
REPORT TO
PARLIAMENT

OPERATION TOWER





ABN 22 870 745 340

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

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

Dear Madam President and Mr Speaker

In accordance with section 96(2) of the *Police Integrity Commission Act 1996*, the Commission hereby furnishes to you a Report regarding Operation Tower, being a Report in relation to a matter in which the Commission has conducted an investigation.

I draw your attention to section 103(2) of the *Police Integrity Commission Act 1996*, pursuant to which I recommend that this Report be made public forthwith.

Yours faithfully

T P Griffin
Commissioner

April 2004

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APRIL 2004

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EXECUTIVE SUMMARY

On 20 November 2000, the Police Integrity Commission commenced a preliminary investigation, codenamed Operation Tower, into complaints by John Robert Marsden against former police officer Michael Woodhouse, then Director of Investigations for the Independent Commission Against Corruption, arising from investigations conducted by Mr Woodhouse into allegations against Mr Marsden.

Strike Force Cori was established by then Commissioner of Police, Peter Ryan on 8 December 1997 to assess allegations of paedophilia disclosed in papers tabled in the NSW Parliament on 21 October 1997 by the Hon Franca Arena MLC. Detective Superintendent Woodhouse, as he then was, was appointed to head the Strike Force.

Among the matters investigated by Strike Force Cori were allegations that Mr Marsden had engaged in unlawful sexual intercourse with a number of under-age males. Similar allegations had been the subject of two earlier investigations by Detective Superintendent Robert Inkster.

Superintendent Inkster's investigations were prompted by the broadcast of the Channel Seven Network programmes *Today Tonight* and *Witness* in 1995 and 1996 respectively. At the conclusion of his investigations, Superintendent Inkster sought and obtained advice from the Director of Public Prosecutions to the effect that there was insufficient evidence to warrant any charges being preferred against Mr Marsden.

Strike Force Cori did not re-investigate allegations that had been investigated by Superintendent Inkster, except to the extent that it assessed the Arena materials and found them to have already been covered in those investigations. However, fresh lines of inquiry came to the attention of Mr Woodhouse during the currency of the Strike Force Cori investigations.

Mr Marsden complained that the Strike Force Cori investigations into allegations against himself were unnecessary, and amounted to "double jeopardy" or police harassment, because he had endured the two earlier investigations by Inkster. In the alternative, Mr Marsden complained that to the extent there was a proper basis for Strike Force Cori inquiries, the investigation was inadequate or conducted improperly. In particular, it was alleged that there were numerous instances where police ignored exculpatory evidence, failed to take proper account of factors affecting the reliability of witnesses and complainants, failed to seek corroborative evidence where it was required, and failed to adequately assess the veracity of allegations. Most if not all of the complainants against Mr Marsden were either prisoners or former prisoners, or had criminal records.

Mr Marsden asserted that the deficiencies complained of, together with an attempt by Mr Woodhouse to stay his defamation proceedings arising from the *Today Tonight* and *Witness* programmes, showed that Mr Woodhouse was biased against him. In particular, it was said that Mr Woodhouse wanted Mr Marsden charged "come hell or high water".¹ It was also implicit in the complaint that if there was inadequate evidence,

¹ Barcode 5878431.

there was no proper basis for a brief of evidence to be referred to the DPP for consideration. Mr Marsden further alleged a number of instances in which police made improper attempts to obtain evidence.

Finally, it was complained that on a number of occasions police had improperly disclosed confidential police information to Amalgamated Television Services Pty Limited (“Channel Seven”), the defendant in defamation proceedings brought by Mr Marsden. It was alleged that police were either improperly attempting to assist Channel Seven and/or were party to some improper arrangement to that end.

Having conducted a detailed review of the circumstances of the Strike Force Cori investigations and the matters put forward in support of Mr Marsden’s allegations of police misconduct, the Commission concludes that there was a valid and proper basis for the establishment of Strike Force Cori, that basis being a matter of public record. It is also satisfied that the inquiries conducted under the auspices of Strike Force Cori had valid and proper bases, and did not amount to police harassment.

The circumstances of the Strike Force Cori investigations as they related to Mr Marsden were somewhat unusual. The concurrent defamation proceedings covered similar subject matter to the police investigations, and various subpoenas were issued on behalf of both parties requiring the production of police investigation materials. As a consequence, the police were required to fight a rearguard action to ensure their inquiries in the public interest were not prejudiced by the demands of civil proceedings involving private interests.

Mr Woodhouse’s request for advice as to whether the defamation proceedings could be stayed or adjourned pending conclusion of police inquiries was entirely understandable given the circumstances. In the Commission’s view such a step did not, nor reasonably could, manifest an intention or desire on Mr Woodhouse’s part to maliciously pursue Mr Marsden.

During a significant portion of Mr Woodhouse’s investigation, there was also in effect a parallel investigation being carried out on behalf of Mr Marsden – partly in relation to issues arising in the defamation proceedings and partly in response to the police inquiries. This resulted in statements being obtained from various complainants of sexual misconduct retracting their allegations to police. Other materials held on Mr Marsden’s behalf by his lawyers suggested possible further lines of inquiry in relation to the circumstances of the sexual misconduct alleged. Mr Woodhouse was at one time provided with viewing access to these materials, but they were retained in the possession of Mr Marsden’s lawyers pending conclusion of the defamation proceedings, lest their production to police render them liable to discovery by Channel Seven.

From an early stage of the police inquiries, it was being urged by Mr Marsden’s legal representatives that the advice of the DPP should be obtained if consideration was to be given to the laying of any charges against Mr Marsden. Mr Marsden’s lawyers also took issue with the way in which police were conducting their inquiries, the suggestion amongst other things being they were not “balanced and objective”. Mr Marsden’s lawyers had also indicated that they would be submitting their own brief of materials to the DPP at the conclusion of police inquiries.

By these circumstances the police investigations concerning Mr Marsden came to resemble an inter partes proceeding, which posed further potential difficulties for the police in the exercise of their independent investigative discretions. That is not to say that Mr Marsden or lawyers acting on his behalf were acting unlawfully or improperly. Mr Marsden was entitled to protest his innocence of allegations against him, and act within the law to preserve his personal interests. However, in conducting an investigation the police serve the broader public interest and must undertake inquiries in the exercise of their investigative discretions as they see fit.

The overall circumstances being as they were, the Commission believes that some credit should fall to the investigating police for achieving a reasonably thorough and independent inquiry into the allegations against Mr Marsden. In the Commission's view, Mr Woodhouse and other involved police conducted themselves in an appropriate and reasonable way throughout the course of Strike Force Cori.

The Commission is not satisfied that Strike Force Cori police improperly attempted to obtain evidence against Mr Marsden by the use of threats, payments or any other form of inducement or pressure. That certain complainants made statements to police implicating Mr Marsden in sexual misconduct, and later withdrew such allegations does not, of itself, afford grounds suggestive of police misconduct in the obtaining of the statements in the first instance. Nor did the fact that many complainants were serving prison sentences at the time of relating allegations against Mr Marsden attract to them the mantle of "prison informer", or proscribe the discretion of police to conduct inquiries into their allegations.

The fact that complainants had criminal convictions – whether or not they received punishment by way of imprisonment – of course put the police on notice that their credibility and reliability would be in issue. However, police inquiries were appropriately conducted with an eye to such matters.

The results of Mr Woodhouse's inquiries were compiled in a brief submitted for the DPP's consideration and advice. It was Mr Woodhouse's intention in submitting the brief to seek guidance as to whether any charges were appropriate for laying, or whether any further inquiries might be undertaken. Mr Woodhouse did this in the knowledge that materials in the possession of Mr Marsden's legal representatives would be submitted directly to the DPP, accompanied by submissions on Mr Marsden's behalf. In the light of these materials (which he had been able to view) Mr Woodhouse documented inconsistencies in the evidence of the various complainants against Mr Marsden.

That there were certain inquiries open to be conducted by the police on the strength of matters advanced on Mr Marsden's behalf and not undertaken prior to submission of the brief did not, in the Commission's view, result in a flawed or improper investigation. Such lines of inquiry would not necessarily have proven determinative of the truth or otherwise of the allegations under investigation, and the brief fairly noted their existence in anticipation of being advanced on Mr Marsden's behalf.

In view of all the circumstances, the Commission considers there to have been a valid and proper basis for a brief being submitted to the DPP. Indeed, it was appropriate, having regard to the complexity and history of investigations relating to Mr Marsden, that the expert and independent advice of the DPP be sought. Such an approach did not

manifest any ulterior motive in so far as seeking to have Mr Marsden charged regardless of the evidence. To the contrary, Mr Woodhouse's conduct exhibited caution.

The Commission is also satisfied that Strike Force Cori police did not improperly disclose confidential police information to the legal representatives of Channel Seven or any other person. In particular, the Commission does not consider that the police response to a subpoena issued on Mr Marsden's behalf was inconsistent with the response to a subpoena issued on behalf of Channel Seven, when considered in the light of the true basis for objection to the respective subpoenas and the circumstances of the police investigations at the time.

In the Commission's view the public can be satisfied that an independent, reasonably thorough and balanced police investigation was conducted into allegations involving Mr Marsden.

1. INTRODUCTION – OPERATION TOWER AND ITS CIRCUMSTANCES

- 1.1 On 20 November 2000, at the request of the Commissioner for the Independent Commission Against Corruption (“ICAC”), the Police Integrity Commission (“the Commission”) commenced a preliminary investigation, codenamed Operation Tower, into a number of complaints by John Robert Marsden against Michael Woodhouse, then ICAC Director of Investigations and formerly Commander of NSW Police’s Strike Force Cori. Strike Force Cori was established on 8 December 1997 to investigate allegations of paedophilia disclosed in papers tabled in the NSW Parliament on 21 October 1997 by the Hon Franca Arena MLC (as she then was – hereinafter referred to as “Arena”).
- 1.2 At the time of Mr Marsden’s complaints he was engaged as the plaintiff in the Supreme Court defamation proceedings *Marsden v Amalgamated Television Services Pty Limited*. The proceedings arose from allegations of paedophilia broadcast by the Channel Seven Network (“Channel Seven”) programmes *Today Tonight* and *Witness* in 1995 and 1996 respectively. This presented somewhat novel circumstances whereby civil defamation proceedings, a police investigation into allegations forming part of the subject matter of those proceedings, and an investigation into complaints about the police investigation were at certain times occurring simultaneously.²
- 1.3 In his complaints to the Commission, Mr Marsden alleged Mr Woodhouse had subjected him to harassment by leading an investigation into allegations that he had engaged in unlawful sex with under-age males. It was complained that the allegations had been investigated previously, that the Director of Public Prosecutions (“the DPP”) had determined that there was insufficient evidence to warrant any charges being preferred against Mr Marsden and that, accordingly, any further investigation was unnecessary and without a proper foundation.
- 1.4 Mr Marsden further complained that, to the extent that there was a proper basis for the investigation into allegations against him by Mr Woodhouse, the investigation was inadequate and was conducted in a manner that was biased against him. In particular, that police had:
- ignored exculpatory evidence;
 - failed to seek or obtain corroborative evidence;
 - otherwise failed to take proper account of factors affecting the reliability of informants; and
 - pursued an investigation of less than reliable allegations against Mr Marsden while at the same time ignoring significantly more cogent evidence of a similar kind (that is, evidence of unlawful sex with under-age males) against other persons.

² Albeit the Commission’s inquiries commenced at a late state of the police investigation, when a brief had been with the DPP.

