]. The above questions that I have been asked to address do not cover all of the criticisms of the Inspector expressed in his report. In responding to the questions asked, it has been my view that there has not been exposed any procedural unfairness of sufficient significance to amount to a denial of natural justice to Hosemans which would call into question the validity of findings made in the report of the Commission. I have considered the remaining criticisms of the Inspector to which I have not made specific reference, and I do not think that there is revealed any other deficiencies in the conduct of the investigation which otherwise amount to procedural unfairness.

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50. The Inspector was very critical of the conduct of Counsel Assisting the Commission, both in the conduct of the proceedings and in relation to the form and content of the written submissions which were circulated. It needs to be said that the particular counsel rightly enjoyed a reputation as being quiet, fair and thorough, and he has continued to maintain that reputation since his appointment as a Magistrate. He was a person ideally suited to the role of Counsel Assisting, and I personally cannot identify any substantial deficiency in the manner in which he carried out his duties.

51. The criticisms of the Inspector concerning the written submissions are also in my view unwarranted. It is true that they were not accompanied by a table of contents or index, but they were not that voluminous that absorbing them was unduly difficult or unfair. In particular, Hosemans was the central character in the Inquiry and in the submissions, and it was not a challenge for a reader to follow the observations and recommendations in relation to him.

52. In addition, the Inspector seems to have proceeded upon the assumption that the written submissions were a draft of the Report. It has been my universal experience with the Commission, and with similar bodies, that Counsel Assisting independently prepares submissions according to his or her view of the evidence, and it is by no means assured that the Commissioner will adopt the same views, or express them in the same manner.

53. It is significant that throughout the entire process of the investigation Hosemans was represented by competent counsel, and at no point was any complaint made about the way in which Hosemans was being treated by Counsel Assisting. In my view, that was for good reason because there had not been any cause for complaint. Nor do I think that the form or content of the Report of the Commission provides a basis for retrospective criticism of the investigation.

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54. Accordingly, it is my view that, as a matter of law, the Report is not unauthorised or invalid. Whether it remains available to public scrutiny on the website of the Commission is a matter for the discretion of the Commission.

12 WENTWORTH SELBORNE CHAMBERS

2 March 2011

PETER HASTINGS QC

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"B"

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POLICE INTEGRITY COMMISSION



STEPHANIE ANNE YOUNG

MEMORANDUM OF ADVICE

Police Integrity Commission
Level 3, 111 Elizabeth Street
SYDNEY. NSW. 2000
Attention: Ms Wendy Gray

25 May 2009

POLICE INTEGRITY COMMISSION

STEPHANIE ANNE YOUNG



MEMORANDUM OF ADVICE

Introduction

1. I have been asked to advise upon the procedural fairness of various aspects of the conduct of investigations by the Police Integrity Commission following the outcome of an investigation conducted by the Commission known as Operation Rani which affected a witness called before the Commission, Stephanie Anne Young.

2. The Commission submitted a Report to Parliament on the outcome of the investigation in December 2007. Following a complaint made on behalf of Ms Young the Inspector of the Police Integrity Commission, the Honourable P J Moss QC, prepared a report on the outcome of his investigation into the manner in which the operation was conducted, and in relation to its outcome, and that report became an attachment to a Special Report submitted by him to Parliament on 2 April 2009. One of the recommendations made by the Inspector in the Young Report was that the Commission should seek written advice from Senior Counsel, in the light of his report, as to the appropriateness of the Commission's relevant practices and procedures, and as to whether, in the light of his Report, changes should be made to such practices and procedures, and, if so, what changes. Pursuant to that recommendation I have been retained to provide advice in relation to issues which have been identified by the Commission in the light of the Inspector's Report.

Background

3. Operation Rani was an investigation into allegations surrounding the disappearance of Janine Mary Vaughan at Bathurst on Friday, 7 December 2001. A former Detective Sergeant Bradley Hosemans

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became a person of interest and appeared in a public hearing of the Commission in Orange on Monday, 5 June 2006. At the time his telephone was being intercepted and it became known that that evening he received an SMS message from Ms Young indicating that she knew where he was on the evening of the disappearance of Janine Vaughan. Investigators spoke to Ms Young on 18 July 2006 when she said that she may have been with Hosemans on the night of Janine Vaughan's disappearance. She also indicated that she had maintained a diary at the time and would endeavour to locate it.

4. On 11 August 2006 Ms Young advised a Commission investigator that she had located the diary and produced it to investigators, but there was no relevant entry for the night in question. Ms Young subsequently gave evidence at a private hearing of the Commission on 21 August 2006 and indirectly asserted that she may have been with Hosemans at the relevant time.

5. On 30 August 2006 Ms Young contacted the Commission to advise that she had found the page of her diary on which she had recorded some SMS messages from Hosemans one of which indicated that she had been with Hosemans on the night of Ms Vaughan's disappearance. On 15 September 2006 she produced the loose page to Commission investigators.

6. The diary and the loose leaf page were examined at the request of the Commission by Michelle Novotny, a document examination expert, who was able to develop latent writing impressions using Electrostatic Detection Apparatus ("ESDA") by which she was able to identify impressions on a page in the diary which were similar but not the same as the writing on the loose leaf page produced by Ms Young. An inference was that the entries had been rewritten in order to reinforce the impression that Ms Young had been with Hosemans on the night that Ms Vaughan had disappeared.

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7. On 14 November 2006 Ms Young was recalled in a private hearing of the Commission. After some preliminary questions, she was stood down while Michelle Novotny gave oral evidence of her conclusions. Ms Young was then recalled and conceded that she may have duplicated a page of her notes but could not recall when or the circumstances in which she had done so.

8. I will not trace the full history of the matter but the result was that in December 2007 the Commission presented a report to Parliament on Operation Rani which contained a chapter in which Ms Young was treated as an affected person because she was the subject of a substantial allegation that she deliberately produced a false document and gave false evidence to the Commission. The report recommended that consideration be given to the prosecution of her for an offence against s107 of the *Police Integrity Commission Act* 1996.

9. On 21 December 2007 a Brief of Evidence was forwarded to the Office of the Director of Public Prosecutions ("ODPP") but on 15 February 2008 the ODPP advised the Commission of its view that there was insufficient evidence available for the prosecution of Ms Young.

10. Subsequently a lawyer from the Legal Representation Office, who had represented Ms Young before the Commission, complained to the Inspector of the Police Integrity Commission about the circumstances in which Ms Young had appeared before the Commission on 14 November 2006. Again, I will not traverse the full history of subsequent events but, after a lengthy exchange of correspondence in which views differed, the Inspector produced a Final Report dated 6 March 2009, which has now been incorporated in a Special Report to Parliament presented on 2 April 2009. In the Young report the Inspector expressed his view that there was unacceptable conduct on the part of the Commission and officers of the Commission in dealing with Ms Young.

11. The Inspector also concluded that the adverse opinions of Ms Young published in the Rani Report should be treated as unauthorised, and

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recommended that the Commission take all reasonable steps to limit the damage caused to Ms Young's reputation. He also recommended that the Commission forthwith seek written advice from Senior Counsel as to the appropriateness of the Commission's relevant practices and procedures, and it is consequent to his report that I have been asked to advise.

Operation Rani

12. It is not necessary for me to make any conclusive observations concerning the circumstances in which Ms Young appeared at the hearings, and the effect of the evidence which was then produced. However, in his report the Inspector dealt with the consequences of his adverse views concerning the lack of procedural fairness to Ms Young in the context of the evidence relied upon by the Commission as the basis for its adverse findings. I have been asked to advise upon some aspects of that outcome and as the evidentiary situation has provided the focus for the exchange of views, and for my advice being sought, it is desirable that I set out my understanding of the circumstances which occurred in order to provide the background against which my observations are made.

Documentary Evidence

13. I have seen the Powerpoint presentation displaying the results of the ESDA examination by Ms Novotny of the diary of Ms Young and of the loose leaf page she subsequently produced on 15 September 2006. I have also had the opportunity of examining the original diary and original additional page. It is reasonably clear to me what has happened. The original notes were written on two consecutive pages on her diary in a chronological order starting at the top of the first page and ending halfway down the second page. The entry of relevance was halfway down the first page. Both pages were then removed before the diary was produced to the Commission investigators by Ms Young on 11 August 2006. Ms Young rewrote the entries from the original first page

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onto the back of the original second page before producing that document to the investigators on 15 September 2006. In the new format, the entries are clearly out of order as the page which has the ring binder holes on the left has entries for 2002 whereas the entries for 2001 are on the back of it with the holes on the right hand side. The new version has a number of differences from the original first page including the addition of the words "last night" and the year "01" in the entry for the important date of 7 December 2001, the effect of which is to make the entries more precise in relation to their application to the night of 6 December 2001 when Hosemans' conduct was in question.

Ms Young's Explanation

14. When Ms Young was interviewed on 15 September 2006 in relation to the page of entries that she had produced, her explanation for using diary pages was

> *"...I got some pages out of it to write the notes down for the SMS's that I was getting because I didn't have another diary"*[1]

It is reasonably clear that her explanation was not correct as the notes were written on pages when they were in the diary, and then re-written. The interview proceeded on the basis that, following the discovery of the SMS entries, she was certain that she was with Hosemans on the night in question.

