



Office of the Inspector of the  
**Crime Commission**

Mr Andrew Tink AM  
Review of Police Oversight  
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Dear Mr Tink

Thank you for seeing and for inviting me to make a written submission concerning your terms of reference.

#### **The Inspector's Special Report to the Minister**

On 28 October 2014 I made a Special Report to the Minister under the terms of s.67 of the *Crime Commission Act 2012* (the CC Act). The Report became public on its tabling in Parliament on 4 November 2014. You have a copy of the Report. In the main the circumstances set forth in the Report are unchanged, but the following three matters should be noted.

- (i) Investigation of the Crime Commission (the CC) by the Police Integrity Commission (the PIC) without complaint or suspicion.***

By subs 23 (2) of the PIC Act the PIC may conduct an investigation even though no CC officer has been implicated and even though no misconduct of a CC is suspected. However, by subs (2A), the PIC must not conduct such an investigation until it has obtained the consent of the Inspector of the CC.

The PIC has no such investigation on foot. The PIC has never sought the consent of the CC Inspector to conduct such an investigation.

***(ii) Investigations conducted on CC officer complaints made to it***

PIC investigation into complaints about the CC form a very small part of its investigation functions. The PIC reports annually on such investigations.

***(iii) The rate of complaints to the Inspector***

During the year ending 30 June 2015 the Inspector has so far received only one complaint about officer misconduct.

**The Terms of Reference of the Review of Police Oversight**

I wish to deal with the sixth of your terms of reference, namely:

*6. Any implications for maintaining oversight of the NSW Crime Commission arising from the recommended model of police oversight, while aiming to minimise unnecessary duplication and overlap.*

The Inspector's position is that PIC oversight of the CC should come to an end. Direct oversight should rest in the Inspector as is the case with the PIC and the Independent Commission Against Corruption (ICAC).

#### **1. The relative powers of the PIC and the Inspector**

During our discussion last week three topics were raised. The first asked whether, under the legislation as it stands, where no complaint or suspicion is reported, the Inspector has any less power than the PIC to investigate the CC. Another way of putting this matter is to ask whether, if PIC oversight came to an end, the power to oversee the CC would become less.

#### The power of the PIC

Subsections 23 (2) and (2A) of the PIC Act are as follows –

*(2) The Commission may conduct an investigation even though no particular police officer, administrative officer, Crime Commission officer or other person has been implicated and even though no police misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer is suspected.*

*(2A) The Commission must not conduct an investigation in relation to the Crime Commission in circumstances where no particular Crime Commission officer has been implicated and no misconduct of a*

*Crime Commission officer is suspected unless it has obtained the consent of the Inspector of the New South Wales Crime Commission.*

Nowhere does the PIC Act or the CC Act limit, prescribe or even guide the Inspector in deciding whether or not to consent to PIC's investigating where no particular CC officer has been implicated and no misconduct of (any) CC officer is suspected. The decision is entirely within the Inspector's discretion.

Given the unfortunate history and effects of PIC's secret investigations of the CC, any prudent Inspector would be likely to deal cautiously with any request for consent to open another. It is difficult in any event to visualise circumstances in which PIC might be justified in seeking such consent without even a suspicion of misconduct of any CC officer. None is readily apparent.

Accordingly it is submitted subs (23A) has effectively removed PIC's power to undertake secret investigation of the CC where there is no implication and no suspicion of misconduct.

#### The power of the Inspector when there is no complaint

The Inspector on the other hand has power by the CC Act s62 -

*(1) The principal functions of the Inspector are:*

*(a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and*

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

*(c) to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission, and*

*(d) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.*

*(2) The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Joint Committee or a government agency or member of a government agency.*

No complaint or report of suspicion is necessary to invoke exercise of the function provided for in para (c). Subs (2) makes clear that the Inspector may act on its own initiative. The Act contains no restriction of the Inspector's right or ability to perform the functions. All the powers set forth in ss 63, 64 and 65 are available.

It is submitted that the Inspector therefore derives power at least equal to that which the PIC had under subs 23(2) of the PIC Act before its practical repeal by subs 23(2A). Accordingly, removal of the PIC as overseer of the CC would not result in any reduction of power to investigate the Crime Commission when there were no complaint or report of suspicion of misconduct.

## **2. Investigating police officers and CC officers together**

The second topic for discussion considers a possibly inconvenient effect of removing PIC's oversight of the CC in the light of the Inspector's inability to investigate asserted misconduct of police officers.