1. INTRODUCTION

- 1.5 Mr Marsden also complained that police, led by Mr Woodhouse, used threats and improperly held out promises to potential informants and witnesses so as to induce persons to make false allegations that he had engaged in unlawful sex with under-age males.
- 1.6 Finally, Mr Marsden alleged that on a number of occasions police (including but not limited to police attached to Strike Force Cori) improperly disclosed confidential police information to Channel Seven's legal team during the defamation proceedings.
- 1.7 The purpose of the Commission's preliminary investigation as initially formulated was to:³
- Investigate whether former Detective Superintendent Michael Woodhouse, while serving as Commander of Strike Force Cori or otherwise as a police officer or member of the Police Service (other than a public servant):
 1. behaved in a biased or unfairly discriminatory manner in respect of the investigation of allegations of paedophilia against John Marsden;
 2. harassed John Marsden; and
 3. improperly disclosed, or was involved in the improper disclosure of, confidential police information to legal representatives for Amalgamated Television Services Pty Ltd or any other person.
- 1.8 Early in the investigation, it became apparent to the Commission that a number of other related allegations by Mr Marsden remained unresolved. At relevant times, responsibility for these matters rested with NSW Police, with the Ombudsman performing an oversight function.
- 1.9 CIS file 00002742⁴ was described in the following terms: "Complaint by John Marsden alleging Crime Agencies police are assisting Channel Seven in court proceedings against him and that Det Supts Woodhouse and Inkster and others have failed to properly investigate some paedophilia offences, preferring only to investigate high profile persons". It listed both Woodhouse and Inkster as adversely mentioned by the complaint.
- 1.10 CIS file 00002744 was described in the following terms: "Complaint by John Marsden alleging Crime Agencies police have been releasing confidential information about him, and that COP Ryan, A/C Small and Supts Woodhouse and Inkster have failed to investigate". It listed the following police officers as adversely mentioned by the complaint: Commissioner Peter Ryan, Chief Superintendent Clive Small, Superintendent Michael Woodhouse and Superintendent Robert Inkster.
- 1.11 The Commission informed NSW Police that to the extent that CIS files 00002742 and 00002744 disclosed complaints against Mr Woodhouse, the Commission would take over the investigation of these aspects. The balance of the complaints on these files were to be dealt with by NSW Police under the oversight of the Ombudsman, in accordance with Part 8A of the then *Police Service Act 1990*.

³ Barcode 5781106.

⁴ Complaint Information System.

- 1.12 At the same time, the Commission requested advice from NSW Police as to the status of an investigation into a related complaint made by Mr Marsden in 1998 against Mr Woodhouse. This complaint was intermingled with a complaint against another Strike Force Cori police officer regarding an improper inducement to a prisoner and paedophilia complainant/witness, Jason Y.⁵
- 1.13 The Commission then became aware of two further complaints by Mr Marsden against Mr Woodhouse that had been made to the Ombudsman. These complaints alleged an improper relationship between Mr Woodhouse and two persons who, depending upon one's point of view, might variously have been described as informants, complainants or witnesses. These matters were also taken over by the Commission.
- 1.14 By letter dated 27 November 2000, the Commission informed Mr Marsden that it had commenced a preliminary investigation of his complaints against Mr Woodhouse and requested further particulars. Mr Marsden informed the Commission he would rather await a verdict in his defamation proceedings before answering the Commission's request for particulars.
- 1.15 On 21 December 2000, the Commission wrote to Mr Marsden advising that it had no objection to the course proposed, and later confirmed that it would nonetheless continue making certain preliminary inquiries.
- 1.16 On 27 June 2001, judgment in the defamation proceedings was delivered.⁶ On 9 July 2001 the Commission wrote to Mr Marsden, requesting particulars of his complaints as per the settled arrangements.
- 1.17 On 11 July 2001 the Commission received from the Inspector of the Police Integrity Commission a large volume of materials originally forwarded to that Office which, upon analysis, appeared capable of amounting to particulars of Mr Marsden's complaints. By letter dated the same day, Mr Marsden advised the Commission that he "had thought this matter had passed the Police Integrity Commission and was with the Inspector".⁷ This misunderstanding on Mr Marsden's part emanated from the fact that he had by that time lodged complaints against the Commission with the Inspector of the Police Integrity Commission, alleging amongst other things that the Commission had improperly failed to investigate previous complaints of police misconduct relating to paedophilia investigations.
- 1.18 The materials received through the Inspector of the Police Integrity Commission covered very broad ground. Considerable effort was involved on the Commission's part in sifting through them so as to identify sufficient particulars of the complaints the subject of its investigation. Other claims or allegations appropriate for inclusion in the Commission's investigation were also identified.

⁵ See [4.312].

⁶ See *Marsden v Amalgamated Television Services Pty Limited* [2001], supra.

⁷ Barcode 5821623.

1. INTRODUCTION

1.19 At the same time, the Commission's resources were engaged in providing a number of detailed written responses to the five heads of complaint involved in Mr Marsden's allegations to the Inspector of the Police Integrity Commission.

1.20 On 26 November 2001 the Inspector of the Police Integrity Commission dismissed all five complaints against the Commission and, in doing so, made two recommendations with regard to the destruction of certain tapes obtained under the authority of listening device warrants by the Royal Commission into the NSW Police Service ("the Royal Commission"). The Inspector also recommended that "the Commission proceed with its ongoing investigation 'Operation Tower' with such expedition as the calls upon its limited resources permit."

1.21 In the result, as at 19 February 2002 the Commission was in a position to settle upon the parameters of its investigation and expand its purpose as follows:

To investigate whether Commissioner Peter Ryan, Chief Superintendent Clive Small, former Detective Superintendent Michael Woodhouse, Chief Inspector Robert Inkster or any other police officer:

1. behaved in a biased or unfairly discriminatory manner in respect of the investigation of allegations of paedophilia against John Marsden;
2. harassed John Marsden;
3. conducted or were involved in or arranged for the conduct of investigations into allegations of paedophilia against John Marsden without proper foundation;
4. improperly disclosed, or was involved in the improper disclosure of, confidential police information to legal representatives for Amalgamated Television Services Pty Ltd or any other person;

To investigate whether former Detective Superintendent Michael Woodhouse:

1. failed to comply with proper procedures or otherwise had an improper relationship with informer Russell Travis;
2. failed to comply with proper procedures in respect of the payment of two amounts of \$50.00 to [David Y], a witness in the defamation proceedings brought by John Marsden against Amalgamated Television Services Pty Limited.

2. THE COMMISSION'S APPROACH

2.1 By its statutory charter the Commission is required “to turn its attention principally to serious police misconduct”.⁸ While “serious police misconduct” finds no definition in the *Police Integrity Commission Act 1996* (“the PIC Act”) and the Commission may nevertheless investigate “other” forms of police misconduct,⁹ the complaints the subject of Operation Tower would ordinarily be taken by the Commission to fall within the ambit of “other” police misconduct, in as much as they largely do not involve the kind of alleged criminal conduct by which “Category 1” complaints are defined pursuant to the provisions of s 67 of the PIC Act.¹⁰

Police investigative decisions and assessments/opinions of police misconduct

2.2 That is not to say the Commission regards allegations concerning inadequacies or improprieties in police investigations as undeserving of its attention. However, peculiar considerations arise in an investigation of this kind. The conduct of a police investigation involves a variety of decisions on matters of policy and discretion, including the setting of priorities and deployment of resources.¹¹ The courts have recognised that within the realm of legitimate investigative discretion, police officers must be left to determine for themselves how best to fulfil the functions and responsibilities of their office. That approach is predicated upon public policy, given the independent nature of the office of police constable and the functions performed therein.¹²

2.3 The Commission is of course not a court and may make assessments and form opinions on any matter within its statutory purview, including (and primarily) whether police misconduct or other misconduct has occurred in any relevant circumstance.¹³ But it is nevertheless cognisant that its assessments and opinions can have significant repercussions. In a Commission Report upon an investigation where matters of police discretion loom large, that may be so not only for police directly involved, but for police in general in so far as the manner in which they may feel obliged or constrained to conduct future investigations, lest they too become the subject of allegations of misconduct.

2.4 It would be contrary to the public interest for police to be fettered in the independent and free exercise of investigative discretions by the thought of

⁸ subs 13(2) of the *Police Integrity Commission Act 1996* (“the PIC Act”).

⁹ Indeed the expressions are intended only for general guidance, rather than being indicative of a precise distinction between the two concepts: subs 5(4) PIC Act.

¹⁰ Which provides for the Commission and the Ombudsman to agree upon the classes and kinds of complaints that are to be treated as Category 1 complaints, and thus required to be notified to the Commission by the Ombudsman and NSW Police.

¹¹ *Sullivan v Moody* (2001) 207 CLR 562.

¹² Per Lord Denning MR in *R v Commissioner of Police of the Metropolis; Ex parte Blackburn* [1968] 2 QB 118 at 136. See also *R v Chief Constable of Devon and Cornwall; Ex parte Central Electricity Board* [1982] QB 458; *R v McAulay; Ex parte Fardell* (1979) 2 NTR 22 at 29; *King-Brooks v Roberts* (1991) 5 WAR 500 at 518-19; cf *Smiles v Commissioner of Taxation* (1992) 35 FCR 405 at 408.

¹³ See s 16(1) of the PIC Act.

having their decisions second-guessed by the Commission, and findings of misconduct made, upon nothing more than the substitution of its view as to what the circumstances of the investigation required at the time.

- 2.5 Inevitably, the Commission's opinions would be derived from the comfortable vantage point of hindsight, in purported expression of what a perfect investigation would have been, given perfect decisions and unlimited resources. Lost to the process would be a measure of realism and the illuminating effects of the competing priorities, demands and considerations with which the investigating police would undoubtedly have been faced at the time. Generally speaking, hindsight judgments and casual criticisms in relation to the conduct of a police investigation will more appropriately be made in the context of the Commission's function of auditing police investigations with a view to making recommendations for future improvements.¹⁴
- 2.6 In the setting of an investigation into alleged police misconduct, the Commission settles upon the view that, absent unlawfulness or apparent lack of good faith, it will be appropriate to express an opinion that police misconduct has occurred in circumstances involving the exercise of police discretion only where minimum standards are fallen short of, or proper boundaries exceeded.¹⁵ The touchstone for these kinds of assessments must be the objective reasonableness of the relevant decision, action or inaction, judged according to the circumstances of the investigation at the time.

Duty versus discretion

- 2.7 Aspects of Mr Marsden's complaints assert that, in doing or not doing something, the investigating police neglected their duty. Although police duties and discretions may properly be thought of as distinct concepts, in many respects the distinction is more theoretical than practical.
- 2.8 For example, police may be spoken of as having a duty to keep the peace,¹⁶ enforce the law,¹⁷ or present prima facie cases to the courts.¹⁸ But in most, if not all, of these areas the duty may be seen to involve no more than the giving of proper consideration as to what should be done in the particular instance, the decision then made and any action then following falling into the domain of discretion. For example, in respect of the duty to enforce the law, a police officer who receives a complaint from a member of the public discharges that duty if he or she gives due and proper consideration to the matter and in what way an

¹⁴ Such as, for example, the Commission's "Operation Dresden" audits.

¹⁵ As to the standards and boundaries involved in the area of police investigative discretion, there is neither any single exhaustive statement available, nor is one capable of articulation. Such standards as may be defined are implied by the common law, or laid out in legislation (including the *Police Act 1990* and the *Police Regulation 2000* and where relevant earlier versions of same), and internal police guidelines contained in the *Police Commissioner's Instructions* and, more recently, the *Police Handbook*.

¹⁶ *Enever v The Queen* (1905) 3 CLR 969.

¹⁷ *R v Commissioner of Police of Metropolis; Ex parte Blackburn* [1968] 2 QB 118.

¹⁸ *Ex parte Jones* (1906) 6 SR(NSW) 313.

initial inquiry into the complaint should be made, and acts appropriately upon the view formed.¹⁹

Complainants and “prison informers”

- 2.9 In complaining that police failed to properly assess the credibility and reliability of various persons who made allegations against him, Mr Marsden describes them as “prison informers”. This tends to lend the appearance of greater credence to claims that their credibility was such as to warrant higher levels of caution by the investigating police than perhaps was taken.
- 2.10 It is true that various complainants against Mr Marsden were prison inmates at the time of providing statements to the investigating police. However, the Commission would not, by that fact alone, ascribe to them the mantle of “prison informer”. Essentially, the phrase is apposite to circumstances where a prison inmate informs against a fellow inmate. At least that is the prevailing way in which the High Court²⁰ and the ICAC²¹ have applied the expression.
- 2.11 The fact that a person may have a criminal record and is undergoing punishment by way of incarceration does not mean that they cannot have been a victim of crime. There is, in the Commission's view, an obvious and fair difference between circumstances where a prison inmate makes a statement to police as a claimed victim of crime during their previous civilian life, and a situation whereby an inmate offers themselves as an informer or witness as to admissions or events that are alleged to have occurred in prison. In the former situation the person's status as a prison inmate is rather incidental to the events that are alleged to have taken place, whereas in the latter it will form an integral part of the circumstances by which the inmate professes to hold information as a witness.
- 2.12 The simplest way to illustrate the distinction is to suppose that any relevant complainant against Mr Marsden had been interviewed by police after being released from prison. Clearly, there would be no logical basis to refer to the complainant as a “prison informer”. To colour a complainant of criminal conduct as a “prison informer” simply because, at the time of interview with police, he or she is in prison, tends to give a skewed impression of the level of care required to be exercised by police.
- 2.13 That is not to say that, because of the criminal background of a complainant, the police should not be alive to potential credibility and reliability issues. But that may frequently be the case in relation to myriad other persons and circumstances in a criminal investigation.