15. When she first gave evidence to the Commission on 14 November 2006 Ms Young was similarly certain that she had been at Hosemans' house on the night of 6 December 2001.[2] She again stated that she had taken pages out of the diary to write the entries upon as she was no longer using the diary.[3]. She could not remember when the entries were written but guessed that the entries were all written at the same time because

[1] Page 9 of interview of 15.09.06
[2] Transcript p12
[3] Transcript p11

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the handwriting was similar.[4] When she was recalled after evidence was given by Ms Novotny, she was unable to recall why she made a second version of the notes[5] nor the reason for doing so. Ms Young conceded that she "obviously had done a duplicate" although she was also unable to explain why there were differences in the entries.[6] She said:

> *"I can't explain that. All I can suggest is that either the first time I wrote the notes I realised: woops, I've missed some words out there, and I've gone back. They were quick – I was writing them quickly. Perhaps I wrote the message and added those words in, thinking that's exactly what it relates to and it was – I didn't read the full message and just wrote it down from what I remembered. I can't explain to you why that happened. I don't recall the time that I wrote them down."*

16. At the time of Ms Vaughan's disappearance, Ms Young was in a sexual relationship with Hosemans although that was not general knowledge. The records were not diary entries in the sense of providing an historical record of events, but, as explained by Ms Young, were copies of SMS messages stored on her mobile telephone which she had received from Hosemans and which she transcribed in circumstances in which she thought that the memory of her phone may have been full and there was some prospect of her relationship with Hosemans coming to an end. Some of the entries on the page produced by Ms Young were of an intimate character and were understandably embarrassing to her. However, the changes made when rewriting the document did not alter the explicit detail of the recorded intimacies which were reproduced in the same detail in the rewritten page, which Ms Young produced to the Commission on her own initiative. Accordingly, embarrassment is not a plausible explanation for the conduct of Ms Young in removing the relevant pages before producing her diary initially and then rewriting the entries with further detail as to timing, before contacting the Commission to advise that she had fortuitously located the missing page.

[4] Transcript p9
[5] Transcript p33
[6] Transcript p32

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17. There seems to be no logical reason for rewriting the entries before producing the document to the Commission other than wishing to add details which would strengthen the inference that the notes referred to a communication made in relation to the night of 6 December 2001 in order to bolster the credibility of Ms Young's claim that she had been in the company of Hosemans on the night Janine Vaughan disappeared.

18. When Ms Young had first been examined on 21 August 2006 she had not been certain that she was with Hosemans on the night in question but recalled that she had told people that she was, although she had not been able to check her diary because there was nothing in it as she had stopped using it at that point. The fact that she added details to the date of the relevant entry to make it more precise, did not fit well with her earlier stated uncertainty as to those circumstances.

19. Accordingly, to produce on her own initiative what turned out to be a rewritten version of the page from her diary with added detail, presented the Commission with substantial indications that Ms Young had deliberately falsified the entries in order to deceive the Commission into accepting as a fact that Hosemans was not associated with the disappearance of Janine Vaughan as he was in the company of Ms Young at the time. Recognition of those circumstances is important in assessing the fairness of the processes used to further examine Ms Young and to assess the significance of her evidence. Where a witness appears before the Commission in circumstances in which he or she has all the appearances of being neutral and truthful, different considerations apply to a situation in which there are reasonable grounds for believing that the witness has been or will be less than frank and even untruthful.

Hearing on 14 November 2006

20. The initial source of controversy is the manner in which the private hearing on 14 November 2006 was conducted, and I shall therefore describe in more detail the sequence of events. Ms Young was advised formally in the hearing by the Commissioner of the following:

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"The scope and purpose of this hearing is to investigate the circumstances surrounding the disappearance of Ms Janine Mary Vaughan from Bathurst on 7 December 2001 and the conduct of NSW Police involved in the subsequent investigation of her disappearance."

The formulation was the same as the scope and purpose given to all witnesses who appeared before the Commission in the course of the investigation. Mr Lewis of the Legal Representation Office was authorised to appear on her behalf. Ms Young was first questioned by Counsel Assisting about the circumstances in which she located the loose page from her diary which she said occurred when she "was going through a whole heap of different boxes that I have papers in from university and things and came across it in there"[7]. She was unable to recall when she wrote the document but said that her relationship with Hosemans was encountering some difficulties and she started keeping a record of SMS messages that had been sent[8]. She said that she wrote down the messages stored in her phone before they were deleted. She said that the entries were all written at different times but not recently. She also said that the page had been taken from her diary because she was no longer using it[9]. In relation to the entry of 7 December, she claimed that she remembered specifically sending the message and that she "had been there the night before". It was at that point that Ms Young was stood down and Ms Novotny was called to give oral evidence of the analysis of the documents. After giving evidence of the ESDA impressions, she was shortly cross-examined by Mr Lewis on behalf of Ms Young.

21. Ms Young was then recalled and asked further questions by Counsel Assisting. She said that there had been a number of pages upon which she had written out SMS messages from her phone and that she had removed all of the pages that had the SMS messages on them from her diary "a long time ago". When asked why the words "last night" seemed

[7] p7
[8] p9
[9] p11

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to have been added to the record of the SMS she agreed that she had obviously duplicated a page. She could not recall why that had been done and surmised that she may have added the words because they had been missed out or added them because that was what the message related to[10]. She said that she would not have made up the messages as some were quite explicit and left her open to ridicule. She insisted that the words "last night" were not particularly significant to her because the message itself was otherwise sufficient to remind her of events of the night of 6 December 2001. It prompted her to recall that she had been having a drink at home before receiving a message from Hosemans which caused her to go to his residence where she arrived at about 11 or 12.00pm and left a few hours later[11].

22. At the conclusion of questioning by Counsel Assisting, Mr Lewis had no questions of his client and she was then excused from her summons.

Submissions of Counsel Assisting

23. After the hearings of Operation Rani concluded, Counsel Assisting produced a lengthy written submission which canvassed a number of issues which had arisen during the investigation, and in particular summarised the evidence of Ms Young. He ultimately submitted that Ms Young had deliberately produced a false document to the Commission and had given false evidence concerning it and that consideration should be given to a prosecution for an offence against s 107 of the Act. He also submitted that consideration should be given to disciplinary action against Ms Young under the *Public Sector Employment and Management Act* 2002.

24. A copy of the submissions of Counsel Assisting were served upon her legal representative. A copy of Ms Novotny's report in relation to analysis of the documents was served with the submissions.

[10] p32
[11] p40

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Submissions on behalf of Ms Young

25. The lawyer acting for Ms Young made submissions in writing to the Commission in reply to those of Counsel Assisting. The submissions on behalf of Ms Young joined issue with those of Counsel Assisting and suggested that Ms Young should have the benefit of the doubt before any finding was made that she had given false and misleading evidence. No complaint was made concerning the circumstances in which Ms Young had appeared before the Commission or access was granted to the evidence of Ms Novotny.

The Commission's Report on Operation Rani

26. The Commission provided its report to Parliament on Operation Rani in December 2007. Chapter 9 of the report was dedicated to Ms Young, who was named for the first time publicly, as she had given her evidence in private. In Chapter 10 she was nominated as an affected person because she was the subject of the substantial allegation that she deliberately produced a false document to the Commission and gave false evidence about it. The Commission was satisfied that she engaged in conduct which came within ss 16(1)(a) of the Act and recommended that consideration be given to prosecuting her for an offence against s 107 of the Act, being an offence of knowingly give false or misleading evidence.

27. Thereafter, the Commission received a letter from the Inspector dated 2 April 2008 referring to a complaint made on behalf of Ms Young concerning the Commission's conduct. Attached to the letter was a draft report setting out details of the complaint and the preliminary observations of the Inspector. For nearly twelve months correspondence flowed backwards and forwards between the parties until the Inspector produced his final report dated 6 March 2009 which was annexed to the Inspector's Special Report and which has now been presented to Parliament. In the report the Inspector made numerous

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criticisms of the conduct of the Commission in its dealings with Ms Young, the validity of which has not been accepted.

My Role

28. I do not see it as my function to adjudicate upon the merits of the different views. The exchange of views, which I have followed generally through the correspondence with which I have been briefed, provides an informed platform from which to endeavour to identify procedures which are appropriate for the conduct of investigations and hearing by the Commission. However, I am wary of purporting to express views of general application and propose framing my advice in the light of the issues which have been extracted from the treatment of Ms Young in the course of Operation Rani. Flexibility is important to the effective discharge of the functions of the Commission and adherence to unduly rigid rules would blunt its effectiveness. The statement by Gibbs CJ in *National Companies and Securities Commission v News Corporation Limited* [1984] 156 CLR 296 is appropriate [at p312]:

> *"The authorities show that natural justice does not require the inflexible application of a fixed body of rules; it requires fairness in all the circumstances, which include the nature of the jurisdiction or power exercised and the statutory provisions governing its exercise. Moreover, as Stephen J said in Salemi v MacKellar [No. 2] (29), the rules of natural justice "may also vary from case to case although each be conducted before one and the same tribunal or person"."*

29. The Commission has published Guidelines and Practice Notes for its hearings, which provide a general indication of a manner in which the Commission approaches the discharge of its functions, but appropriately, they do not provide precise detail of the approach to be adopted in relation to issues associated with the conduct of hearings and the examination of witnesses of the type now under consideration. It is not my function, nor would it be sensible in any event, to endeavour to write a Manual for the conduct of hearings by the Commission. I shall express my views on the issues which are raised in this Operation, but at the

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same time, I will bear in mind that those views may be capable of more general application.

Applicable Law

30. There is a substantial body of law concerning the requirements of procedural fairness in tribunals. Decisions of the High Court such as *Annetts v McCann* (1990) 170 CLR 596 and *Johns v Australian Securities Commission* (1993) 178 CLR 408 are leading authorities on the topic. The clear point which emerges from the authorities is that there are no rigid rules, but an overriding requirement that whatever process is adopted, it must be fair in all the circumstances.

31. I regret that in the main, my opinions about the issues raised do not coincide with those of the Inspector, whose views I respect. Given the flexibility recognised by the law, ultimately there may be policy considerations which affect how the Commission should operate. In that regard, I am conscious of the historical aspects of investigations into police corruption. The Police Integrity Commission was established as a result of recommendations by the Wood Royal Commission resulting from the exposure of significant corruption within the NSW Police Force. History had shown that exposing and prosecuting police corruption by conventional methods had been largely unsuccessful. It was recognised that a wide range of coercive powers were necessary to provide mechanisms whereby steps could be taken to control police corruption in New South Wales (and in other States). What was also recognised was that a degree of ingenuity and innovation was necessary to overcome the advantages available to corrupt police by virtue of their knowledge of conventional investigative techniques, and from the prevailing culture of tolerance and protection that existed in police services across the country.

32. It is undoubtedly the position that in recent years there has been a marked improvement in the ethical standards of the NSW Police Force, and the challenges of combating widespread and endemic police

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corruption have diminished, but at the same time the complexity of the task has increased due to greater awareness of the strategies of internal affairs investigations and the techniques of the Commission. As a result it may be accepted that some latitude is still permissible by the Commission in investigating police corruption which may be inappropriate in other areas of enquiry. However, it is simply to state the obvious that accompanying the coercive powers and a license to depart from traditional investigative procedures, comes an obligation to ensure that the result of the exercise of those powers is not unfair.