CC officers collaborate with police officers. The circumstances in which that happens do not need elaboration. It is conceivable that during collaboration CC and police officers will jointly engage in conduct that entitles the Inspector to investigate a CC officer and the PIC to investigate a police officer. As the law stands the PIC could perform both functions at once. If the PIC's oversight of the CC were removed neither office could investigate both officers even though a joint investigation might have been convenient.

The following points may be made –

1. Although such circumstances are conceivable there is no report of their ever having materialised. As far as I am aware the PIC has never investigated the joint misconduct of a CC officer and a police officer. One cannot say that the circumstances would never arise but it seems that they are unlikely to do so.
2. In the unlikely event that both agencies have to investigate there is no reason why they should not do so co-operatively. The legislation does not forbid it. To co-operate would be to act consistently with provisions of both Acts enjoining reciprocal cooperation (CC Act s13, PIC Act s18), with PIC Act s75D and, if it

were enacted, a reciprocal requirement of the CC Act for PIC and other officials to inform the Inspector of reports of CC officer misconduct.

3. The CC Act and the PIC Act could be amended if clarification were necessary to give express approval to co-operative investigation. None of that would prevent each office from making its own report.
4. Some such co-operative arrangement would be preferable to the maintenance of power in PIC to oversee CC. Reference is made to the unfortunate series of events that followed the PIC's secret investigation of the CC. That has led to a poor atmosphere which needs to dissipate. Continued oversight will slow the development of appropriate relations between the agencies.
5. The question of the possible need to co-operate is not confined to the CC and the PIC. It exists also between PIC and ICAC and between CC and ICAC.

As to the PIC and the ICAC, special provision has been made in the PIC Act and the ICAC Act about arrangements those agencies may make to deal with notification by either to the other about suspected conduct that may come under the jurisdiction of the other: s131(1)(a) and (b); and about the investigation of matters that may come under both jurisdictions. As to that s131(1) provides:

*(1) Arrangements may be entered into The PIC Commissioner and the ICAC Commissioner may enter into arrangements regarding:*

- (a) *matters about which the ICAC will notify the PIC where the ICAC suspects police misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer may exist, and*
- (b) *matters about which the PIC will notify the ICAC where the PIC suspects corrupt conduct as defined in the Independent Commission Against Corruption Act 1988 (other than by a police officer, Crime Commission officer or administrative officer) may exist, and*
- (c) *matters that the ICAC will investigate or otherwise deal with where conduct involves:*
  - (i) *both police officers and other public officials, or*
  - (ii) *both Crime Commission officers and other public officials, or*
  - (iii) *both administrative officers and other public officials, and*
- (d) *matters that the PIC will investigate or otherwise deal with where conduct involves:*
  - (i) *both police officers and other public officials, or*
  - (ii) *both Crime Commission officers and other public officials, or*
  - (iii) *both administrative officers and other public officials.*

The Commissioners of those bodies have reached an agreement which they have incorporated in a Memorandum of Understanding. The Inspector is not privy to its contents. As far as is known to the Inspector no question of investigation at once of officers of both kinds has ever arisen. It is curious that PIC and ICAC can make confidential arrangements to allocate between themselves responsibility to investigate the conduct of CC officers without any apparent obligation to inform the Inspector, let alone consult.



Although investigation of CC officers is provided for when the question arises between ICAC and PIC, there is no such provision when it arises between ICAC and the Inspector. Neither is the ICAC obliged to report to the Inspector any complaints or suspicion of misconduct by any CC officer. I mention these matters not merely to point out the inadequacy of hastily amended legislation but to make the point that decisions about which agency is to investigate which officer will in all probability never have to be made.

### Conclusion

Where misconduct is asserted against both a CC officer and a police officer the PIC and the Inspector could decide how the investigation should be conducted. To that end, legislation could authorise a scheme like that in the PIC Act S131(c) and (d) but restricted to police officers and CC officers. If it is considered that the asserted problem is a real one that demands a solution that is what should be done.

### **3. The provision of staff and facilities for the Inspector**

As currently established the position of Inspector is a part-time one. Two staff are allocated to the Inspector, both part-time. The Inspector has facilities for taking evidence from witnesses *viva voce*, producing transcripts and publishing reports. The Inspector does not have facilities such as a formal hearing room for examining witnesses in any inquiry where substantial space is required or where, for example, security is a concern. The Inspector does not have available investigators or staff with experience in preparing and conducting formal hearings.