¹⁹ *Hinchcliffe v Commissioner of Police of the Australian Federal Police* (2001) 118 FCR 308. A range of matters may be pertinent to the police officer's consideration of the complaint, depending upon the circumstances.

²⁰ *Pollitt v The Queen* (1992) 174 CLR 558. The relevant circumstances there involved an alleged confession by the accused to a fellow prison inmate, who became a key prosecution witness.

²¹ In Volume 1 Part 6 of its 1993 “Report on Investigation Into The Use of Informers”. The context of the ICAC's investigation concerned prison inmates informing against fellow inmates, and/or serving as witnesses to crimes alleged to have been committed in gaol. For example, at page 50 the ICAC remarked that “prisoners generally provide information about their fellows, or become witnesses, or both of those things because of a common perception that benefits will flow from doing so.”

- 2.14 It may also be possible, as with genuine prison informers, that a prison inmate who assists the police as a claimed victim of crime may hold out some hope of a reward or benefit for doing so. But that seems less a danger in the light of the inmate complainant's personal interest in the matter. Moreover, any suggestion that such a complainant should be taken by police to start out with no bank of credit at all is not, in the Commission's view, an approach supported by any clear authority.

Civil proceedings as a yardstick for assessing the propriety of police investigations

- 2.15 In some respects Mr Marsden's allegations of misconduct as they concern alleged failures by Mr Woodhouse and other police to take proper account of the credibility and reliability of witnesses and/or seek corroboration, rely upon the assessments of witness credibility made, at a later time and place, by the learned trial judge in his defamation proceedings.
- 2.16 While intending no disrespect to the trial judge, the Commission considers such an approach apt to misinform the present exercise. Clearly, a civil trial and a police investigation are two different things. The former is not a "search for the truth", but an adversarial proceeding whereby the court's access to information is largely controlled by the parties acting in their private interests according to the facts and issues in dispute between them. In this contest, witnesses are selectively called to give evidence in chief and subjected to cross-examination, in both cases according to the narrow (that is, non-public) interests of the opposing parties.
- 2.17 A police investigation is not a trial, and proceeds in an entirely different way. Complainants or witnesses are interviewed, giving their version of allegations or events. True it is that assessments may often have to be made as to their reliability as complainants or witnesses, and further inquiries conducted in order to corroborate relevant allegations or evidence, or indeed to exclude them. But nowhere in this process do police have the opportunity or advantage of directly pitting the version of one witness against another's, least of all by conducting examination and cross-examination under oath. Indeed, police are restrained in the manner in which they may properly conduct their inquiries by a number of controls, both at the investigative stage²² and as a consequence of how evidence may be later treated at any trial.²³
- 2.18 Common experience tells us that it is a reasonably frequent occurrence for prosecutions to succeed or fail according to the credibility of witnesses. However where the latter is the case, it does not follow that the police responsible for the investigation will have failed in their duties or engaged in misconduct. In some cases that may be so, but more usually it will be

²² NSW Police *Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME)*; NSW Police *Guidelines for the Investigation of Major Crimes*.

²³ For example, the principles at common law whereby evidence might be excluded on the basis of unfairness to an accused (*R v Lee* (1950) 82 CLR 133), or on grounds of public policy (*Bunning v Cross* (1978) 141 CLR 54) and the similar statutory provisions contained in the *Evidence Act 1995*, in particular ss 90, 137 and 138.

unremarkable in as much as it simply underscores the different circumstances of a police investigation and trial.

Thoroughness in police investigations

- 2.19 Mr Marsden has drawn the Commission's attention to remarks by Adams J in *R v Littler*,²⁴ in so doing asserting that they represent a statement of principle against which should be measured the police conduct in relation to matters forming the subject of his complaint. In particular, Mr Marsden says that his Honour's remarks articulate a requirement that police were obliged to seek out evidence of an exculpatory nature that might disprove the various allegations made against him.
- 2.20 Littler was charged with sexual assaults on a number of minors. The alleged offences occurred between 38 and 46 years prior to application being made that the trials be permanently stayed. In the context of discussing the unavailability of potential witnesses as a ground for prejudice that may justify the grant of a permanent stay, Adams J said: "a properly conducted police investigation should have thrown up the names of possible material witnesses and attempts should have been made to locate them in light of the possibility that relevant evidence material to the issues in the might have been discovered. The mere fact, if it occurred, that this evidence might assist the defence of course, should have been irrelevant ...".
- 2.21 The Commission respectfully agrees with the remarks of Adams J, bearing in mind the relevant circumstances involved insurmountable prejudice to the accused in so far as the availability of witnesses was concerned. But the Commission does not take his Honour to have intended to lay down a universal requirement that, in every case involving alleged sexual assault, a "properly conducted police investigation" will involve investigating police going to the greatest possible lengths to search out and interview each and every potential witness, inculpatory or exculpatory of the allegations involved, such that if charges are laid the accused person may legitimately expect to have no occasion to locate or call any witness of their own accord.
- 2.22 In the Commission's view, in the responsible discharge of the functions of their office police should be as thorough as possible in an investigation. But this is not necessarily in any absolute or ideal sense, but in the practical circumstances of the investigation. As the remarks by Adams J in *Littler* suggest, the obligation to be thorough is particularly important where the offences under investigation are so dated that, from the very start of the investigation, there is a real prospect of a prejudice being worked against a potential defendant in that, as a result of the passage of time, witnesses may have become unavailable.²⁵
- 2.23 The imperative of "thoroughness" may thus differ from case to case. Providing the decisions made by those conducting the investigation have been reasonable in the circumstances, there will be little foundation for complaint.

²⁴ [2001] NSWCCA 173.

²⁵ Cf eg *Longman v The Queen* (1989) 168 CLR 79; *Crampton v The Queen* (2000) 206 CLR 161.

- 2.24 It is necessary, however, to also have regard to available resources. Police, like other public officials, must carry out their functions within certain financial and other resource constraints. This cannot displace the need for thoroughness nor, obviously, does it provide a licence to behave improperly in relation to the collection of evidence. Nevertheless, it seems to the Commission that during the course of an investigation decisions may need to be made as to whether it is necessary or practicable to pursue certain lines of inquiry, recognising that myriad alternatives can present themselves throughout the course of an investigation.

Necessity for corroboration

- 2.25 That it lies upon investigating police to make such inquiries as may reasonably be made to corroborate or disprove allegations of criminality, is a matter distinct from what might be done where the result of those inquiries is inconclusive.
- 2.26 It is not the case that criminal allegations proceeding to prosecution necessarily require corroboration or else risk an implication of impropriety. Nor does the referral of matters to the DPP in the absence of corroborative evidence infer bad faith on the part of police. The nature of particular crimes being what they are, whether by the circumstances in which they are committed or the passing of time, corroboration might be difficult if not impossible to obtain.

The need for police to guard their independence in an investigation

- 2.27 What is clear within this area dominated by discretion and reasonable judgment is that police do and may not serve any interest other than the public interest when performing their functions. This duty is self-evident from the independent nature of the public office held by a police constable.
- 2.28 It is no part of the functions of police to adopt the cause of any privately held interest, whether the interest be in favour of, against, or collateral to the conduct of the investigation.
- 2.29 Beyond what has been said, it is not possible to state exhaustively other factors that may be relevant to determining the measure against which the propriety of a police investigation stands to be assessed. Nor is it possible to devise a single test in an area dominated by discretion. In respect of each of Mr Marsden's allegations, the propriety of police decisions and the thoroughness of their inquiries will depend upon the relevant circumstances, judged objectively.

Conduct of the Commission's investigation and this Report

- 2.30 Operation Tower proceeded largely as a documentary investigation. By that, the Commission means to say that the vast majority of information relevant to the matters under investigation existed in document form, whether records, notes and reports on relevant police inquiries, briefs of evidence, or correspondence between various persons and agencies.

- 2.31 Over the course of the investigation it proved unnecessary for the Commission to interview any but a small number of persons, including Mr Marsden and Mr Woodhouse. No hearings, private or public, were held for the purposes of the investigation.
- 2.32 The matters involved in this investigation and Report touch upon a large number of private citizens other than Mr Marsden himself. These persons are variously complainants of or witnesses to alleged sexual misconduct, or individuals against whom allegations have been made, whether during the course of the Strike Force Cori investigations or by Mr Marsden in complaining of misconduct in the investigations.
- 2.33 The Commission is conscious that the identities of these various persons may not have been previously aired in a public forum, or perhaps only in so far as the defamation proceedings might have been concerned. The Commission must be conscious of the harmful effects publicity may have upon the persons concerned in making this Report to Parliament, whether it may involve a person by or against whom a criminal allegation has been made. In the latter case, so far as the Commission is aware the majority of persons – no matter their public notoriety – have not been charged with or convicted on relevant allegations by a court of law and procedural fairness thus requires circumspection in the naming of such persons in this Report. Accordingly, the Commission has adopted an approach whereby Christian names or initials only have been used to ensure an appropriate measure of anonymity.
- 2.34 Against this background, this Report will proceed to consider the various aspects of the allegations by Mr Marsden. As far as possible, the Commission will endeavour to make specific assessments in relation to each allegation. In some cases, however, the Commission's assessments will be self-evident without the need for any concluding comments. For the most part, the Commission proceeded in its investigation as defined by the particulars drawn by it from Mr Marsden's letter to the Inspector and various documents enclosed therein. Those particulars are included at Appendix 2 of this Report, restructured somewhat to better accord with the format of this Report. On occasion, this Report also addresses particular related issues not specified therein for the sake of completeness.
- 2.35 In addition, the Report will consider the allegations as a whole and, based upon all the information obtained during the course of its inquiry, express an opinion about the allegations when considered together. This is not to suggest that the sheer volume of allegations can provide support and corroboration for each other. However, in the Commission's view the myriad allegations raised by Mr Marsden require an assessment of their net merit.

3. ESTABLISHMENT OF STRIKE FORCE CORI

- 3.1 Mr Marsden asserted that the decision of the Commissioner of Police to set up another inquiry into the same allegations, including those in which a decision not to investigate had been made previously, placed him in double jeopardy.²⁶ Of course, the concept of double jeopardy as it is known in law refers to a situation whereby a person is exposed to a risk of conviction or punishment in respect of the same offence on more than one occasion.²⁷ What has been put forward by Mr Marsden is that the mischief to which double jeopardy is directed be expanded to proscribe situations where a person is of interest at the investigative rather than adjudicative stage.
- 3.2 The Commission does not consider the doctrine of double jeopardy apposite to the circumstances in which Mr Marsden found himself during the course of the Strike Force Cori investigation, nor that such principles prohibit multiple police investigations into the same or similar offences. Moreover, as will be seen, the Strike Force Cori investigation explicitly focussed its attentions on new lines of inquiry in relation to Mr Marsden.
- 3.3 The real question – articulated by Mr Marsden on more than one occasion – is whether he was subjected to police harassment by virtue of the Strike Force Cori investigation led by Mr Woodhouse.
- 3.4 “Police harassment” is a phrase often used but incapable of precise definition. The expression may be employed to legitimise an otherwise unworthy complaint by a person merely displeased about police attention. It may of course be appropriate and necessary in the circumstances of many investigations for police to conduct themselves in ways that might be considered by some to constitute harassment in one form or another. At other times, underlying what might be regarded in lay terms as “police harassment” may be serious breaches of police standards, and indeed corruption. According to the *Macquarie Dictionary* to “harass” is to “trouble by repeated attacks, incursions ... to disturb persistently; torment ...”²⁸
- 3.5 In the context of this complaint, harassment is not to be understood in the sense that police unreasonably set themselves upon Mr Marsden by repeatedly badgering him for interviews, following him about, or otherwise behaving in a manner that constituted an unreasonable interference with his basic rights and liberties. Rather, implicit in the complaint by Mr Marsden is the proposition that there was no proper basis for Strike Force Cori, or at least the interest of Strike Force police in him. Having endured two previous investigations into allegations against him, Mr Marsden believed he had been unjustifiably placed in a state of apprehension and anxiety, and therefore felt harassed by the fact of Strike Force Cori’s establishment and the taking of steps in its pursuit.