Legal Representation

33. It is a significant factor in the circumstances which unfolded that Ms Young was legally represented from the time of her first appearance before the Commission on 21 August 2006 by an able and experienced lawyer from the Legal Representation Office ("LRO"), who also represented other witnesses during the investigation. The LRO was established during the time of the Wood Royal Commission in 1994 to provide a source of legal representation to persons appearing before the Royal Commission and has since become a permanent organisation providing legal services for witnesses appearing before the Commission and the Independent Commission Against Corruption, as well as inquests and other Special Commissions of Inquiry. It is staffed by lawyers experienced in representing witnesses in statutory inquiries. Its existence is an important factor in the landscape in which the Commission operates as the Commission is entitled to proceed on the assumption that witnesses appearing before it will usually be represented by a competent lawyer from the LRO and will have their interests adequately protected.

Overview

34. My general view of the appropriate process for examining Ms Young was that because there were reasonable grounds to suspect that she would not be frank, and that she could be directly or indirectly a party to the

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"thin blue line" of protection suspected to surround Hosemans, it was proper to question her first without notice in order to commit her to a position, before then revealing the evidence tending to demonstrate the contrary by calling Ms Novotny to give evidence of her finding. It was then appropriate to recall Ms Young in order to receive her explanation for the evidence which seemed to be at odds with her earlier account.

35. In that sense, the position of Ms Young was no different to that frequently encountered by the Commission where a police officer is under suspicion and is called to give evidence of his or her explanation, before contrary material, such as electronic recordings from telephone intercepts or listening devices are revealed, which has the result in many cases of the witness "rolling over" when they become aware that their denials are unacceptable. It is not clear that such an approach was pioneered by the Wood Royal Commission, but it has certainly been consistently used for a decade since then without any adverse finding as to the use of such a strategy.

36. The only variation on the process that was followed that I would suggest, with the benefit of hindsight, and in a perfect world is to have tendered Ms Novotny's report at the conclusion of either her evidence or the further evidence of Ms Young before the hearing was adjourned on 14 November 2006 in order to provide Ms Young's lawyer with access to the document contemporaneously. However, during the hearing on that day, the Commissioner seemed sensitive to Ms Young's position and had provided her legal representative with an opportunity to consider his position, before proceeding to cross-examine Ms Novotny but that opportunity was not taken. In the circumstances it would seem unlikely that the tender of the document then would have changed the course of events and the service of it as an attachment to the submissions of Counsel Assisting overcame any deficiency in not providing the document at the time.

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Advice Sought

37. The first two matters on which my advice has been sought relate to the same general issue of the extent to which the Commission should have given notice to a witness to the effect that it was intended to examine her in relation to evidence which may result in adverse findings against her. The questions are posed in the following terms:

> *"54.1 Was the Commission obliged, as a matter of procedural fairness, in the circumstances of this matter to do more beyond that of announcing the general scope and purpose of the hearing (s32(3) of Act); if so, what might that have involved?*
>
> *54.2 In particular, would it require, as suggested by paragraph (81) of the Inspector's report, that the Commission was obliged to ensure "adequate notice to [Ms Young of the existence of Ms Novotny's report] and equally important, an adequate opportunity to digest the content of the Report prior to [Ms Novotny] commencing her evidence at the hearing" on 14 November 2006?"*

38. In paragraph 32 of his Report, the Inspector by implication seems to have decided that the statement of general scope and purpose read to Ms Young when she was called to give evidence before the Commission was inadequate for the purposes of providing procedural fairness in giving proper notice of allegations of misconduct. Later in his Report he also concluded that it was crucial that notice be given of the Novotny report, and an adequate opportunity to digest the report be given prior to the expert witness commencing her evidence at the hearing.[12] It was said that the rule of natural justice that is particularly relevant is that the parties must be given adequate notice and the opportunity to be heard.[13]

39. The questions referred to above involve consideration of statutory obligations which arise under s 32 of the *Police Integrity Commission Act* to announce the general scope and purpose of a hearing, and the

[12] Paragraph 81
[13] Paragraph 76

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common law requirements of natural justice of adequate notice of allegations which may lead to adverse findings.

Announcement of General Scope and Purpose

40. The principle functions of the Commission are set out in s 13(1) of the Act and include the detection and investigation of police misconduct. Section 23 of the Act empowers the Commission to conduct an investigation and s 32(1) provides that for the purposes of an investigation, the Commission may hold hearings. The Commissioner is empowered to summon a person to appear before the Commission at a hearing to give evidence by s 38 of the Act. Sub-section 32(3) requires that at each hearing, the person presiding must announce the general scope and purpose. At the hearings in which Ms Young appeared she was informed of the scope and purpose of the hearing in the same terms as had been used for all witnesses who had appeared in the course of the hearings conducted by the Commission in its investigation into the disappearance of Janine Vaughan. The issue is whether the announcement complied with s 32(3) or whether a different and more specific announcement should have been made referring to the suspicion that Ms Young had presented a false document to the Commission.

41. On any view, the important word in interpreting s 32(3) is the requirement to announce the "general" scope and purpose of the hearing. It is not a requirement to be specific or to particularise the precise objective of the hearing. It has to be borne in mind that a "hearing" may involve a number of witnesses appearing before the Commission on the same day, or on different dates. It would be unrealistic to expect that the Commission should have prepared different announcements as to the scope and purpose of the attendance of each witness before the hearing.

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42. The statutory obligation depends to some extent on when there is a hearing. As the majority said in *National Companies and Securities Commission v News Corporation* at 322:

> *"The word "hearing" is not used here as a term of art. It is used as an ordinary word which must take its meaning from its context in the Act. The Act authorises the Commission to conduct an investigation by way of procedures which the Act refers as to a "hearing".*

It is not clear from the *Police Integrity Commission Act* what constitutes a "hearing", but it does not appear to contemplate a separate hearing each time a witness is summonsed to give evidence in the course of an investigation.

43. The Act requires the announcement of the general scope and purpose of the hearing, not of the investigation, but I do not see any reason why the terms of the announcement for each hearing should not be the same throughout an investigation, and in most cases, they probably should be. As the hearings are "(f)or the purposes of an investigation" (s32(1)), it would follow that each hearing has the same purpose and the use of the same announcement at each hearing of the investigation would be logical.

44. In some cases where an investigation exposes a different form of police misconduct, it may be desirable to redefine the terms of the announcement of the general scope and purpose and embrace the extended ambit of the investigation, but on the facts of this case that situation did not arise. Whilst there were unexpected implications arising from the document produced by Ms Young on 15 September 2006, those circumstances directly related to the current investigation into the disappearance of Ms Vaughan and did not amount to an extension of that investigation, such that a redefinition of the scope and purpose of the investigation was required. I do not see it as necessary that the Commission should generally have to redraft the terms of the announcement of the general scope and purpose for each witness who

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appears at the hearing of the Commission in the course of an investigation about whom there may be a particular suspicion as to their role in the matter under investigation and, in my view, the terms of the scope and purpose given to Ms Young complied with s 32 of the Act.

Common Law Requirements of Procedural Fairness

45. The Inspector considered that the Commission had not complied with the rule of natural justice that parties must be given adequate notice and the opportunity to be heard. When the issue was first raised, the Commission responded by letter dated 9 May 2008 in which the following was asserted:

> *"32) It is well established that evidence taken in private hearings held for the purposes of an inquiry such as that which the Commission conducts may, for strategic reasons, be withheld from a person who may be affected by the evidence. It may be necessary to do so to ensure the integrity of an investigation. A commission may for similar reasons deny access to documents held by it. The absence of a pre-indication by way of particulars or supplied material however in no way erodes the right to have an opportunity to meet an adverse finding before it is made or reported.*[2]

[2] *Peter M Hall, Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – powers and procedures, (2004) para 13,130 (at page 726) referring to decisions in Aristodenmou v Temby and Independent Commission Against Corruption (unreported) Supreme Court of NSW, Grove J, 14 December 1989. See also Morgan v Wanless v Independent Commission Against Corruption (unreported), Supreme Court, Sperling J, 31 October 1995, and Donaldson v Wood (unreported), Supreme Court of NSW, Hunt CJ, at CL, 15 September 1995*

> *33) Indeed in Donaldson v Wood, it was held that the technique of confronting a witness with an allegation against him of which he had no notice and requiring him to answer immediately, without any opportunity of reflecting upon his position, did not constitute a denial of procedural fairness in a proceeding which involved the investigation of allegedly corrupt conduct.*[3]

[3] *Hall, op cit*

46. I agree with that summary of the law. The reference to the decision of Hunt CJ at CL in *Donaldson v Wood* is particularly apt as it established a precedent for not being required to give witnesses advanced notice of

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the issues they will confront which applied during the balance of the Wood Royal Commission and has been followed by the Commission since its existence. I would add to the authorities cited the decision of Ashley J in *Firman v Lasri & Anor* [2000] VSC 240 at [304] where it was also recognised that a Royal Commission was not obliged to give advance notice if it would be "to the Commissioner's ultimate disadvantage if the witness was given forewarning of a likely attack". Similar sentiments were set out in the judgment of the majority in *National Companies and Securities Commission v News Corporation* in the following passage at p323:

> *"It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry. Of course, there comes a time in the usual run of cases when the investigator will seek explanations from the suspect himself and for that purpose will disclose the information that appears to require some comment."*

47. Similarly in *Edwardes v Kyle* (1995) 15 WR 302 Owen J stated that wherever possible an investigator should have a "free hand" subject to the overriding requirement of fairness to prescribe practices and procedures that will be adopted during the enquiry, and in *Bond v The Australian Broadcasting Tribunal* (No. 2) (1998) 19 FCR 494 Wilcox J acknowledged the concept of flexibility when stating that the confines of particulars were inconsistent in principle with the performance of a statutory duty to follow the evidence "wherever it leads". None of the authorities establish a principle that a witness should be given notice before a hearing of an allegation, or the existence of adverse material.