During the two years and two months since the Inspector took office the existing facilities have been sufficient to enable the proper conduct of the office.

In amending the Crime Commission Act 2012 to establish the office of the Inspector the Parliament gave consideration to the possible need for additional resources. Section 66 of the Act is as follows:

*(1) Persons employed in the Public Service under the government Sector Employment Act 2013 to enable the Inspector to exercise his or her functions are subject to the control and direction of the Inspector.*

*(1A) Subsection (1) does not affect the exercise of the functions under the Government Sector Employment Act 2013 of the head of the Public Service agency in which those persons are employed. The head of that agency may delegate those functions under that Act to the Inspector.*

*(1B) That staff of the Inspector comprise the persons so employed and the persons referred to in subsection (2).*

*(2) The Inspector may arrange for the use of the services of:*

*(a) any staff or facilities of a government agency, or*

*(b) any staff who are employed by or for or assigned to the person who is Inspector, in his or her capacity as the holder of some other position (for example, as a Judge of a court of the State).*

*(3) Without limiting subsection (2), the Inspector has the right to make reasonable use of the services of the staff or facilities of the Police Integrity Commission.*

In enacting subs (3) the Parliament was aware that the PIC was to have oversight of the Crime Commission and one may infer that the provision by the PIC of staff and facilities to investigate were seen as a natural consequence of that function.

The question has been raised whether if subs (3) were removed the Inspector would have the resources to carry out all investigations that became necessary. Those expressing concern always cite the matter of Mark William Standen. The facts are notorious and I need not repeat them. But the shadow cast by the case is longer than the facts justify and something needs to be said about it to enable a proper understanding of its implications.

Standen was a senior officer of the CC. He was communicating with others with a view to importing into Australia chemicals from which illicit drugs might be made. A foreign agency, the National Crime Squad of the Netherlands (NCSN), discovered Standen's activities and told the Australian Federal Police (AFP). The AFP began investigating Standen in 2006. From then on Standen was watched by the AFP. The investigation was kept a very tight secret for more than a year and involved a very small number of CC officers, who kept watch on Standen. The actions of the Crime Commission in doing this work was remarkable. Standen never found out that he was being watched. It was only because of the careful and dedicated work of the AFP, the CC and the NCSN that Standen was caught and eventually convicted and sentenced.

There was then no Inspector. PIC had no jurisdiction. The investigation succeeded because of the combined work of the agencies I have mentioned. The investigation was so wide-ranging and lasted so long that it could not have been carried out by PIC alone or the Inspector alone. The participation of police at senior levels, local and international, was essential.

Standen shows that if surveillance or investigation of any size or length became necessary, the agency supervising the CC would have to collaborate with all the investigating agencies involved. Those agencies would be likely to include the New South Wales Police Force (NSWPF). It is a principal function of the PIC to investigate the activities of officers of the NSWPF, when appropriate without their knowledge. The NSWPF could not reasonably be expected to collaborate completely with an agency that might simultaneously be investigating it. The PIC would therefore be likely to encounter considerable difficulties in performing its functions. It could not remove the NSWPF as an investigator yet could not rely on its unfettered collaboration.

The Inspector would encounter no such conflict or limitation.

The lesson of Standen is that the CC is a disciplined and effective agency. It was so on the only occasion that the relevant misconduct was that of one of its own officers. The case does not demonstrate that PIC oversight must be maintained.

There are always likely, of course, to be cases where investigation of the Crime Commission and its officers is necessary, sometimes without their knowledge. Those

will probably be cases which call for greater forces and facilities than are currently available to the Inspector.

This possibility does not justify permanently providing the Inspector with the sort of premises and staff that such an investigation would require. Some way of providing such facilities at reasonably short notice is necessary. It is not suggested that if PIC's oversight of CC comes to an end PIC should be obligated to provide the Inspector with premises and personnel: subs 66(3) of the CC Act could be repealed. However, the NSW Parliament, having created the office of Inspector and having given the office functions and obligations, must provide a means of enabling it to do its job. No single provider needs to be nominated. Subs 66(2) is enough. Several agencies and institutions in Sydney have hearing rooms that can be made available. Many departments and agencies have investigators, solicitors, security officers and other officials who can be co-opted for a limited time to give their special services. The whole can be co-ordinated by the Inspector and the Department responsible for financing and providing for the office.

I repeat the submission that PIC and the CC need to be separated and allowed to become the independent co-operative agencies the legislation requires.

16 June 2015