²⁶ Barcode 5878415.

²⁷ *Carroll v The Queen* [2002] HCA 55.

²⁸ 2nd edition, (1991), Macquarie University, Sydney.

- 3.6 To understand the whys and wherefores of Strike Force Cori, and the bona fides of its initiation, it will be necessary to go back some time, beginning with the first Channel Seven broadcast the subject of Mr Marsden's later defamation proceedings.

THE 'TODAY TONIGHT' PROGRAM AND INKSTER'S FIRST INVESTIGATION

- 3.7 On 13 March 1995, during a broadcast on Channel Seven of its *Today Tonight* program, it was alleged that Mr Marsden had knowingly had sexual intercourse with boys who were under the age of 18.
- 3.8 Specifically, two unidentified men alleged that, when they were approximately 15 years of age, they were solicited by Mr Marsden at Kings Cross and driven back to Mr Marsden's home where they engaged in sexual intercourse. The identities of these witnesses were Ronald and John X. Ronald further alleged that he had sex with Mr Marsden on a number of other occasions and that Mr Marsden supplied him with "plenty of drugs".
- 3.9 The *Today Tonight* program also broadcast allegations by RD, a solicitor and former business partner of Mr Marsden, that "John Marsden has had sex with boys under the legal age", including former clients of Mr Marsden's law firm.
- 3.10 The interviewer also referred to allegations contained in a statutory declaration by Colin Fisk – later ventilated in the NSW Parliament by Deirdre Grusovin MP (as she then was) – to the effect that Mr Marsden was a pederast.
- 3.11 Finally, the *Today Tonight* program contained reference to the execution of a search warrant on Mr Marsden's house in May 1994. The reporter Quail noted that two unidentified witnesses (later identified to police as DT and SW) had provided statements to the police asserting that Mr Marsden kept drugs on the premises. Despite also asserting they had a report of the warrant's execution, no indication was given during the broadcast as to whether anything incriminating or of significance was located during the course of the search. The program stated that the matter was being considered by the Royal Commission.
- 3.12 On 15 March 1995, a special investigation was ordered to be conducted into the allegations raised on the *Today Tonight* program. Detective Inspector Robert Inkster was assigned to lead the investigation.
- 3.13 On 19 May 1995, Inkster submitted a preliminary report of a "Special Investigation into criminal allegations levelled against John Robert Marsden, Member of the Police Board". The report summarised the information gathered to that time in relation to a number of matters. In anticipation that the time would eventually arrive when recommendations would need to be made, the report concluded with the following:

As indicated in this preliminary report there are numerous criminal allegations levelled against MARSDEN by persons who generally have lengthy criminal records. The credit of each complainant and witness in these allegations will be subject to extensive legal argument. It is therefore imperative that before making any recommendation concerning the veracity of any such allegation, corroboration

of the complainant witnesses is considered paramount. It is clearly understood that in the circumstances outlined in the various allegations contained in this report, the evidence of each complainant witness does not constitute corroboration of the other named witnesses.

- 3.14 On 26 July 1995, Inkster submitted his final report on the investigation precipitated by the *Today Tonight* program. Extracted below are some relevant conclusions in relation to allegations against Mr Marsden (initials having been substituted for names):

ALLEGATIONS OF UNLAWFUL SEXUAL INTERCOURSE BY MR MARSDEN OF [RONALD]:

...

12. Taking into account the general lack of credit of [Ronald] and the absence of any corroborative evidence, I am of the view that there is insufficient evidence to warrant the preferring of a criminal charge against Mr MARSDEN relating to [Ronald's] allegations.

...

ALLEGATIONS OF UNLAWFUL SEXUAL INTERCOURSE BY MR MARSDEN OF [JOHN X]:

...

29. John Marsden admits having had a sexual relationship with [John X] but states that this occurred after [John X] attained the age of 18 years.

...

32. I have no reason to doubt the genuineness of [John X], however the passage of time, the lack of specific dates of the alleged events subject of complaint and his general lack of credit make it dangerous to recommend criminal charges relating to his complaint.

...

ALLEGATIONS OF UNLAWFUL SEXUAL INTERCOURSE BY MARSDEN OF [EDWARD]:

...

36. As [Edward] has not provided a formal written complaint and there being no other independent evidence concerning his allegations, the allegations were not put to MARSDEN during his formal interview on 6 July 1995.

37. There is no further investigation of the [Edward] allegations contemplated at this stage.

...

ALLEGATIONS OF UNLAWFUL SEXUAL INTERCOURSE BY MR MARSDEN OF [DJR]:

...

42. The investigation failed to disclose any evidence that could corroborate [DJR] having had unlawful sexual intercourse with Mr MARSDEN. Particular attention must be given to [DJR]'s version concerning the evening when the alleged "threesome" took place and it is quite evidence that this occurrence took place on the 26th August, 1989 when he was 19 years of age.

43. [DJR]'s version, his general lack of credit and his subsequent actions as indicated in the interview of Mr MARSDEN highly discredit him and little credence can be placed on his complaint.

44. I recommend that no criminal proceedings be considered concerning the complaint by [DJR] of his unlawful sexual intercourse by Mr MARSDEN.

3. ESTABLISHMENT OF STRIKE FORCE CORI

ALLEGATIONS OF [RD] ALLEGING THE UNLAWFUL SEXUAL INTERCOURSE BY MR MARSDEN WITH NAMED CLIENTS OF HIS LEGAL PRACTICE:

...

54. There is insufficient evidence to recommend any criminal charge being preferred against Mr MARSDEN relating to his relationship with [SE].

...

58. There is no evidence to warrant the preferring of any criminal charge against Mr MARSDEN relating to [ME].

...

63. There is no evidence to support the preferring of any criminal charge against Mr MARSDEN relating to [SPF].

...

66. There is no evidence upon which a recommendation can be made for the preferring of a criminal charge against Mr MARSDEN relating to [SCR].

...

70. There is no evidence upon which a recommendation can be made for the preferring of a criminal charge against Mr MARSDEN relating to [BE].

- 3.15 The report also dealt with potential drug charges against Mr Marsden, dismissing their possibility, and a number of allegations of unlawful homosexual intercourse against persons other than Mr Marsden, which are not relevant for present purposes.
- 3.16 Finally, the report dealt with an allegation made on Mr Marsden's behalf by Corrs Chambers Westgarth, Solicitors, that Mr Marsden was the victim of a criminal conspiracy to manufacture allegations against him. No evidence of any criminal conspiracy was detected.
- 3.17 The report was forwarded to the DPP for assessment and advice. On 1 December 1995, the DPP advised that there was insufficient evidence to support the preferring of any criminal charge against Mr Marsden.

THE 'WITNESS' PROGRAM AND INKSTER'S SECOND INVESTIGATION

- 3.18 On 7 May 1996, Channel Seven in its Witness program again broadcast allegations that Mr Marsden had been involved in unlawful homosexual activity with males when those persons were under 18 years of age.
- 3.19 The *Witness* program broadcast allegations by three unidentified males that Mr Marsden had had homosexual intercourse with them when they were 14 or 15 years old or "under age". These men were given the pseudonyms "Bill", "Russell" and "Steve". During the police investigation which followed, they were identified as Edward, John X and Ian respectively.
- 3.20 A fourth man, given the pseudonym "Alex", said that he was a former barman at Costello's night club and that he remembered seeing Mr Marsden "pick up" boys at Costello's. He said he recalled one particular incident involving "a kid called Mark". Alex alleged that Mr Marsden had treated Mark "badly ...

roughly". Police subsequently identified Alex, who is referred to below by the initials "PR".

INKSTER'S SUPPLEMENTARY REPORT – 'WITNESS' ALLEGATIONS

3.21 On 17 July 1996, following the receipt of advice from the Royal Commission, Inkster was directed to investigate the allegations against Mr Marsden aired on the *Witness* program.

3.22 On 29 May 1997, Inkster submitted a supplementary report on the special investigation into allegations against Mr Marsden prompted by the *Witness* program. Salient parts of this report, including the conclusions drawn by Inkster, are extracted below:

ALLEGATIONS OF [EDWARD]:

...

No evidence capable of constituting corroboration has been determined concerning the allegations of unlawful sexual intercourse upon [Edward] by Mr MARSDEN. I do not consider the evidence of [PR] sufficiently supports the allegations of [Edward], albeit, Mr MARSDEN strenuously denied knowing or ever meeting the person ...

49. I am of the view that there is insufficient evidence to warrant the preferring of any criminal charge against Mr MARSDEN concerning these allegations.

...

ALLEGATIONS OF [IAN]:

...

63. The investigation has not revealed any evidence that is capable of constituting corroboration of the allegations of unlawful sexual intercourse by Mr MARSDEN upon [Ian]. The inconsistencies in the two versions given by [Ian], although later explained by him, are matters that effect [sic] his credit.

64. Although Mr MARSDEN has made a general denial of any criminal act and denies ever having attended the Castello's Night Club [sic], he has declined to be interviewed concerning these specific allegations.

65. I am of the view that there is insufficient evidence to warrant the preferring of any criminal charge against Mr MARSDEN concerning these allegations.

...

THE FURTHER ALLEGATIONS OF [JOHN X]:

[After noting that further information from John X had been supplied by the Police Royal Commission, the report stated:]

74. The information received from the Royal Commission contained in the documents referred to above is substantially the same to that gleaned from the original police investigation. It was considered that the information did not further advance the investigation. No further investigation was conducted into those issues following receipt of that material.

75. There is no dispute from Mr MARSDEN that he was engaged in sexual conduct with [John X]. What is disputed is whether or not that sexual conduct was at a time when [John X] was under the age of 18 years.

76. [John X] is adamant that the relationship commenced prior to his eighteenth birthday. The evidence of [PR] does support to some extent the existence of an association between [John X] and Mr MARSDEN at a time when [John X] was under the age of 18 years (pre 1979). His evidence however does not corroborate the fact in issue that Mr MARSDEN had intercourse with [John X] at that time.

...

78. I remain of the view that there is insufficient evidence to support a criminal charge against Mr MARSDEN concerning the allegations of [John X].

3.23 In relation to the allegation by PR concerning the alleged assault by Mr Marsden on “Mark” at Costello’s, the *Supplementary Final Report* stated:

109. There is no direct evidence to support this allegation. Mr MARSDEN denies having at any time attended the Castello Nightclub [sic] and he denies having had sexual intercourse with any person under the legal age of consent.

110. ... [T]here is no evidence to support the allegation and I recommend that no criminal charge be considered against MARSDEN or any other person relating to this issue.

INKSTER’S SUPPLEMENTARY REPORT – ROYAL COMMISSION ALLEGATIONS

3.24 In addition to the allegations broadcast on the *Witness* program, the *Supplementary Final Report* dealt with a number of further allegations against Mr Marsden, as disclosed in intelligence that had been received by the Royal Commission and disseminated to NSW Police for further investigation. In respect of some, it was considered there was insufficient evidence for prosecution or that it did not advance the investigation. Certain other matters were referred for independent advice from the DPP.

3.25 On 18 November 1997, the DPP advised that there was insufficient evidence to warrant prosecution of Mr Marsden.

3.26 On 26 November 1997, Clive Small, then Commander of Crime Agencies, wrote to Mr Marsden’s legal representative, informing him that “[o]n the information presently available it is not intended to conduct any further investigation into your client.”

ALLEGATIONS BY THE HON FRANCA ARENA MLC AND THE NADER INQUIRY

3.27 As Inkster’s investigations were in their final stages, on 17 September 1997 the then Hon Franca Arena MLC rose in Parliament to allege:

- (a) a meeting had taken place between the Premier, Bob Carr, and then Leader of the Opposition, Peter Collins, to plan the suppression of names of individuals allegedly being investigated by the Royal Commission;
- (b) the Premier and Justice Wood had met and “an agreement was reached to ensure that people in high places would not be named”; and
- (c) a meeting took place between Premier Bob Carr, John Della Bosca and Terry Sheahan at Parliament House to plan the suppression of the names of individuals allegedly being investigated by the Royal Commission.