48. The Inspector referred to various authorities in support of his position. In particular, he referred to *Moore v Guardianship and Administration Board* [1990] VR 902, a judgment of Gobbo J in relation to a decision of the Victorian Guardianship and Administration Board. In paragraph 78

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of his Report, the Inspector appears to quote a passage from p912 of the judgment by incorporating a statement in italics. If so, the passage is incomplete. The actual passage is as follows:

> *"The Report was of such possible significance that if it was to be used at all by the Board, it should have actually been provided, desirably before the hearing or at least in such a way as to afford the relevant persons a meaningful opportunity of evaluating and responding to the Report or if thought fit objecting to the whole or parts of the Report."*

I have underlined the words omitted which, when read, indicate that the statement of principle was not as specific as restated by the Inspector and does not lay down a requirement that notice should be given before a hearing. In any event, the context of decisions being made by the Guardianship and Administration Board was different to the character of the functions being carried out by the Commission, and different rules of fairness are applicable. Similarly, other authorities referred to by the Inspector in paragraph 79 relate more to proceedings of a judicial character in which different standards apply.

49. On the fundamental issue of any requirement for advance notice of potential adverse consequences, I do not think that there is any doubt that the statement of the majority in the High Court decision in *National Companies and Securities Commission v News Corporation* (at p323) quoted above in relation to the obligations of an investigative body invested with coercive powers, is more authoritative than the dicta of a single judge of the Supreme Court of Victoria in *Moore* when dealing with the processes of a decision making body such as the Victorian Guardianship and Administration Board, especially when the same approach was approved by a judge of the Supreme Court of New South Wales of the standing of Mr Justice Hunt in *Wood v Donaldson*.

50. In the end result, I do not think that the authorities provide support for the proposition that there was a requirement that Ms Young should have been given notice of the suspicions as to her conduct, or a copy of the report of Ms Novotny which provided the basis for those suspicions.

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Similarly, I do not think that the authorities require the Commission as a general rule to adopt the practice of providing particulars of possible allegations, or copies of adverse evidence, that a witness is likely to be confronted with at a hearing. Such a procedure would be inimical to the strategies which have been successfully adopted by Royal Commissions and the Commission in exposing police corruption in recent years. The application of such a principle would have the result that, not only Reports of the type prepared by Ms Novotny be supplied, but also adverse evidence in other forms, such as testimony given by previous witnesses in hearings, which would not only create an unacceptable administrative burden, but would also frustrate the proven technique calling upon witnesses to deal with the evidence without an opportunity to reflect upon their position, as approved in *Donaldson v Wood*.

Failure to Tender Ms Novotny's Report

51. The Inspector was very critical of the failure of Counsel Assisting to tender Ms Novotny's report during the hearing of 14 November 2006. He expressed his dissatisfaction with the procedure adopted in various terms but particularly paragraph (85) described the process as one which could not be justified on any basis and was in his opinion "incomprehensible".

52. It is to be recalled that when Ms Novotny gave her evidence on 14 November 2006 she gave her evidence orally although there was displayed electronically the ESDA comparison of the loose page and pages from the diary. No specific reference was made during her evidence of a report being prepared by her, although a CD containing the analysis and comparison was tendered as an exhibit prior to the proceedings being adjourned. At the conclusion of the evidence-in-chief of Ms Novotny the Commissioner manifested his appreciation of the position confronting the lawyer for Ms Young by having to deal with the issues immediately, but the lawyer indicated that he had one matter only

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to raise and proceeded to do so without accepting the implied invitation to take more time.

53. A copy of the report was forwarded to Ms Young's lawyer together with the submissions of Counsel Assisting on 3 May 2007. Submissions in reply were lodged on behalf of Ms Young on 9 May 2007 and no reference was made to the Report or to any procedural disadvantage arising from the circumstances in which it had been provided.

54. I have been asked to advise upon the following questions:

> *"57. In relation to paragraph (85) of the Inspector's Report:*
>
> *57.1 Was the Commission obliged, in the circumstances, as a matter of procedural fairness, to tender Ms Novotny's report at the private hearing on 14 November 2006?*
>
> *57.2 Did the failure to tender Ms Novotny's report at the hearing, in the circumstances, involve a breach by the Commission of its obligations of procedural fairness?*
>
> *57.3 As a matter of procedure is it open to say that the failure to tender Ms Novotny's report, or disclose the existence of the report and provide access to it to Ms Young prior to, or at any time during the hearing "could not be justified on any basis"?*
>
> *57.4 Was there anything improper in the manner in which the evidence was adduced from Ms Novotny during the private hearing without disclosing the existence of her written report or establishing whether she adhered to it or wished to qualify it or amend it in any way?*
>
> *57.5 Is there any similarity between the circumstances in which Ms Novotny gave her evidence and the subsequent manner in which her report was admitted as material forming part of the investigation and the circumstances in Moore's case such that "similar criticism" made in that case could also be made in this matter?"*

55. The principles of law relating to procedural fairness have been stated and restated many times over and are to be found in the authorities to

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which reference has been made already. For convenience, I shall refer to statements of principle summarised in *Edwardes v Kyle*:

> *"The notion of procedural fairness demands that a person be given notice of what is put against him and be given a real opportunity to be heard. He must be given sufficient particulars of contentious matters to allow him to respond by way of correcting or contradicting the adverse material in a meaningful way."* (at 317)

and

> *"7. The investigator must decide what is required so as to afford the affected party a real and meaningful opportunity to be heard. The particularity with which the adverse material is to be identified, whether the party is entitled to adduce further evidence and whether he or she can insist on cross-examining witnesses are all decisions to be taken in the context of the particular fact situation. No general rule can be enunciated but the gravity of the possible consequences for the party may well dictate the extent of the duty in a particular case."* (at 318)

56. The issue arises in a situation in which the fact of the witness being legally represented is very significant. It had the practical consequence that the Commission was entitled to assume that if there was a perception of unfairness or disadvantage, that would be brought to the attention of the Commission.

57. There is little point in the Government funding through the LRO the legal representation of witnesses if that assumption cannot be made. In my view, it is a matter of some moment that no complaint was made about the way Ms Young was treated at any time prior to the publication of the Rani Report.

58. In the circumstances in which Ms Novotny was called to give evidence and due to the nature of it, it was to be expected that any experienced practitioner would proceed on the basis that:

    (a) experts invariably produce reports or statements, and do not give oral evidence without providing a written version in advance;

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(b) where the opinion of an expert called without notice is complex to the point of requiring further consideration, an adjournment can be sought for that purpose; and

(c) when a report is provided after a hearing has concluded which contains information which is regarded as a surprise, controversial or disputed, a request can be made for a further hearing at which those matters can be explored, or at least submissions can be made to the effect that an opportunity was not available to raise those issues.

59. The importance of legal representation was reflected in the arrangements approved by the majority in *National Companies and Securities Commission v News Corporation Limited* when they said (at p325):

> *"In our opinion the Commission will comply with the statutory mandate to observe the rules of natural justice in the present case if it proceeds to allow each witness who is called to give evidence to be legally represented, with freedom for that representative to participate in the examination of the witness, and for the provision of a transcript of his evidence."*

60. As mentioned above, I do not see the decision in *Moore's* case as a useful guide in the current circumstances and the full quotation reproduced above does not provide authority for the proposition that it was obligatory that the report of Ms Novotny be provided either prior to or during the hearing during which Ms Young gave evidence. I have already expressed my preference for a procedure in which the report was tendered at the time, but the failure to do so, in my opinion, did not amount to procedural unfairness or impropriety, given that it was provided before her legal representative was required to make submissions on her behalf.

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Failure To Lead All Of The Contents Of Ms Novotny's Report



61. In paragraphs (86) to (92) of his Report the Inspector was critical of the conduct of Counsel Assisting for failing to lead from Ms Novotny when she gave evidence all of the contents of her report. The particular matter which the Inspector suggests would have been revealed was the fact that Ms Novotny could not identify the date when the document containing the notes was written. Other matters are alleged in general terms in paragraph (61)(vi) of his Report, but the matter to which specific criticism is directed is the question of the date of the writing of the notes. The Inspector was of the view that the fact that Ms Novotny could not specify the time when the notes were written was important and should have led to acceptance of the evidence of Ms Young as to the writing of the notes, which in turn would have removed any basis for "the adverse and damaging opinions concerning" her in the Commission's Rani Report. The Inspector went on to conclude that the unfairness was exacerbated by other procedures, such as not permitting Ms Novotny to be present during the further examination of Ms Young or otherwise making available to her Ms Young's evidence.

62. Ms Novotny's report does not state that she was unable to place a time on the writing of the notes. The Inspector has inferred such a representation from the fact that the Report states that the purpose of the examinations was to determine "when" the entries were written, and the failure to make any statement on that topic indicates that she was not able to do so. I am not sure that the document generates such an inference. The term "when" could equally mean that she was asked to express a view as to the "at what stage" or "in what circumstances" the notes were written. In any event, a concluded view upon the interpretation of her report is probably unnecessary. It emerges from the later correspondence that Counsel Assisting was aware from his discussions with Ms Novotny before she gave her evidence that she did not or could not express a view as to the age of the writing and there remains a broad issue concerning the failure to advise Ms Young's legal

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representative of that fact, either by providing the report or informing him expressly of it.

63. A number of specific issues have been identified for my consideration, to which I turn shortly. However, as there is a theme common to most of the questions, I shall take the opportunity of expressing my view in general terms first.

64. I am reluctant to become embroiled in a debate over the factual significance of the matters referred to in the Inspector's Report, however, I am obliged to state that I do not agree with the weight attributed by the Inspector to the lack of evidence of the date of the writing of the notes. Ms Young was not precise as to when she created the notes which were ultimately produced. Her explanations seemed to amount to a claim that it was reasonably contemporaneous with the dates to which the notes related, which of course was some years earlier. As I understand the evidence, the inability of Ms Novotny to put a timeframe to the writing of the notes did little to reduce the adverse implications from the evidence she gave concerning the notes having originally been written on pages in the diary which then was produced with the pages missing, before the subsequent voluntary production of the notes containing additional information in the relevant entry. Evidence as to the recent writing of the document would certainly have enhanced the adverse inferences to be drawn, but the absence of that evidence did not negate the inferences that were otherwise available. The ultimate situation was that there was no evidence as to the timing of the writing, and it was open to the legal representative of Ms Young to make that point in the submissions lodged on her behalf. However, the opportunity was not taken.