3.28 By Letters Patent dated 26 September 1997, the Hon J A Nader RFD QC was appointed to conduct a special commission of inquiry into the claims by Arena.

3.29 On 21 October 1997, Arena moved that the Legislative Council grant her leave to table four folders of documents concerning her allegations of a cover-up of

paedophilia in high places. Attorney General the Hon J W Shaw QC (as he then was) proposed a number of amendments to the terms of Arena's motion, including:

4. That leave be given to the Clerk of the House to provide a copy of any documents tabled ... to:
 - the Special Commission of Inquiry ...; and
 - the Commissioner of Police.
5. That the Commissioner of Police is to make an assessment of the documents provided ... and report upon his assessment to the House as soon as practicable.

3.30 On 11 November 1997, Nader QC issued his report of the *Special Commission of Inquiry into Allegations Made in Parliament by Arena*, concluding the claims made by Arena were "false in all respects". He added:

Mrs Arena had no evidence, sufficient or otherwise, to support these claims, or any part of them, which she made under parliamentary privilege; nor was there anything, not amounting to evidence in the strict sense, that could have provided to any reasonable person acting in good faith any justification whatsoever for these claims, or any part of them. The evidence strongly suggests Mrs Arena knew she had no such evidence.

STRIKE FORCE CORI

3.31 On 8 December 1997, then Commissioner Peter Ryan established Strike Force Cori with the following terms of reference:

1. To analyse and evaluate the material supplied by Franca Arena and to identify criminal offences or fresh evidence relating to child sexual abuse which have not previously been investigated by the police.
2. To investigate such criminal offence or fresh evidence that may reasonably be pursued having regard to the availability and admissibility of evidence, the prospects of securing corroboration and the likelihood of a prosecution arising.
3. To review Special Branch files to determine whether they contain information relative to allegations of paedophile activity committed by persons named in the material supplied by Franca Arena.
4. To investigate the circumstances surrounding the letter of 24 November 1997 to Franca Arena to determine whether a criminal offence has been committed.
5. To report directly to the Commissioner of Police for New South Wales.

3.32 Detective Superintendent Michael Woodhouse was appointed Commander of Strike Force Cori. A number of other police officers were seconded to the Strike Force from other areas within NSW Police.

3.33 Strike Force records note that, on 18 December 1997, Arena handed over four volumes of material to the Commissioner of Police, together with two files marked "secret". While it is not apparent whether those four volumes were the same as those tabled in Parliament on 21 October 1997, it is clear that one of the volumes was described as "Volume 7 – Material relating to John Marsden".

3.34 On 16 February 1998, Strike Force Cori presented an interim report to the Commissioner of Police. Mr Woodhouse sought approval to "commence a

sustained target operation” against a person other than Mr Marsden.²⁹ Other investigations were identified as priorities. Matters relating to Mr Marsden were not specified among these investigations. However, matters relating to Mr Marsden were identified elsewhere among investigations that “now assume priority with a view to bringing a prosecution where the evidence supports this.” It would appear that this decision may have been taken in April 1998.

FURTHER STRIKE FORCE CORI INVESTIGATIONS AND FINAL REPORT

- 3.35 On 29 May 1998, Mr Woodhouse submitted the *Strike Force Cori Final Report*. In relation to the Arena papers, it concluded that all information provided was already in Inkster’s hands and, there being no fresh evidence falling within their terms of reference, considered that aspect of the investigation concluded. The report noted a number of fresh lines of inquiry arising during the Strike Force Cori investigation, and recommended a review of Inkster’s investigation with a view to determining whether persons there interviewed might be of assistance in advancing those new lines of inquiry. The question of corroborative evidence was clearly in mind, it being noted that by the very nature of the offences, it would be difficult to come by.
- 3.36 The report concluded, inter alia, that matters relating to Mr Marsden were among a number of matters that were under further investigation. Further, that “[t]he investigation against John Marsden is clearly a highly sensitive issue and whilst progress has been good there is yet much work to be done.”
- 3.37 The Commission is advised that the recommendations contained in the *Strike Force Cori Final Report* were accepted.

THE STRIKE FORCE CORI BRIEF TO THE DPP

- 3.38 On 30 March 1999, Mr Woodhouse furnished the DPP with a brief of evidence entitled “Strike Force Cori Brief in the Matter of John Robert Marsden”. The “Introduction” to this document stated:³⁰
2. Although Franca Arena’s documents contained numerous references to John Marsden it was established after initial assessment that these did not amount to “fresh” allegations and that each of the matters had already been investigated by the police. The earlier investigations were conducted by [then] Detective Inspector Inkster following two television programs about John Marsden made by Channel 7 Television. Reports concerning these two investigations were submitted at that time to The Director of Public Prosecutions who determined in each case that there was “insufficient evidence” to prosecute John Marsden.
 3. A decision was taken by Detective Superintendent Woodhouse, the Commander of Strike Force Cori that John Marsden would not be investigated further and the relevant papers were filed.
 4. However, in the course of making other inquiries concerning the Franca Arena papers, detectives from Strike Force Cori became aware of fresh allegations about John Marsden which caused him once again to become the focus of investigation. In

²⁹ Barcode 6271688.

³⁰ Barcode 6088007.

consequence the decision was taken that the earlier investigations conducted by Detective Inspector Inkster should be re-assessed for the purpose of identifying evidence which may support or disprove the fresh allegations.

5. A number of witnesses from the earlier investigation were re-interviewed although in only one case (Edward) will the Director be invited to reconsider allegations arising from the Inkster investigation. All other allegations contained within this report have arisen since the Inkster investigation.

6. Detectives from Strike Force Cori were also successful in tracing witnesses, [David Y and John Y], whose identities were known to the Inkster investigation but who were not traced at that time. The “fresh” allegations made by the brothers are included within this brief of evidence.

7. Detectives from Strike Force Cori spoke to a considerable number of so-called “fresh victims” who claimed to have had homosexual relations with John Marsden whilst under the age of 18 years. In a number of cases the Commander has himself determined that the evidence is unsatisfactory because of the reliability of witnesses or the absence of corroboration. These particular cases are not included within this report. However, it was determined that other allegations should be put to John Marsden in interview and this was achieved on 29 January 1999. This report concerns only those matters which were put to John Marsden in interview.

3.39 The brief stated:³¹

16. It was with this knowledge that detectives from Strike Force Cori began an investigation into the fresh allegations against John Marsden, and mindful of the background and sensitivity of the matters, every effort has been made to conduct an impartial and objective assessment of the available evidence.

17. In addition Mr Marsden has complained to the New South Wales Ombudsman about the oppressive nature of his being subjected to repeated investigation. The Strike Force Commander, Detective Superintendent Woodhouse has given assurances to the Ombudsman about the conduct of the investigation and there is no doubt that police action will be subsequently assessed.

18. As has already been identified in this report, several of the fresh allegations have already been eliminated by the police and the Director’s advice is sought only on the matters which were put to Mr Marsden in interview on 29 January 1999.

CONSIDERATION OF BRIEF BY DPP

3.40 By letter dated 31 March 1999, Corrs Chambers Westgarth, Solicitors acting for Mr Marsden in relation to investigations by Strike Force Cori, requested the DPP “defer the finalisation of your recommendation until such time as the evidentiary part of the [defamation] proceedings has concluded.”³²

3.41 The Director of Public Prosecutions, Mr N R Cowdery QC, later informed Corrs Chambers Westgarth, Solicitors, he had determined “to defer the finalisation of my consideration of matters affecting Mr Marsden until the conclusion of evidence in the matter of MARS DEN v CHANNEL 7.”³³

3.42 On 21 or 23 March 2001 (it is not entirely clear which of these dates is correct), Corrs Chambers Westgarth, Solicitors made submissions to the DPP on behalf of Mr Marsden in relation to the Strike Force Cori brief of evidence.³⁴ It is one of

³¹ Barcode 6088009.

³² 7942/141.

³³ 7942/141.

³⁴ Barcodes 5879070-165.

the primary documents supplied by Mr Marsden particularising his various allegations against Mr Woodhouse.

- 3.43 At interview with Commission officers, Mr Woodhouse indicated that he considered the nature of the brief to be “a preliminary brief for an advising”.³⁵ In particular, he saw its function as being to “present to the DPP sufficient information upon which they could at least make a decision about whether the case had merit or not.” Mr Woodhouse did not consider the brief to be complete in the sense of being ready for prosecution, and expected further discussions with DPP solicitors concerning the status of a number of the allegations in the brief. In relation to inconsistencies noted in the brief of evidence, Mr Woodhouse further elaborated on what he expected might occur, at least in relation to an issue of conflicting evidence as to the vehicle supposedly driven during the alleged offences.³⁶

... I think it then becomes an issue for the DPP to say whether there are so many inconsistencies in this case that we can't proceed and if they had said to me “Well we think that this particular investigation may have merit but we need to establish whether Marsden had access to a particular car at that time.” Then I would have undertaken [further inquiries].

- 3.44 As to his decision to present a brief in this form and for this purpose, Mr Woodhouse commented:

If I ever thought that there was a prima facie case or if I thought there was a strong enough case then I would have taken the decision to charge John Marsden but I felt that there were lots of grey areas in this investigation. I tried to draw attention to them in my report. Tried to make it as balanced as I possibly could and I anticipated, as had been the practice for the past thirty years in the UK, that I might have discussions with the DPP about the merits of the file and we'd decide what, if any, further action needed to be taken.

- 3.45 Mr Woodhouse also held an expectation that Mr Marsden or those acting on his behalf would be providing information directly to the DPP, and anticipated that it might well be that police would follow up on some matters as a result, referring to the investigation as one “that never stopped”. Of note was Mr Woodhouse's observation in the context of the completeness of the brief:

... it was a very unusual investigation. It was unlike any other investigation I think I've ever conducted. In most investigations the facts or the person who presents the facts is usually the Investigator. In this case, I became aware from a very early stage that there was almost a parallel investigation going along by John Marsden and Investigators appointed by him and his solicitor ... [His solicitor] advised me that they would be presenting a body of evidence to the DPP so in effect the DPP was going to be presented with two files to consider. Mine and the one presented by them.

- 3.46 Further, Mr Woodhouse was also in the position of knowing that certain information material to his investigation was in the possession of Mr Marsden and his solicitor, and might well not be readily available to him:

I think [the complainant and his legal representatives] were reluctant because of the civil proceedings that were going on to hand over this stuff to me but there was a

³⁵ 20 December 2002.

³⁶ See also [4.234] below in relation to the motor vehicle inquiries in relation to the Strike Force Cori investigation.

stage when I was permitted by Michael Lee [Solicitor for Mr Marsden] to have access to it and I went along to his office and I examined all the material and I took notes of the relevant issues. Some of which that he had flagged with me in interview and perhaps some that he hadn't flagged with me in interview ...

- 3.47 In relation to steps taken by Mr Marsden and his solicitors in the course of his inquiries, Mr Woodhouse commented:

What happened in just about every case with this was that Marsden or his team, re-interviewed the witness, took their own statutory declarations by a variety of means overturned the evidence that had been gathered by the Police and I mean, some of these witnesses have gone through not just three hundred and sixty degrees, some of them have gone through seven hundred and twenty degrees. The investigation was a moving concept over time and it became apparent that as soon as Mr Marsden was aware of any action that the Police had done, he would go out of his way and try and undo that and I was aware that he was presenting his dossier of evidence to the DPP as I was presenting mine.

- 3.48 At the time the brief was submitted to the DPP on 30 March 1999, Mr Woodhouse had completed active inquiries as part of Strike Force Cori's investigation of allegations against Mr Marsden. At the same time, further inquiries may have become necessary, depending upon the views formed by the DPP in relation to the brief.

ASSESSMENTS – DID STRIKE FORCE CORI AMOUNT TO POLICE HARASSMENT?

Establishment of Strike Force Cori

- 3.49 Strike Force Cori occurred as a result of events very much on the public record. Documents were tabled in Parliament which purported to support allegations of serious criminal conduct. Parliament, in addition to having relevant allegations examined in a special inquiry, resolved to have the documents assessed by the Commissioner of Police. In the Commission's view, the terms of Strike Force Cori were perfectly apposite to that task. As such it has not been necessary for the Commission to examine Commissioner Ryan on the circumstances or bona fides of its establishment.
- 3.50 The Commission is drawn to conclude that the fact the Strike Force Cori investigation was commenced cannot on any reasonable view be considered improper, to have constituted an attempt to harass Mr Marsden or otherwise to give rise to any issue of police misconduct.

Strike Force Cori investigations

- 3.51 It remains to be considered whether the way in which the Strike Force Cori investigations were conducted by Mr Woodhouse manifested an intention to harass Mr Marsden.
- 3.52 Both the *Strike Force Cori Final Report* and the brief furnished to the DPP in relation to Mr Marsden, make it abundantly clear that Mr Woodhouse had determined very early in the investigation not to further investigate the

allegations that had been investigated by Inkster and dismissed, either by Inkster in the exercise of his discretion or as a consequence of advice by the DPP.

- 3.53 It was only when fresh evidence emerged in relation to allegations that Mr Marsden had engaged in sexual activity with males under the age of 18 years that Mr Woodhouse began to make further enquiries. The fresh evidence came to notice, quite unintentionally, first by way of disclosures by Jason X in the course of an interview concerning two other persons of interest to Strike Force Cori. Jason X named another alleged victim by first name only, which then led police to make enquiries at Goulburn Gaol. Police subsequently interviewed Sean Y on the basis that he “appeared to fit the profile provided by [Jason X].”³⁷ While not the person to whom Jason X had referred, Sean Y stated that he was a former boy prostitute who had worked “The Wall” and had engaged in sexual activity with Mr Marsden when he (Sean Y) was 15 years of age.
- 3.54 Second, independently of the information provided by Jason X and Sean Y, police were informed of further allegations against Mr Marsden. The source of the allegations on this occasion was David X – another person who had not come to notice during the special investigations by Inkster. The allegations were made during the course of an interview with David X concerning an unconnected investigation. Like Sean Y, David X described his experience as a prostitute at “The Wall” and alleged that, when he was 16 years of age, he was solicited by Mr Marsden at “The Wall” and then accompanied Mr Marsden to his home where sexual activity took place.
- 3.55 A third fresh line of inquiry in relation to matters concerning Mr Marsden emerged when Russell Travis contacted police from prison “to say that a fellow inmate wanted to make allegations against two men, John Marsden and one other.”³⁸ The fellow inmate, who was also serving a sentence in June Correctional Centre, subsequently provided a statement to police that he had engaged in sex with Mr Marsden when he was 16 years of age. Again, this person was a former boy prostitute who had worked “The Wall”.
- 3.56 Yet another fresh line of inquiry emerged when Strike Force Cori investigators traced David Y, a witness who had been identified by Inkster during the course of his special investigation into the allegations raised in the *Today Tonight* and *Witness* programs but was unable to be traced during that investigation.
- 3.57 By letter dated 25 October 1998,³⁹ Mr Marsden was informed by Mr Woodhouse that he was pursuing further inquiries in relation to allegations by David Y, as well as his brother, John Y. A letter from Mr Woodhouse to Mr Marsden some weeks earlier did much to explain the position taken by the investigating police.⁴⁰
- 3.58 These fresh allegations against Mr Marsden and new lines of inquiry having emerged, Mr Woodhouse was entitled, indeed duty-bound, to give them due and

³⁷ *Strike Force Cori Final Report*.

³⁸ See observations on *Strike Force Cori Brief in the Matter of John Robert Marsden*.

³⁹ Barcode 6088232.

⁴⁰ Barcode 6331380.

proper consideration and then to make such further enquiries as were reasonable in the circumstances.

- 3.59 In terms of the general allegation that the investigation by Strike Force Cori into allegations against Mr Marsden was unjustified because the matters had been previously investigated, the Commission can only reject that proposition. Clearly, the matters that prompted the further investigation into Mr Marsden were not the same as those considered by Inkster.
- 3.60 Unless and until reasons emerged to justify the view that further inquiries under the auspices of Strike Force Cori were manifestly inappropriate or unnecessary because, for example, none of those making the allegations could be relied upon, the police were fully entitled to continue with the investigation. In the Commission's opinion matters never reached that stage.

Submission of brief to the DPP

- 3.61 By Mr Woodhouse's own account, the brief to the DPP was not as complete as any final brief might have been. However, that is explicable by its preliminary nature and it is understandable that Mr Woodhouse would have wanted the DPP to review relevant materials and advise on whether any prosecution was appropriate, or indeed whether further investigation might be warranted. It was to Mr Marsden's benefit that this occurred.
- 3.62 Furthermore, Mr Marsden's legal representatives had been urging precisely that course as early as 29 September 1998 in a letter to the Commissioner of Police:⁴¹
- If ... it is thought appropriate to consider taking further action against our client ... the appropriate course would be for the Police to refer the matter to the Office of the Director of Public Prosecutions for advice as to whether any action should be commenced.
- 3.63 The Commission agrees with Mr Woodhouse's view that it was a "very unusual investigation".⁴² In some ways the investigation came to resemble an adversarial inter partes proceeding. From the outset of Strike Force Cori, Mr Marsden's legal representatives were making representations to the police, urging certain approaches and cautioning against others in order to achieve "a thorough, balanced and ... objective investigation".⁴³ In one such letter Mr Marsden's legal representative, seemingly treating a police investigation as if it were a criminal trial, wrote to Mr Woodhouse to protest that he had "no legitimate forensic purpose" in asking certain questions of a witness.⁴⁴
- 3.64 Mr Marsden himself wrote to a female police officer whose duties concerned liaison with the Gay and Lesbian community, enclosing copies of DPP memoranda and policies concerning the prosecution of sexual offences, together with statutory declarations obtained from persons relevant to Mr Woodhouse's

⁴¹ Barcodes 6326487-8.

⁴² Interview between Mr Woodhouse and PIC officers, 20 December 2002.

⁴³ Barcodes 6088247-9.

⁴⁴ Barcodes 6088247-9.

investigation.⁴⁵ According to an internal memorandum by Commissioner Ryan, the officer later sought to raise on Mr Marsden's behalf matters pertaining to the investigations with a view to having them stopped. The Commissioner immediately made it clear that he did not want to hear anything in such regard, as he considered it an attempt to interfere with Mr Woodhouse's inquiries.⁴⁶

3.65 That the police investigation was taking place at a time when Mr Marsden's civil defamation proceedings were at a stage where witnesses were being sought out by both parties, and frequent demands for the production of investigation materials were being made under subpoenas, also could not have helped matters. This Report later deals with the allegation of mala fides in the seeking of advice by Mr Woodhouse as to whether the defamation proceedings could be stayed pending completion of the criminal investigations,⁴⁷ and issues concerning alleged bias and impropriety in the police response to subpoenas in those proceedings.⁴⁸

3.66 As an investigative agency itself, the Commission is conscious of the difficulties these factors potentially posed for Mr Woodhouse in the conduct of his inquiries. There is of course ample room in any police investigation for a person to provide information to those charged with the conduct of inquiries, and to make representations as to whether charges should be pursued. But in the Commission's experience an investigation is in most other respects best conducted without persons the subject of inquiries constantly seeking to look over the investigator's shoulder, purportedly to give guidance or directions as to what a "thorough, balanced and objective" investigation might be. It is axiomatic that a police investigation which bends to the influence of any external interest, whether for or against the laying of charges, might fairly be regarded as less than objective and independent.

3.67 According to the Commission's review of relevant materials Mr Woodhouse was alive to these ideals and at appropriate times made appropriate responses to overtures on Mr Marsden's behalf, so as to stake out his territory. For example, in an October 1998 letter to Mr Marsden's legal representative he wrote:⁴⁹

... You indicate that the compendium of documents which you are preparing will, amongst other things, deal with the inherent weakness and falsity of the allegations against Mr Marsden. I hope you will forgive me for pointing out that you have not yet been advised of what the allegations are.

...

I think it may be advantageous to both our causes if Mr Marsden ceased attempting to second guess my investigation ...

3.68 None of the foregoing is to suggest any impropriety on Mr Marsden's part, or those acting in his interests. There is nothing inherently wrong with a person faced with the potential for criminal prosecution acting, within the law, to safeguard their private interests. But an objective and independent police

⁴⁵ Barcodes 6346571.

⁴⁶ Barcodes 6346569.

⁴⁷ See [4.337].

⁴⁸ See [4.379].

⁴⁹ Barcodes 6088245-6

investigation must prevail and it is up to the investigating police to ensure that inquiries proceed according to their discretionary judgments as to what is reasonably required.

- 3.69 However, the circumstances of the investigation being as they were, Mr Woodhouse's expectation that Mr Marsden would also be submitting evidentiary materials to the DPP to supplement areas lacking in his preliminary brief was entirely understandable. That expectation was founded upon the conduct and assertions of Mr Marsden's legal representatives and cannot now be reasonably relied upon by Mr Marsden to support complaints of misconduct.
- 3.70 In the Commission's opinion, it was reasonable for Mr Woodhouse to have submitted a preliminary brief for the Director of Public Prosecution's consideration, both of itself and, in so far as parts of the brief were incomplete, on the expectation that those acting on Marsden's behalf would be submitting materials withheld from his investigation.
- 3.71 Before proceeding to a deeper assessment of the specifics of the Strike Force Cori investigation, it remains to comment upon the prior investigations undertaken by Inkster, the bona fides of which was also called into question. The Commission is satisfied there was a valid and proper basis for both phases of the special investigation by Inkster. Both the initial and subsequent investigations resulted from a number of serious allegations by persons who placed themselves very much on the record.

4. CONDUCT OF THE STRIKE FORCE CORI INVESTIGATIONS

- 4.1 Mr Marsden asserted that “from day 1”, the Strike Force Cori investigation had “a clear focus on charging John Marsden come hell or high water and getting the evidence no matter what.”⁵⁰ That allegation tends to summarise the tenor of the complaint against Mr Woodhouse and perhaps other members of Strike Force Cori. This general complaint may be divided into a number of categories, namely, that Mr Woodhouse and perhaps other Strike Force Cori officers:
- behaved with bias or prejudice;
 - neglected their duty in that they investigated allegations against Mr Marsden to the exclusion of allegations against others where the evidence was more or as compelling;
 - ignored exculpatory evidence or failed to seek evidence of corroboration or to exercise appropriate discretion when assessing the veracity of allegations against Marsden;
 - ignored prosecution guidelines issued by the DPP;
 - improperly attempted to obtain evidence.

BIAS AND PREJUDGMENT

- 4.2 Accepting, as the Commission does, that there was a proper basis for Strike Force Cori pursuing a further investigation into allegations against Mr Marsden, it is necessary to consider the more specific allegations of misconduct by Mr Marsden in relation to the conduct of the investigations. These allegations may be divided into a number of categories, for example, failure to seek corroborative evidence and improper attempts to obtain evidence, and are considered in greater detail later.
- 4.3 It may, however, be noted that the allegations appear to all stem from the same basic premise. That is, Strike Force Cori, led by Mr Woodhouse, was prepared to ignore professional standards with a view to achieving its objective, namely, the criminal prosecution of Mr Marsden. Implicit in this complaint is an allegation that Mr Woodhouse and perhaps others within Strike Force Cori behaved with bias and prejudice. Mr Marsden has suggested the bias against him was the product of retribution for his service with the NSW Police Board, and his robust attitude towards corrupt, dishonest and inappropriate police promotion whilst a member of the Board, as well homophobia.⁵¹
- 4.4 According to Mr Marsden, the circumstances of the publicised arrest and charging of a judge of the NSW District Court typified the prejudice of Strike Force Cori in relation to the investigation of himself also.⁵² He alleged

⁵⁰ Barcode 5878431.

⁵¹ Barcodes 5878431, 5921092.