65. Whatever the implications of any further representations in the written report of Ms Novotny that was not adduced orally, the report itself was provided to Ms Young's legal representative together with the written submissions of Counsel Assisting, prior to written submissions being prepared on behalf of Ms Young, and the opportunity existed to utilise

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such of the additional material as was considered to be of assistance to her case in submissions in reply. Accordingly, any deficiencies which existed in the process of leading her evidence during the hearing were substantially overcome by the subsequent provision of her report, and I do not think that there was any breach of procedural fairness.

66. The next group of questions that I have been asked to address substantially deal with the same issues and I shall shortly state my responses to each of them.

> *"58.1 Accepting that not all of the contents of Ms Novotny's report were adduced in her evidence in her evidence in private hearing on 14 November 2006, what was the effect of that failure to do so and, in the circumstances did this involve or amount to a denial of procedural fairness to Ms Young?"*

67. I do not think there was anything in Ms Novotny's report which was not adduced in oral evidence which significantly influenced the issues which affected her and accordingly I do not consider that there was a denial of procedural fairness.

> *"58.2 Did the fact that the report was subsequently admitted as part of the material to be considered within the overall investigation and a copy provided to Ms Young's legal representative together with Counsel Assisting's submissions alter that position?"*

68. I am of the view that if there was any procedural unfairness in the way that Ms Novotny's evidence was led, the provision of the report to Ms Young's legal representative before he was required to respond to the submissions of Counsel Assisting, overcame any unfairness.

> *"58.3 What was the effect, if any, on the validity of the opinion expressed by the Commission as to Ms Young in the Rani Report of the failure of the submissions of Counsel Assisting*

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and the Rani Report to refer to the additional material not adduced from her during her evidence at private hearing?

69. In the Rani Report the Commission described the evidence of Ms Young as to the handwritten records as "less than satisfactory" and found the more likely scenario to be that the document produced to the Commission was created to support her claim that she was with Hosemans on the night of 6 December 2001.[14] In his written submissions, Counsel Assisting reviewed the evidence relating to the conduct of Ms Young in producing the notes and submitted that her evidence as to why she made two different handwritten records of the SMS messages was fanciful with the more likely scenario being that the document produced to the Commission was concocted in order to support her claim that she was with Hosemans at the time of Ms Vaughan's disappearance.[15] Consistent with those conclusions Ms Young was then found to be an affected person because she was the subject of the substantial allegation that she deliberately produced a false document to the Commission and gave false evidence about it. In that context, the Commission suggested that consideration should be given to the prosecution of her for an offence against s 107 of the *Police Integrity Commission Act*. As explained above, I agree with the conclusions expressed and I do not see anything in the additional material in the Novotny report as being likely to change those opinions. I do not overlook the fact that the Office of the Director of Public Prosecutions declined to prosecute Ms Young, but the reasons for that decision are not known to me and there could well have been formal matters which prevented a prosecution, or indeed, a view that the evidence was not sufficient to prove the offence beyond reasonable doubt. Such a conclusion would not be inconsistent with the opinions expressed in the Rani Report, which do not purport to make conclusive findings as to the misconduct by Ms Young.

[14] Paragraph 9.20
[15] Paragraph 149

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"58.4 *Did the manner in which Ms Novotny's oral evidence was adduced at the private hearing on 14 November 2006 and the subsequent admission of her full report as an exhibit in the overall Rani investigation have the effect that not all relevant material was available for the Commission to consider in expressing the opinions it did as to Ms Yong in the Rani Report?"*

70. The matter which seemed to particularly concern the Inspector, which was not referred to in Ms Novotny's evidence or in her report, was the fact that she was unable to place a date on when the document was written. It is not clear when that fact became known but it seems that it was known to either the investigators and/or Counsel Assisting before the hearing and certainly before submissions of Counsel Assisting were distributed to the legal representative of Ms Young. For the reasons referred to above I consider that the point was available to be made by the legal representative of Ms Young by virtue of the omission of any evidence that identified the date of the writing, and that there was no enduring unfairness to Ms Young due to the failure to expressly refer to the instructions provided by Ms Novotny.

"58.5 *In particular, what was the effect if any, on the opinion expressed as to Ms Young in the Rani Report of the fact that Ms Novotny was unable to determine the date on which the entries were written on the loose leaf diary page?*

71. As indicated earlier, I do not think that the fact that Ms Novotny was unable to determine the date on which the entries were written had any material effect on the opinion expressed in the Commission's Rani Report concerning Ms Young. It did not change the conclusion to be drawn that she had written the original notes when the pages were inside the diary and had thereafter rewritten the entries by adding detail to the relevant SMS message before producing the document to the Commission. Ms Young ultimately accepted that scenario but was unable to state when she had rewritten the entries. Whenever that occurred, it was after the pages had been taken out of the diary, and in

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my view the absence of any evidence as to the date when that occurred did not cast any doubt upon the conclusions to be reached.

> *"58.6 Was there any "unfairness" occasioned to Ms Young in that Ms Novotny was not present during the private hearing when Ms Young gave evidence although Ms Young was present when Ms Novotny gave her evidence?*

72. On balance, I consider that it would have been preferable to have Ms Novotny present when Ms Young gave evidence in order to enable her to have the opportunity of clarifying any aspects of her evidence in the light of the explanation given by Ms Young. However, in the circumstances which occurred, where Ms Young gave a very imprecise account of the creation of the document, I do not think that there is any particular matter upon which Ms Novotny could have shed any further light in addition to the evidence that she had already given, or that her absence occasioned any unfairness to Ms Young.

> *"58.7 Did the manner in which the Commission admitted Ms Novotny's report (Exhibit 122C)[51] as material to be considered as part of the investigation concerning Ms Young and the associated manner in which it was disclosed to her legal representative, as indicated in the Commission's letter of 2 May 2007, amount to or involve a "continuing breach of procedural fairness" by the Commission?*
>
> *[51] Tab 4*

73. I have already expressed my view that there was no procedural unfairness in the manner in which Ms Novotny's evidence was led during the hearing and her report later provided to her legal representative. I have also expressed my preference for the report to have been handed to Ms Young's legal representative at the time of the hearing, although I noted that it was unlikely that anything would have changed so far as the protection of Ms Young's interests were concerned. Consistent with that view, I do not think that there was continuing breach of procedural

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fairness in not supplying the report until 2 May 2007, together with the submissions of Counsel Assisting.

"58.8 *In serving a copy of Ms Novotny's report on Ms Young's legal representative with the submissions of Counsel Assisting, was the Commission obliged to do more beyond that set out in its letter of 2 May 2007?*

74. If there was anything additional in the report of Ms Novotny compared with the evidence she gave orally, which I doubt, then the report spoke for itself and Ms Young's legal representative was capable of either requiring a further hearing to deal with any such matters, or of responding to those issues. The implications of the submissions of Counsel Assisting were immediately apparent to her legal representative who responded with a letter on the same date and then in the form of detailed written submissions accompanying a letter of 9 May 2007. Nowhere in that correspondence is there any indication that there was some dissatisfaction or disadvantage in the way that the evidence of Ms Novotny had been adduced.

"58.9 *In the circumstances, was the Commission obliged to recall Ms Novotny for further examination in light of the additional matters referred to in her report that were not adduced from her in her evidence in the private hearing of 14 November 2006?*

75. I do not think that the Commission was obliged to recall Ms Novotny. If the legal representative of Ms Young considered that to be necessary, he could have made a request, but did not do so.

"58.10 *Does the "general rule" referred to in paragraph (93) of the Inspector's Report said to be based on the decision of Peko Wallsend Case [1986] HCA 40 have any application to the circumstances of this matter given the functions and powers of a commission of inquiry that the Commission exercised*

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under the Act? (see paragraph (3) of Commission's response of 23 February 2009)[52]

52 Tab 37

76. In paragraph 93) the Inspector cited "the *Peko-Wallsend case* in [1986] AC 40 at paragraphs (13) and (14)" of the judgment of Brennan J as authority for the proposition that it is wrong for a tribunal to get outside information which may tell against one of the parties without giving that party an opportunity of dealing with it. It would seem that the Inspector was referring to the decision of the High Court in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1985-1986] 162 CLR 24 and to the passage in the judgment of Brennan J at p59. In his judgment, having referred to *Errington v Minister of Health* [1935] 1 KB 249 as authority for the proposition that a Minister is bound to give the parties to the controversy a fair opportunity for correcting or contradicting any relevant statement prejudicial to their view, Brennan J said:

> *"The principles of natural justice, embracing the Errington principle, govern the procedure for ascertaining facts for consideration; but, statute apart, they do not finally shut out from consideration information acquired by means of an ex parte communication from one party. A decision-maker is entitled to take into consideration relevant information contained in an ex parte communication and any response by the other party; he is not entitled to take such information into consideration without giving the other party an opportunity to respond.*

77. I do not think that the rule was breached in this case. The statement by Brennan J was a variation on the theme expressed in many of the cases referred to above. I do not think that there is any additional requirement being specified in the passage quoted. It was clear from the evidence and the report of Ms Novotny that she did not express a view as to the date of the writing on the document. It may have been preferable if that had been said in express terms, but it was readily apparent from what she did say that she did not take the extra step of purporting to identify the time of the writing. The legal representative for Ms Young was in a position to take advantage of that deficiency had he chosen to do so.

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"58.11 *Are the views expressed at paragraph (97) of the Inspector's report as to the procedures adopted by the Commission as having denied procedural fairness to Ms Young well founded as a matter of law such that there is any basis for the recommendations set out at paragraph (100) of the Inspector's Report?*

78. I consider that the procedure by the Commission was in accordance with the principles and practices approved particularly in *Donaldson v Wood* and *National Companies and Securities Commission v News Corporation Limited*, and other authorities to which reference has been made, and did not amount to procedural unfairness. Accordingly, I do not think that there was any basis for the consequential conclusions and recommendations made by the Inspector in his Report.