⁵² Barcode 5874831.

corroborative evidence was there not sought, and that the police “tipped off” the media as to the arrest.⁵³

- 4.5 While questions would appear to remain as to precisely who was the source of information to the media concerning the imminent arrest and charging of the judge, it is also apparent, at least on the basis of the Ombudsman’s investigation into the matter, that there is no evidence to explain the “leak” other than from Mr Woodhouse’s conversation with Arena some time prior to the judge being arrested and charged. Mr Woodhouse explained his purpose in informing Arena in advance of these events as being to ensure she did not place subsequent court proceedings in jeopardy by injudicious public statements. That objective is understandable, though views may differ, especially with the benefit of hindsight, as to its wisdom.
- 4.6 It does appear that Mr Woodhouse made arrangements for the judge to be transported to a secure location to avoid direct media contact, and Mr Woodhouse has emphatically denied any suggestion that the details of the arrest were leaked to the media by police. In the result, nothing springs from this matter that can rationally assist the Commission in more easily forming the view that Mr Woodhouse acted inappropriately vis-à-vis the allegations against Mr Marsden.
- 4.7 If anything, there is a lack of consistency between Mr Marsden’s assertions as to alleged improprieties in the case of the judge and his own. The complaint of impropriety in the former includes the failure of police to seek advice from the DPP before charging.⁵⁴ Yet the complaint by Mr Marsden as it concerns the investigation in relation to himself involves a claim that Mr Woodhouse acted improperly by seeking the DPP’s advice.
- 4.8 In relation to media knowledge of the charging of the judge, when this issue was earlier raised by Mr Marsden⁵⁵ there was no suggestion that police “tipped off” the media. Rather, it was suggested that the “media leak” might be explained by Mr Woodhouse’s approach to Arena. That approach is explained above. In the Commission’s view the fresh assertion that Mr Woodhouse “tipped off” the media, implicit in which is the claim that Mr Woodhouse contacted the media directly, lacks any proper foundation.

NEGLECT OF DUTY

- 4.9 According to Mr Marsden, the failure by police to investigate allegations of criminality, including unlawful sexual intercourse involving persons other than Mr Marsden, provides evidence of bias against him on the part of Mr Woodhouse and perhaps other members of Strike Force Cori.

⁵³ Barcode 5878406.

⁵⁴ It appears the then Commissioner of Police, Peter Ryan, agreed with the decision of Mr Woodhouse to charge the judge without obtaining advice from the DPP. While best practice was to refer for advice, this was ultimately a matter for the discretion of the officer in charge: barcode 6271693. In discussing whether a brief of evidence should be submitted to the DPP in relation to Mr Marsden, it was observed there was an established legal principle that the unique discretion of the investigating officer is paramount in such matters: barcode 6271693.

⁵⁵ In correspondence to the Ombudsman by Mr Marsden on 21 December 1998.

- 4.10 Mr Marsden's correspondence named a number of persons in respect of whom, in his view, there was compelling incriminating evidence which should have been investigated before any further investigation, if any, into allegations against Mr Marsden.⁵⁶ These persons were: TC, PR, CH, Edward, "a high profile solicitor", and KR.

"TC"

- 4.11 Mr Marsden alleged that TC admitted engaging in sexual activity with an under-age David Y and supplying him with drugs when corroborating evidence given by David Y against Mr Marsden. TC had worked as a drug and alcohol counsellor at Dharruk Correctional Centre in 1984 and 1985 during which time he became acquainted with David Y.
- 4.12 In his initial statement to police in 1998, TC discussed how he came to know David Y (then approximately 15 years of age) and his regular contact with him at Kings Cross. He stated that David Y told him John Marsden was among his clients. TC also stated he maintained a friendship with John Y (brother of David Y) from when John Y was 18 years of age, and that (perhaps at an earlier point) John Y informed TC he was engaged in prostitution. In later statements, apparently witnessed by Mr Marsden, TC, in addition to revising his earlier statement concerning David Y pointing out Mr Marsden as a client of his when about 15-16 years old, admitted to sexual relations with David Y, then approximately 22 years of age, and John Y, then about 18-19 years of age.
- 4.13 While it is apparent that TC admitted to sexual relationships with both David Y and John Y, nowhere on information before the Commission does there appear an admission by TC that these relationships were carried on while either or both of the brothers were under 18 years of age.
- 4.14 There was reportedly an allegation, seemingly based on remarks by John Y during a broadcast on radio station 2BL on 16 May 1996, that TC did engage in under-age sex with one or both of the brothers. The transcript of that broadcast does not, however, appear to raise such an allegation. Be that as it may, there is no basis for asserting that any such admissions were made by TC, and so no grounds to support the complaint that police ignored other established allegations in order to improperly pursue Mr Marsden.

"PR"

- 4.15 Mr Marsden wrote to the Commissioner of Police drawing attention to evidence given by PR in the defamation proceedings that he was "a participant himself in sexual activities at Costello's nightclub."⁵⁷ Inter alia, PR's evidence was that he had had a two-year sexual relationship with one "Carlos". During at least part of this relationship, Carlos was 16 years of age. PR also gave evidence that he had "had sex once or twice with John X and once with 'Brett'."⁵⁸

⁵⁶ Barcode 5921094.

⁵⁷ Letter dated 7 July 2001.

⁵⁸ *Marsden v Amalgamated Television Services Pty Limited* [2001], supra, at [416].

- 4.16 In the Commission's assessment, the complaint that police failed to make inquiries in response to the admissions by PR is not borne out. PR's admissions did not come to the attention of police until well after Strike Force Cori had conducted its investigation and submitted its brief relating to Mr Marsden to the DPP. There can therefore be no basis to suggest investigations into Russell were deferred or refused by Strike Force Cori police so as to focus upon Mr Marsden.
- 4.17 Whilst immaterial to the complaint against Mr Woodhouse, it does appear police conducted inquiries into PR after the receipt of court transcript from Mr Marsden. That investigation was terminated after witnesses did not reply to police efforts to interview them in relation to any complaint they might have against PR. Accordingly, it would appear that police found themselves in a position where inquiries reasonably could not be taken any further. Mr Marsden was also informed of the lack of success of police in pursuing these allegations.⁵⁹

"A high profile solicitor"

- 4.18 Mr Marsden alleged that Neville, who during Strike Force Cori had made and later withdrew allegations of under-age sexual relations with Mr Marsden, had "nominated a person who he had sex with when he was under-age, a high profile solicitor and a senior partner of a major law firm". "[A]mazingly enough", however, the person concerned was not investigated "probably because he was not known in the public arena."⁶⁰ It was further alleged police failed to act on information from Neville that he had worked in a brothel when under 18 years of age.
- 4.19 On the material available to the Commission, the facts appear somewhat different. According to police running sheets, Neville had said he was a male prostitute and that a "friend ... well up in the legal hierarchy" had "rescued him from the streets". Neville refused to name the "friend" (whether or not it be assumed that he was the "high profile solicitor" with whom Mr Marsden alleged Neville had had under-age sex). He further indicated that he did not wish to become involved in any prosecution of Mr Marsden, having "completely transformed his life" and, at the time of interview, about to leave Sydney to further his career. At no stage did Neville appear to allege that he had had sex with either the "friend" or any other person potentially fitting the mantle of "high profile solicitor" (other than Mr Marsden himself).
- 4.20 Nor does it appear, contrary to Mr Marsden's claim, that Neville admitted to police that he had worked in a brothel when under 18 years of age.⁶¹
- 4.21 Perhaps what is being suggested by Mr Marsden is that a reference by Neville to a "friend" having "rescued him from the streets", in combination with the assertion by Neville that he "ceased working at the Wall ... 4-5 years ago", should have been sufficient to launch an investigation into whether the "friend"

⁵⁹ Confirmed in interview with the Commission on 14 January 2003.

⁶⁰ Barcode 5878411.

⁶¹ See also [4.32].

had engaged in unlawful sexual intercourse with Neville. In the absence of Neville's willingness to provide information to police and to participate in any prosecutions, that might have been a difficult task. But it is not necessary to go this far. There was no allegation by Neville against the "friend". By contrast, there was an allegation against Mr Marsden.

- 4.22 The Commission therefore cannot be persuaded that any alleged failure by police to take investigative action in relation to the "friend" gives rise to any reasonable question of bias on the part of Mr Woodhouse or any other police officer vis-à-vis Mr Marsden.

"CH"

- 4.23 It was complained that despite David Y stating he had under-aged sex with CH, no inquiries were made by police into the matter. David Y, in a statement made in December 1998 and supplied to Mr Woodhouse by solicitors for Mr Marsden in January 1999, had alleged having sexual contact with men during the years 1980 until 1986, including CH. David Y did not turn 18 until 22 October 1987.
- 4.24 CH was the person who first brought the allegation by David Y of under-aged sex with Mr Marsden to the attention of police, the allegation being conveyed to CH when acting as a solicitor for him in 1992. CH attempted then to seek corroboration and spoke with the former licensee of the Rex Hotel, who apparently confirmed to him that Mr Marsden would enter the bar and leave quickly with David Y, then about 14 years of age. CH asserted that the former licensee had informed him that he had provided different information to the police, stating to them he knew Mr Marsden only as a customer. Reportedly, he also told CH there was a code of silence among members of the gay community.
- 4.25 CH advised the Royal Commission of the allegations in March 1996, and this information was subsequently provided by the Royal Commission to Inkster. Inkster, while concluding CH was acting in good faith, recommended no further investigation as CH had no direct evidence of criminality involving Mr Marsden.
- 4.26 In the observations on brief prepared by Strike Force Cori, Mr Woodhouse referred to the relationship between CH and David Y thus: "[it] may or may not be true [that CH was acting for David Y], but in reality they were also consenting adult sexual partners."⁶² Mr Woodhouse, in his comments upon the statement of CH, derived his observation as to the sexual relationship between CH and David Y from unrecorded comments made by CH during his interview with police in September 1998. The resulting statement by CH asserted he did not become acquainted with him until 1991 (when David Y would have been in his 20s).
- 4.27 Implicit in Mr Woodhouse's observations on brief was a preference for CH's version of events to that of David Y (that is, that the two met after David Y had reached adulthood) based upon his interview with CH. There is little other evidence of Mr Woodhouse consciously giving consideration to pursuing any

⁶² Barcode 6104281.

further line of inquiry in relation to whether CH had had sexual relations with David Y during the years 1980 to 1986.

- 4.28 While it would have been open for Mr Woodhouse to have pursued further inquiries in an effort to ascertain which version of events was correct – by seeking corroborative evidence one way or another – the Commission is not prepared to say that it was unreasonable for Mr Woodhouse not to have done so. Mr Woodhouse had before him two differing accounts as to when a sexual relationship between CH and David Y had commenced. While by no means determinative, that CH’s professional relationship with him had commenced in 1992 was at best corroborative of his account, and at worst a neutral fact. Viewed objectively, the circumstances were such that Mr Woodhouse’s apparent disinclination to pursue any further lines of inquiry, if indeed any were reasonably open at that time, was not outside the pale of the discretionary judgments routinely made by police during an investigation.
- 4.29 A further complaint was that police failed to have regard to the fact that CH bore some animus towards Mr Marsden. However Mr Marsden faces a hurdle in so far as the relevant allegations were those of David Y rather than CH. This fact informed Inkster’s recommendation to take no further action in relation to matters raised by CH. At best, CH could provide evidence of the fact of a complaint being made, not of the criminal conduct alleged, and so CH appears much less significant when considering a complaint that police failed to obtain corroboration of allegations against Mr Marsden.
- 4.30 Further, such an allegation necessarily infers that CH manufactured the allegations by David Y. There is, however, no evidence before the Commission which establishes any actions by him to lead David Y to make false allegations in some manner.

“KR”

- 4.31 Mr Marsden complained that in interviews with police, Shane X had “clearly indicated that he had worked in [a brothel run by KR] when he was under 18 years, yet no investigation of [KR.]”⁶³
- 4.32 The police running sheet to which Mr Marsden referred in support of this allegation attributes to KR an admission that a Neville worked for him as a male prostitute at a brothel.⁶⁴ It does not attribute to KR any admissions to the effect that Shane X worked *as a prostitute* at a brothel owned or operated by him. On the contrary, it states KR had told police that “[Shane X] did not work for him as a prostitute but did odd jobs for him around the brothel, sweeping, cleaning etc for which he was paid a small monetary remuneration.”⁶⁵
- 4.33 In a statement to police dated 14 September 1998, Shane X gave information regarding the circumstances of his employment at the brothel run by KR, which indicates that he had worked in the brothel when a minor. In a statement dated

⁶³ Barcode 5878411.

⁶⁴ This “Neville” would also appear to be a different person from that discussed at [4.18].

⁶⁵ Strike Force Cori running sheet PP171102.H, dated 12 November 1998.

11 November 1998, Shane X told police that when he first met KR: “I told him that I was only 17 years of age and if that would be a problem.” According to Shane X, KR replied: “not as long as I don’t tell anyone.” An inference is available that the nature of Shane X’s work was of a sexual nature, though this is not necessarily the only available inference.