The role of the Inspector

79. In his report the Inspector recognised that his functions were limited and did not include the capacity to conduct a merits review of the opinions and assessments of the Commission as a result of the investigation by it[16]. The Inspector expressed that view after noting the terms of s 89 of the *Police Integrity Commission Act*. However, the Inspector also concluded that a failure to consider relevant evidence by the Commission or a failure to accord procedural fairness to a witness, may have a bearing as to the opinions formed by the Commission which may not have been so formed had the omission not occurred, thereby bringing such a case within "Section 89(i)(a)(c)(*sic*) and also s89(1)(b)"[17]. Consistent with the last observation, the Inspector concluded that, had the views of Ms Novotny that she could not date the writing been considered by Counsel Assisting, it would have left Ms Young's evidence apparently uncontradicted and "there would have been no basis for the adverse and damaging opinions concerning the Complainant formed and published by the Commission in the Rani

[16] Paragraph 66
[17] Paragraph 68

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Report[18], and that had the evidence been produced "it would have ruled out of contention the opinion formed by the Commission as to Document 573"[19] Following on a series of adverse findings by the Inspector, to which reference has already been made, he then said:

> *"...to that end it follows that the adverse opinions published of the complainant in the Rani report should be treated as unauthorised on the basis that in coming to such opinions the Commission failed to observe the requirements of procedural fairness, and consequently no reliance should be placed on such unauthorised material for any purpose adverse to the complainant."*[20]

The Inspector ultimately recommended to the Commission that it should take all reasonable steps within its power to limit the damage caused to the Complainant's reputation by the publication of the adverse opinions concerning her and to halt any further damage on the continuation of the publication of the adverse opinions on the Commission's website[21].

80. In that context I have been asked to address the following questions:

> "59.1.1 *Does the discussion at paragraphs (63) to (68) represent a correct summary of the Inspector's jurisdiction under section 89 of the Act; in particular, is the discussion at paragraphs (65) to (68) as to the limitations on the Inspector's functions consistent with the opinion expressed at paragraph (48) of the Inspector's Report?"*

In my opinion, the summary of his functions by reference to s 89 of the Act by the Inspector is accurate. I note also that s 101 of the Act enables the Inspector to make a report to Parliament on "any matters affecting the Commission", which in its terms is unlimited but presumably is restricted by the limitations upon the functions of the Inspector in s 89. The Inspector recognised the fact that his principle functions are to deal

[18] Paragraph 88
[19] Paragraph 48
[20] Paragraph 99
[21] Paragraph 100

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with procedural issues, and not to engage in a merits review of opinions or findings of the Commission, but he went on to make emphatic and express findings as to the appropriateness of the conclusions formed by the Commission. Although it is clearly not the function of the Inspector to usurp the role of the Commission to decide the effect of the evidence, I do not think that the limitations implicit in s 89 preclude the Inspector altogether from engaging in an assessment of the evidentiary significance of the consequences of procedural issues that he has under consideration, as such a task may be necessary in order to determine whether the matters are of sufficient gravity to warrant a report by him. Nevertheless, it was, in any view, inappropriate for the Inspector to have expressed his comments in such positive terms, rather than referring to the possibility that the opinions of the Commission may have been different if the procedures he considered necessary had been followed.

81. It seems to me that what more clearly exceeded the powers of the Inspector was the recommendation in paragraph 100 that the Commission should take action to limit the damage to Ms Young's reputation by removing material from the Commission's website. It is only a recommendation, and presumably the Commission can independently decide whether to follow the advice or not, but it is difficult to see how the Inspector is authorised to take such action under s 89 or s 101 of the Act.

> *"59.2.1 What would such a failure have to involve in order for any opinion that the Commission did express to be not open to it?*

82. In paragraph (68), the Inspector referred to a "failure to consider relevant evidence by the Commission, or a failure to accord procedural fairness to a witness" as having a possible bearing on the opinions formed by the Commission. The range of possibilities is so broad that I do not think that I can meaningfully express a view as to what matters would amount to such a failure to effect an opinion of the Commission to the extent that

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the opinion would not be open to it. Clearly it will have to be a matter of major importance. Consistent with the views that I have already expressed, I do not think that the omission identified by the Inspector in this case involving the fact that Ms Novotny could not specify the date of the writing was such that the opinion reached by the Commission was no longer open to it.

"59.2.2 Does such a failure fall within the jurisdiction of the Inspector to deal with under section 89 of the Act?

83. As indicated earlier, I consider that it could be appropriate for the Inspector to take into account potential evidentiary consequences of conduct which is the subject of a complaint in order to determine whether any alleged deficiencies were identified by him of sufficient significance to require a report, but clearly such an assessment should not take the form of a merits review of the findings of the Commission, nor result in positive expressions of opinion about the opinions reached by the Commission.

"59.2.3 Did the Commission fail to take into account any relevant evidence such that the opinion that it did express as to Ms Young's conduct in the Rani Report was not open to it to express?

84. As I have said on a number of occasions, I do not think that the evidence that Ms Novotny could not give an opinion as to the age of the writing, had the consequence that the opinion formed by the Commission was not open to it, I am not aware of any other evidence which the Commission did not take into account, which would result in the opinions about Ms Young's conduct being not open. My attention has been drawn to the fact that after Ms Novotny gave evidence, a further attempt was made to gather evidence concerning the age of the writing by sending the page containing the notes to the Forensic Science Centre in

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South Australia for testing, but the results were inconclusive as the laboratory was unable to detect the presence of the necessary solvents in the samples they took, in order to enable any view to be expressed. I consider that the situation resulted in evidence of a similar character to that of Ms Novotny and was therefore neutral in its effect. It may have been preferable to have disclosed the circumstances to the legal representative of Ms Young, but in my view, it did not have the capacity to change the conclusions otherwise available from the evidence.

59.2.4 If the Commission did not fail to take into account any relevant evidence, was the Commission's opinion that it expressed as to Ms Young's conduct in the Rani Report supported by the evidence that is referred to in that Report?

85. My personal view is that the evidence justified the opinion formed by the Commission as to Ms Young's conduct. The fact that the ODPP decided not to prosecute Ms Young was immaterial, and reflected an appropriate application of the criminal justice system with the ODPP making an independent assessment of the adequacy of the evidence following a preliminary conclusion by the Commission.

12 WENTWORTH SELBORNE CHAMBERS

25 May 2009

PETER HASTINGS QC.

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ABN 22 870 745 340

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Our Ref: 20370/67
Your Ref: C03-07 DC

11 March 2011

The Hon P J Moss, QC
Inspector of the Police Integrity Commission
GPO Box 5215
SYDNEY NSW 2001

Dear Inspector,

Re: Complaint by Mr Bradley Hosemans

I have been Acting Commissioner of the Police Integrity Commission since mid-January 2011. During that time a considerable amount of time has been directed to the many criticisms you have made of the Commission when conducting hearings. I do not claim to have absorbed all the correspondence. I have, however, read the lengthy reports which have been published on your website as well as the opinions of Senior Counsel to the effect that in the Hosemans and Young matters your views were not legally correct.

I do not propose to respond paragraph by paragraph to your detailed letter dated 8 March 2011 (some of which, for example paragraph 9, I do not understand) beyond making it clear that I have read the opinion of Senior Counsel and agree with the gist of it, viz. that the Commissioner has not denied natural justice (or if you prefer, procedural fairness) to those examined nor has it been guilty of apprehended bias as those expressions must be understood in the context of the relevant legislation regulating the activities of the Commission.

The events giving rise to your criticisms of the Commission, including those in the reports published by you and put on your website took place before I was at the Commission. I played no part in those events. However I accept responsibility for the publication on the

website of the opinions of Senior Counsel to the effect that your assertions are legally incorrect. I did so for the following reasons:

a) In your view, the Commission has abused its power, acted with impropriety, and otherwise engaged in serious misconduct (see Hosemans Report p 43). This conclusion proceeded from your view that the Commission has denied natural justice to people who appeared before it and has acted in a way that a reasonably minded person would think it was biased. The Commission disputes the correctness of your opinions.

   In view of the correspondence passing between the Commission and the Inspectorate (including the opinions of independent Senior Counsel and your rejection of them), I will not pursue further the details of the criticism beyond perhaps reminding you that, contrary to your expressed view in the conclusion of the Hosemans report (see p 43), the Commission at all relevant times was not engaged in "the judicial process" but was exercising its investigatory powers.

b) You have made public on your website your conclusions as to abuse of power, impropriety, or other serious misconduct. Your conclusions derive from your understanding of the doctrine of "procedural fairness" and "apprehended bias" in the context of the relevant legislation. These conclusions were published before and after Senior Counsel retained by the Commission had advised that your view concerning the matters was not correct. Whether you have the legal authority to do other than make reports to Parliament (see section 101) may be a moot point but I would remind you that, on the information available to me, earlier you believed you did not have the authority and your request for it was not forthcoming.

Your devastating public criticism has damaged the morale of the organisation. Moreover, it has caused members of the Police Force (if the views of their Association are to be accepted) to believe that they have been and will in the future be exposed to, to use your terms, "unbalanced, bias and grossly unfair conduct" by the Commission in the discharge of its duties (see p 41 of Hosemans Report).

Although, of course, I have no power or control (nor would I seek any) over the exercise by you of your functions, it cannot be denied, I think, that your manner of expression including words such as I have already referred to, and the use of italics and underlining to give effect to your apparent sense of outrage, has seriously damaged the standing of the Commission and the confidence it should enjoy from members of the public - a confidence which it had, on my understanding, prior to your publications.

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If your views and conclusions were unarguably correct, the Commission could do no other than accept your censure and adjust its procedures to accommodate your view of how it should conduct itself in the discharge of its functions. But, as I have said, although you may think to the contrary, it is the Commission's view, buttressed by two opinions from Senior Counsel and, for what it is worth, my opinion, that your understanding of the doctrines of "procedural fairness" and "apprehended bias" in the context of the relevant legislation is seriously flawed.

Since I have been the Acting Commissioner, I have become aware that Cabinet is presently undertaking a review of the legislation. I propose to recommend that the reports of the Inspector such as the ones under discussion are to remain in confidence until authorised to be released by the Parliament. If accepted and when applied to the facts and circumstances under discussion, the Parliament would decide whether or not to publish the reports after, I would hope, it had regard to competing views.

Although as I have said it is not part of my function to dictate the duties of the Inspector and I accept that the views expressed by you in the past concerning the matters under discussion were views honestly held by you, it is my opinion that those views are wrong. Perhaps a great deal of unpleasantness might have been averted had the competing views been referred to the Crown Solicitor (as you were not, apparently, prepared to await the opinion of Senior Counsel) before you made public your last devastating and damaging criticism of the Commission.

Yours faithfully

The Hon Jerrold Cripps QC
Acting Commissioner

"D"

7670102

OPERATION WHISTLER: AUTHORITY OF THE INSPECTOR UNDER THE *POLICE INTEGRITY COMMISSION ACT 1996*

OPINION

I am asked to advise the Police Integrity Commission about the apparent intention of the Inspector of PIC to publish a report of an inquiry into aspects of PIC's own dealing with certain complaints against police officers, known as Operation Whistler. In particular, the question is raised as to the power or propriety of the Inspector doing so by posting a copy of the report on his official website, before the report has been given to the Presiding Officers of the Houses of Parliament and thus before they have directed its publication.

2 In my opinion, this proposed course of conduct lacks lawful authority, at least conveys disrespect for the Houses and unjustifiably departs from the orderly process by which (among other things) privilege is granted for the matters published in an Inspector's report. It follows that the Inspector should not self-publish, so to speak, and should await and abide by the superior authority of the Presiding Officers in this regard.

3 The powers of the Inspector include those expressly provided by subsec 90(1) of the *Police Integrity Commission Act 1996* (NSW) ("PICA"),which do not extend to any such action. Those powers do include two means of disseminating outcomes of inquiries, in the forms of references to other agencies in para (f) and recommendations for discipline or prosecution under para(g). Their expression rather prevents than assists any implication of a general power of publication.

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4 Similarly, the express grant of Royal Commissioner equivalent powers by sec 91 does nothing to warrant those provisions being read as somehow interstitially providing such a general and anticipatory power of publication.

5 Finally so far as statutory grants of power are concerned, apart from the specific provisions noted below, there is the general if supererogatory grant by sec 93 of incidental powers. They are stipulated to be powers to do all things necessary for the Inspector's exercise of his functions. In my opinion, it cannot be seriously argued that the kind of publication proposed by the Inspector falls within that class of actions. This is especially so given the specific regulation of publication to which I next turn.

6 All reports by the Inspector must be given to the Presiding Officers of the Houses: secs 101 and 102 of PICA. Indeed, the obligation of the Inspector with respect to his annual report is to "prepare" it and to "furnish" it accordingly. This statutory description leaves no room for intervening publication by the Inspector. Its terms are mandatory, not optional.

7 The clincher in my opinion, against the availability of the course apparently intended by the Inspector, is the prescriptive regulation by sec 103 of PICA in relation to publication of Inspector's reports. Under subsec 103(1), a report must be laid before each House. This can be done, of course, by direction of each Presiding Officer to whom the report had to be furnished under sec102.

8 Then, tellingly, the Inspector is given a role expressly with respect to publication, in subsec 103(2). That role is limited to making a recommendation - plainly, for consideration and decision by the Houses of the their Presiding Officers.

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9 The provisions of subsecs 103(3) and (4) of PICA complete the scheme by governing the manner and consequences of publication of an Inspector's report. They do so unmistakably in terms appropriate to the publication of reports by Parliamentary fiat and not to their publication by the prior and unilateral decision of the Inspector.

10 The allocation of functions to the Inspector, the Presiding Officers and the Houses, and specific recognition of the prerogative of the Houses to control publication of their own proceedings, including the contents of papers laid before them, seen in these provisions are clear. They contradict any supposed implication of authority of the Inspector to take the matter of publication into his own hands.

11 Whether unlawfully anticipating the decisions of the Houses by publishing a report on the Inspector's website might be treated by them as a contempt of Parliament may be debatable - but by them. The better view is that it could well be so. On any view, decent respect for the place and responsibility of the Houses should prevent the Inspector from proceeding as he apparently has proposed.

FIFTH FLOOR,

ST JAMES' HALL.

29th August 2011

Bret Walker

ABN 22 870 745 340

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COPY

The Hon Don Harwin MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon Shelly Hancock MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

5 October 2011

Dear Mr President and Madam Speaker

Re Police Integrity Commission s98 Report to Parliament

I refer to the s 98 Report presented by the Commission in Chambers on 19 September 2011.

In that Report reference was made to an opinion sought from Mr Bret Walker SC regarding a draft report prepared by the Inspector of the Police Integrity Commission into a complaint by former Inspector Timothy O'Neill.

That opinion was received on 4 October 2011 and I enclose a copy for your information. I request that the opinion be placed with the Commission's s98 Report and treated as Annexure E to that Report.

Thankyou for your assistance.

Yours faithfully

The Hon Jerrold Cripps QC
Acting Commissioner

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POLICE INTEGRITY COMMISSION
COMPLAINT TO INSPECTOR OF PIC BY T J O'NEILL

OPINION

I am asked to advise PIC about questions of procedural unfairness and apprehended bias addressed by the Inspector of PIC in his dealing with complaints by former police inspector Timothy Joseph O'Neill. The O'Neill complaint concerns investigations by PIC into alleged police delinquencies in the Wagga Wagga area command early last decade – an investigation known, or largely known, as Operation Whistler.

2 The background is significant, but too detailed for repetition in this Opinion – I refer generally to the outline contained in the Observations dated 20th April 2011, and to the attached documents.

3 The critical documents which provide by far most of the material upon which I have formed my opinions are the Submissions of Counsel Assisting dated 19th April 2005, the Submissions on Behalf of Former Inspector Timothy Joseph O'Neill dated 5th May 2005, the Report regarding Operation Whistler provided to the Presiding Officers of the Houses of Parliament in December 2005 and the Draft Report by the Inspector of PIC provided under cover of his letter dated 9th March 2011. I have also taken into account the other material briefed to me, including the very detailed correspondence between PIC and the Inspector of PIC.



4 The Inspector of PIC proposed to report that PIC had displayed apprehended bias against Mr O'Neill and had denied him procedural fairness. On an assumption that the many and detailed criticisms of PIC's Report on Operation Whistler proposed to be made by the Inspector of PIC are valid, I am asked whether those proposed conclusions about PIC's treatment of Mr O'Neill would be correct.

5 I note that PIC does not accept the correctness of the assumption stated in 4 above. Because I have proceeded on that assumption, I will not set out any of the matters which, in my opinion, justify PIC in taking that position.

6 On the other hand, I should state at the outset that, in my opinion, there is a very solid basis indeed for the disquiet so plainly expressed by the Inspector of PIC in his proposed report. In short, for the reasons summarily noted below, the process that led to the Report on Operation Whistler and the contents of the Report itself, in relation to Mr O'Neill, fell below an appropriate standard. That overall unfavourable view of PIC's part in the exercise involving Mr O'Neill, however, by no means equates to PIC displaying apprehended bias against him or denying him procedural fairness.

7 By way of preface as well, it should be noted that there are surprising features of the way in which the present state of affairs has come about. The arrests of Hathaway and WH-1 took place in February 2003 and February 2002 respectively. PIC's investigation into Hathaway's arrest commenced in mid 2004. Thereafter the WH-1 matter was included in PIC's investigation. Hearings – private for WH-1 and his companion – were held in February 2005. After the exchange of submissions



including those noted in 3 above, the Report on Operation Whistler was delivered in September 2005.

8 After the various iterations of complaints to and reports by the Inspector of PIC noted in the observations to my brief from October 2007 to June 2010, during the course of which Mr O'Neill's name had come up, the Inspector of PIC received a complaint from Mr O'Neill, some particulars of which are the focus of his Draft Report.

9 Mr O'Neill had retired in March 2005. His delay in complaining to the Inspector of PIC was on account of his lack of awareness of that possibility until contacted by the Inspector of PIC. There is no suggestion in my brief that in the meantime Mr O'Neill has suffered adverse publicity, such as in newspapers or broadcast media based on the terms of PIC's Report on Operation Whistler concerning him. Nor was there ever any legal action – such as judicial review – threatened or taken by him against PIC on account of the way he was dealt with in its Report on Operation Whistler.

10 These are surprising features because of the lapse of time and, viewed in one way, the lack of grievance. There are, of course, other ways to see the case.

11 An explanation might be seen in the predominant aspect of the outcome for Mr O'Neill of PIC's Operation Whistler. He suffered no adverse finding or recommendation in terms of the statutory conclusions required to be considered by PIC. Furthermore, he was evidently successfully represented before PIC by counsel, most of whose submissions were accepted by PIC.

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12 In an ordinary case, which I suppose it is clear this one is not, it would be idle to debate whether apprehended bias or procedural unfairness had affected the decision. That is, a decision favourable to a person is, in my experience, never challenged by that same person on the basis that the decision-maker had displayed apprehended bias or denied the person procedural fairness. Theoretical possibilities, in my experience, have never sufficed to produce such a case.

13 In any ordinary case, usually, consideration would be channelled by reference to the possibility of judicial review succeeding. Mercifully, our system of law does not contemplate appeals or judicial review at the suit of a person who has been favourably treated. Appeals or reviews are against orders or decisions, not against the expressions of reasons. No doubt, this is yet another useful reason for the existence of absolute privilege granted by common law to judges and by statutes to personages like the PIC.

14 On the other hand, the Inspector of the PIC may properly express an opinion on modes of handling matters by the PIC, even if the complainant in question has not suffered an outcome in formal statutory terms of a kind that may be regarded as adverse. There is no jurisdictional bar to the Inspector of the PIC proceeding as proposed in his Draft Report.

15 The genesis of the problems in the case of Mr O'Neill seems to me to lie in the procedures adopted, actively or by default, by the PIC back in 2005. No doubt because of his duties at the station in the case of Hathaway and his physical chase of WH-1, Mr O'Neill was involved in the narratives of both cases. His further involvement in the case of WH-1 with respect to the dropping of the resist-arrest

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charge further implicated him in that case. Without instructions specifically to this effect, I gather that this is why he was provided with legal representation for the purposes of the Operation Whistler investigation and hearing.

16 However, I also gather, from the written exchange between counsel, that it was not until final submissions by counsel assisting that what may be regarded as allegations against Mr O'Neill were explicitly articulated. Furthermore, I also gather that neither Hathaway nor WH-1 had made complaints, let alone allegations, against Mr O'Neill to the effect of those stated by counsel assisting and adopted by PIC in its Report on Operation Whistler.

17 In my opinion, this was deplorable practice by PIC. The Inspector of PIC would be correct, according to canons of fair practice, to criticize PIC for this lack of timely formality and clarity in the statement of allegations against any person.

18 All the more so, in my opinion, when the making of relevant allegations is the factum by which a person is accorded the status of an affected person within the meaning of subsec 97(3) of the *Police Integrity Commission Act 1996* (NSW). Unless allegations are attempted to be crystallized, a person who is the object of them will not properly be enabled to gauge the nature of his or her response. This is critical to the conduct of an investigation, given the possibility of occasions for the cross-examination of witnesses.

19 It is, in the nature of such statutory investigations and supervision, obvious that allegations may change, recede or emerge during the course of investigation – including as threads are drawn together by the formulation of final submissions by

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counsel assisting. In my opinion (and experience), such developments will raise, in accordance with the common law requirement of procedural fairness, questions whether further opportunities should be granted for the testing of evidence, presentation of evidence and the marshalling of argument about matters not already sufficiently addressed by the investigation process.

20 It need hardly be said, but bears repetition in the present unusual circumstances, that the capacity for PIC to pronounce under absolute privilege damaging statements about a person (such as Mr O'Neill) imposes an obligation on PIC to afford procedural fairness, in accordance with the common law as enunciated in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

21 That common law obligation is capable of modification (indeed, abrogation) by statute. The PIC Act certainly does not abrogate procedural fairness, but does regulate and refine it. It is here that the critical questions arise concerning the conclusions reached by the Inspector of PIC.

22 At first sight, there is an almost perverse element in the conclusion proposed by the Inspector of PIC. The fact that Mr O'Neill was named as an affected person, and accorded rights appropriate to that position, is broadly speaking a vindication as opposed to a denial of procedural fairness. The whole point of the statutory scheme is that such a person is entitled to know the allegations against him or her, reasonable opportunity to deal with them, and formal pronouncement by PIC of a statutory conclusion in relation to them. To put it mildly, it is odd to regard it as a denial of procedural fairness for a person to be placed in a position where they are assured of that regulated procedural fairness.

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23 On reflection, I have decided that this is not a complete statement of the position concerning Mr O'Neill thrown up by these rather special circumstances. My agreement, such as it is, with the ultimate conclusion of the Inspector of PIC derives from the particular course of conduct of PIC's investigation and reporting, in the following way.

24 For reasons which simply do not appear from the submissions of counsel assisting, he did not discriminate in a way the facts compelled between Mr O'Neill and other police officers who may or may not have been involved in the Hathaway incident. I regret to say that the argument in [172]-[175] of his final submissions are untenable concerning Mr O'Neill. It was common ground, surely, that Mr O'Neill was not present at Hathaway's arrest and beating. It was positively found, in accordance with the submissions of counsel assisting, that Mr O'Neill was the police officer who initiated medical care for Hathaway's injuries and expressed a senior officer's concern lest police delinquency had caused them.

25 In the absence of any trace of a complaint by Hathaway, which probably would have constituted an allegation rendering Mr O'Neill an affected person, the question remains where counsel assisting found the material to render Mr O'Neill an affected person in relation to Hathaway. I have looked repeatedly in the material for such a basis. I have found none. This was predictable, given that counsel assisting himself ultimately urged the exculpation of Mr O'Neill in relation to the Hathaway incident, and PIC understandably adopted that position in its Report on Operation Whistler (eg at [9.51]).

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26 Had the course of investigation, perhaps including an initiating complaint by Hathaway himself, brought to attention an alleged failure by Mr O'Neill to observe appropriate standards with respect to the arrest and subsequent dealing with Hathaway, I would have had no doubt that it was proper for Mr O'Neill to be identified as an affected person. But this was not so. As the recording of substantial allegations against Mr O'Neill was made virtually in the same breath as they were dismissed for want of any evidence (eg that he was present, or neglected his duties when they were engaged at the station), I am afraid I see no merit in counsel assisting having made any such submission. It follows that I see no merit in PIC having recorded the "making" of such allegations against Mr O'Neill.

27 There is something to be said for erring on the side of caution in PIC deciding who is or is not an affected person. Mostly, perhaps nearly always, no harm and considerable good will be done by naming as an affected person any police officer whose conduct arises for consideration in an investigation. This is because that status assures the officer of procedural fairness and a statutorily expressed conclusion. Most people in most cases do not complain about the statement of allegations against them which are there and then dismissed as lacking substance.

28 Nonetheless, and without associating myself with the rhetoric of the Draft Report to any degree, I regard the inclusion of Mr O'Neill in the job-lot approach of counsel assisting, whether that was intended or not, as reprehensible. Submissions such as [174] should not be made except with specific and explicit naming of persons and designation of evidence. PIC, like all guardians of institutional integrity, must never be willing to wound but afraid to strike.



29 In relation to the case of WH-1, according Mr O'Neill the status of an affected person was appropriate. He had given evidence which on one view may have conflicted with inferences available from other evidence, concerning the "deal" or plea bargain. Principles illustrated by *Smith v New South Wales Bar Association* (1992) 176 CLR 256 virtually compel that approach. Certainly, even if out of more abundant caution, it was right for PIC to accord him this status – which, after all, ensured the explicit outcome one way or the other (in the event, in his favour) of its investigation so far as it concerned his comrade.

30 This Opinion largely supports the general tendency of the Draft Report. But there is in my opinion a large non-sequitur in the Draft Report. It does not follow, emphatically, that errors of a kind I have identified above amount to or even indicate apprehended bias or denial of procedural fairness. Judges and tribunals are very often wrong, without any fair possibility of them displaying apprehended bias or thereby denying procedural fairness. I am afraid I vehemently disagree with the way the Draft Report elides the difference between PIC wrongly raising allegations against Mr O'Neill and PIC displaying apprehended bias against him or denying him procedural fairness.

31 This is particularly so because, after all, the wrongful raising of allegations against Mr O'Neill was made in a context where they were immediately dismissed. That is inconsistent with apprehended bias. It suggests a consideration of the evidence also inconsistent with a denial of procedural fairness.

32 Although the Draft Report does not reason thus, I note in order to reject it a possible argument that Mr O'Neill should have been consulted before being named as



an affected person, and so was denied procedural fairness in the absence of that prior consultation. Given the history narrated above, this would be absurd, and counsel for Mr O'Neill raised no objection of this kind. She sensibly (if I may say so, with respect) concentrated on the merits, on which she was successful.

33 There are other aspects of the Draft Report with which I disagree. It is wrong in law, in my opinion, to criticize PIC for what the Inspector of PIC calls the "inconclusiveness" of its opinion under subsec 97(2) of the PIC Act. Crucially, those provisions require expression of an opinion "whether or not" an affected person has brought himself or herself within the relevant categories of wrongdoing. The provision emphatically does not compel the artificial dichotomy that seems to inform the approach of the Inspector of PIC. It is not the case that PIC must say that an officer did a bad thing, or did not do a bad thing. PIC may also say that the evidence does not permit an answer one way or another. Worldly experience, including in courts of law, strongly urges the realism of this third possibility.

34 The Draft Report also deprecates the way in which PIC's Report on Operation Whistler (and, I would add, the obviously influential submissions of counsel assisting) makes plainly adverse comment in the most general terms about evidence including Mr O'Neill's without those views producing any adverse outcome eg against Mr O'Neill. Respectfully, I share the disapproving views of the Inspector of PIC in this regard. The privilege to defame brings with it an obligation of sufficient specificity to enable fair assessment by readers of the quality of the judgement involved. Counsel assisting and, unfortunately, PIC by adopting these submissions, did not observe this canon of decency.



35 All that being said, I return to the fundamental questions raised by the conclusions proposed in the Draft Report. In my experience, denials of procedural fairness cannot be equated with apprehended bias. Nor does apprehended bias readily if at all appear from administrative dealings favourable to the person in question. No sufficient reasons appear in the Draft Report to show why the shortcomings of process about which the Inspector of PIC and I agree amount to the serious conclusions of apprehended bias and denial of procedural fairness.

36 Rather, the process shows inappropriate submissions by counsel assisting, fairly and fully made available to counsel for Mr O'Neill, and completely effective rebuttal of those submissions by counsel for Mr O'Neill, leading to his success before PIC. Further, it shows an opportunity given to Mr O'Neill to be heard concerning publication of the tabled Report on Operation Whistler, before its publication. These matters are strongly against apprehended bias or procedural unfairness on the part of PIC. They are not considered at all in the Draft Report.

37 There is one final element, upon I also agree with the Inspector of PIC. That is, as noted above, the wrong inclusion in its Report on Operation Whistler of excessively general aspersions on Mr O'Neill's evidence, in the case of WH-1. Of course, as spelled out in great detail in the Draft Report, ultimately PIC's Report on Operation Whistler declines to make any finding against Mr O'Neill. The possibility of his evidence being correct is expressly left open by PIC. It would undoubtedly have been better, legally and humanly, for a more gracious or circumspect approach to the "reservations" that counsel assisting excessively generally invited concerning Mr O'Neill's evidence.

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38 However, this shortcoming of process and conclusion is far from amounting to apprehended bias or procedural unfairness. And it is a fallacy to require decision-makers, judicial or administrative, to express contentment with any evidence, whether or not it has been "challenged" or contradicted. I do not understand how the Inspector of PIC can implicitly require PIC to be convinced by Mr O'Neill's evidence, if PIC was not convinced by that evidence. Further, it is very inappropriate to discern apprehended bias or procedural unfairness in a tribunal's failure to be convinced by evidence that, on transcript, convinces oneself. There is a real possibility that the Inspector of PIC has committed this fallacy and error.

39 For all these reasons, I advise that the Inspector of PIC would not be correct to conclude, as proposed in his Draft Report, that PIC had displayed apprehended bias against Mr O'Neill or had denied Mr O'Neill procedural fairness.

FIFTH FLOOR,

ST JAMES' HALL.

30th September 2011

Bret Walker