- 4.34 In an interview between Mr Woodhouse and Commission officers on 20 December 2002, Mr Woodhouse indicated that his probable view was that any allegation that KR had committed offences relating to child prostitution was not worth pursuing. There were inconsistencies about Shane X’s age at relevant times (that is, whether he was a minor or not). In the circumstances Mr Woodhouse did not turn his mind specifically to child prostitution offences.
- 4.35 It is noted that Shane X’s evidence of an alleged sexual encounter with Mr Marsden when aged 17½ was not accepted by the trial judge in the defamation proceedings. That assessment of Shane X’s lack of credibility was doubtless welcomed by Mr Marsden. The Commission has of course said that the trial judge’s assessment of Shane X’s evidence in those later civil proceedings should not be determinative of what properly should have occurred in the police investigation. But implicit in the present allegation is that it was improper for Mr Woodhouse not to have accepted Shane X’s account over KR’s, such that a full investigation of KR should have occurred.
- 4.36 The Commission cannot agree with any such proposition. There were conflicting accounts of the nature of Shane X’s work at the brothel run by KR and police were uncomfortable about Shane X’s precise age when he had worked at the brothel. An assessment of the reliability of Shane X was implicitly, if not explicitly, made and the investigations moved on. There is nothing to show that any disinclination on the part of Mr Woodhouse to pursue an investigation of KR on the basis of Shane X’s assertions was unreasonable, or suggestive of bias against Mr Marsden.

“Edward”

- 4.37 Edward conceded in evidence during the defamation proceedings that he had lied about Mr Marsden’s involvement in large-scale drug importation and distribution. Mr Marsden asserted that these lies had been given in evidence to the Royal Commission, and questioned whether this was to be ignored.
- 4.38 An examination of the transcript of the proceedings before the Royal Commission confirms that the admitted lies by Edward were not given in evidence. Rather, the claims were made at interview only, not as a witness under oath. Edward had not, by later admitting to their fabrication, thereby exposed himself to prosecution for knowingly give false testimony to the Royal Commission. It also bears noting that Edward’s admission was made after the Strike Force Cori investigations and during the defamation proceedings.
- 4.39 Moreover, a charge of this description, were it at all open to bring, would more properly have been within the province of the Royal Commission or this Commission to investigate and to bring forward for prosecution.

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- 4.40 It follows that nothing in this allegation reasonably supports Mr Marsden's contention that police failed to investigate more compelling allegations than those relating to him.
- 4.41 In all the circumstances, the Commission is not satisfied that Mr Woodhouse or any other members of Strike Force Cori were biased against Mr Marsden or unreasonably pursued the investigation of allegations against Mr Marsden in preference to allegations involving other persons. This is further illustrated by the mere fact that Mr Marsden was not the only person of interest to Strike Force Cori investigations.

IMPROPER OR INADEQUATE INVESTIGATION

- 4.42 Mr Marsden asserted the Strike Force Cori investigation seemed to operate on the basis that:⁶⁶
- (a) The allegations of what sort of a nature or kind were true.
 - (b) Anyone making the allegations would have been believed.
 - (c) Corroborating material to the investigation was not essential.
- 4.43 Against this alleged approach, it was argued that it behoved an investigator to investigate all aspects of a complaint, duly taking account of any exculpatory evidence and interviewing those named by an accused said to be able to assist in establishing their innocence.⁶⁷
- 4.44 Further, it was alleged that the attitude of police to under-age sexual offences since the Royal Commission was that:
- i. If a person is accused of such an offence then that person is guilty.
 - ii. You do not look for corroborative evidence.
 - iii. You do not question the allegation.
 - iv. You charge and let the onus be on the individual to prove that he or she is not guilty.
- 4.45 It was also asserted that it was inappropriate to investigate by seeking out those who may or may not have worked at "the Wall" and then approaching those persons to ask if they had sex with a certain person, particularly if they were in gaol.⁶⁸ In particular, it was said the evidence of such persons "should always be fully investigated, should be treated with scepticism and should be backed up with strong independent evidence". Mr Marsden pointed to the long criminal records of some of the alleged victims, and implied the possibility of concoction arising from some of those persons mixing in gaol. It was specifically said that the evidence of the alleged victims in relation to himself was taken at "face value".
- 4.46 In addition to alleging proper corroboration was not sought, Mr Marsden asserted he was in fact "informed by senior police that there was a direction not

⁶⁶ Barcode 5878431.

⁶⁷ Barcodes 5921093-4.

⁶⁸ Barcode 5874811.

to worry about corroboration evidence.”⁶⁹ At interview with this Commission and when asked to identify the “senior police”, Mr Marsden refused to do so stating only that it might be put to two police he had referred to earlier in the interview. After further inquiry, the Commission is not satisfied that any direction was issued to the effect that Strike Force Cori need not seek nor obtain evidence corroborating the allegations against Mr Marsden. Indeed, as will become apparent, it is manifest that Strike Force Cori police did in fact seek to obtain corroborative evidence.

LEGALITY OF POTENTIAL CHARGES AND DPP PROSECUTION GUIDELINES

- 4.47 As a prelude to consideration of the complaints concerning the investigation, it will be convenient to consider Mr Marsden’s assertion that Mr Woodhouse was not aware of the need for charges to be laid within 12 months of an offence of homosexual intercourse involving persons between the age of 16 and 18, and the years that law applied in New South Wales.
- 4.48 From 8 June 1984 to 5 May 1992, the then *Crimes Act 1900* provided that prosecutions in respect of offences and attempted offences of homosexual intercourse with males between the age of 16 and 18 years of age⁷⁰ could not be commenced after 12 months of the commission of the alleged offence.⁷¹ While it is not clear precisely when Mr Woodhouse became aware of this limitation, it was clearly known by the time the brief was submitted.
- 4.49 To the Commission’s mind, regardless of when Mr Woodhouse became aware that certain potential charges were statute barred, on the face of things no live issue of misconduct turns on the matter.
- 4.50 Firstly, Mr Woodhouse was not conducting an investigation with pre-determined charges in mind. Initially, the investigation was being conducted in order to assess the materials furnished by Arena, in accordance with Parliament’s request to the Commissioner of Police. Additional matters then arose during the course of Mr Woodhouse’s inquiries. Judged objectively, Mr Woodhouse’s purpose in submitting a preliminary brief to the DPP was not in furtherance of the laying of any particular charges, regardless of whether they might have been statute barred or not. Mr Woodhouse himself said that, had he thought *prima facie* charges to be open, he would have commenced proceedings himself. His purpose in approaching the DPP was to obtain expert advice on whether the potential for any charges or any further investigations existed, on the facts known at that time.
- 4.51 Any suggestion, with nothing more, that Mr Woodhouse was acting corruptly by investigating matters in relation to which charges could not be laid must ultimately come to rest upon the premise that, in submitting a brief to the DPP, Mr Woodhouse was furthering that design. Seemingly a malicious prosecution would have been the point of malicious investigation.

⁶⁹ Barcodes 5878415, 5878431.

⁷⁰ ss 78K and 78L *Crimes Act 1900*.

⁷¹ s 78T *Crimes Act 1900*. The benefit of the limitation also continued after the repeal of the section, but only in respect of those offences occurring during the life of s 78T.

- 4.52 Moreover, to finally come to fruition, Mr Woodhouse's supposed improper motives would have depended upon the DPP advising that charges incompetent at law should be laid. Hard against this contention is the fact that the brief correctly noted instances where charges may not be open due to the limitation period. On the exceedingly unlikely hypothesis that statute barred charges were remotely possible as a result of this process, the flaw doubtlessly would have been quickly discovered and the charges withdrawn or dismissed by the court. The informant police officer, most probably Mr Woodhouse, would thereby have been exposed to unfavourable scrutiny, not to mention potential liability for malicious prosecution.
- 4.53 It is difficult to gather from this state of affairs a reasonable argument that Mr Woodhouse set out on a frolic in investigating allegations against Mr Marsden, or otherwise planned to have him charged with offences incompetent at law.

FAILURE TO CORROBORATE OR HAVE DUE REGARD TO THE CREDIBILITY OF WITNESSES

- 4.54 A number of lines of inquiry arose during the course of the Strike Force Cori investigation into allegations against Mr Marsden and remained uninvestigated at the time that the brief was submitted to the DPP on 30 March 1999. Mr Marsden alleges impropriety in the non-pursuit of those lines of inquiry, and these complaints will be considered in detail below. However, it will also become evident that the police pursued a number of lines of inquiry where it was complained that they did not.
- 4.55 In its consideration of those instances where a reasonable line of inquiry presented itself but was not pursued by police, the Commission generally bore in mind two questions derived from the applicable standard of proper police conduct in the exercise of investigative discretion:⁷²
- (a) whether in the circumstances it was reasonable for police not to have made the relevant inquiries; and
 - (b) whether it rendered the decision to refer the brief unreasonable, in that an improper motive might be inferred.
- 4.56 The lines of inquiry which actually remained uninvestigated (putting aside other inquiries alleged by Mr Marsden not to have been undertaken but in fact were) can conveniently be summarised as follows:
- obtaining of records of the Department of Family Services in relation to Michael to verify his claims of where he was living and when;
 - verifying Sean Y's date of birth against records kept by the Registry of Births, Deaths and Marriages;
 - checking the descriptions provided by Sean Y as to the layout of Mr Marsden's house;

⁷² See above at [2.1]ff.

- making inquiries with the RTA regarding Mr Marsden's history of motor vehicle ownership, nor following through on the undertaking given by Mr Marsden's lawyer on 29 January 1999 to provide access to their copies of motor vehicle records;
- confirming when Johnnie Walker Blue Label Scotch Whisky could be acquired in Australia in relation to allegations by David Y;
- obtaining a copy of the article from *The Sydney Morning Herald* which was said to establish the date of acquisition of a donkey by Mr Marsden in relation to allegations by David Y;
- obtaining evidence of the locations where a lithograph, identified in the statement of John Y, was displayed and the periods during which the lithograph was in those locations;
- obtaining information about the date of production of a pornographic video referred to by John Y in his allegations;
- obtaining information about when "Special K" became available in Australia in relation to the allegations of David Y and John Y; and
- further inquiries of John Y as to whether he could give a more precise description of the chauffeur.

4.57 The complaint implicit in many of the instances cited comes down to a question of whether the credit and/or reliability of particular persons was such that the decision to refer to the DPP for advice was taken unreasonably in the absence of carrying out additional inquiries so as to corroborate, or further corroborate, aspects of their recall in making allegations, or indeed to discredit the allegations. In considering this aspect, two considerations dominate:

- The envisaged purpose of the brief, and the rather unique nature of the interaction between Mr Marsden and police, not the least of which was the almost parallel investigation being conducted by or on behalf of Mr Marsden.
- The anticipated referral of the fruits of Mr Marsden's inquiries to the DPP in answer to any police brief.

4.58 In this respect, the question for the Commission is whether, in light of the circumstances and information at hand, it was reasonable to have referred a particular person's allegations for advice. It will also become evident that not all persons in relation to whom Mr Marsden raises issue were the subject of a request for advice by Strike Force Cori.

4.59 Each particular allegation by a person and/or related line of inquiry alleged by Mr Marsden to have been improperly investigated will now be considered.

"Shane X"

4.60 Shane X alleged having sexual relations with Mr Marsden shortly after his 17th birthday at the Regent Hotel. Mr Marsden put forward a number of factors said to render the allegations by Shane X less than reliable and which it was said were not taken into account by police, including his criminal history, his less

than reliable memory due to his history of drug abuse and a head injury, as well as certain factual matters in his statement.

- 4.61 A number of inquiries were undertaken by police, such as confirming his description of the hotel and its rooms, interviewing staff of the hotel, and attempts to contact a potential corroborating witness, Barry. It is clear at least some of the matters complained of were taken into account, as the brief included both his criminal history, information concerning the hotel layout (which were complained to be incorrect) and interviews with hotel staff. Further, at the point that a statement was taken from Shane X, it was noted he was in a stable relationship and had been in full time employment for seven months. The brief appropriately noted the effect of the 12 month limitation on the bringing of charges would arise for consideration.
- 4.62 In the circumstances, the Commission cannot be satisfied that it was unreasonable for matters to have been referred to the DPP in relation to Shane X, nor that the police failed to give due consideration as to his reliability before doing so.

“RD”

- 4.63 RD was formerly a business associate of Mr Marsden in his legal practice. Whilst he apparently resigned, it was asserted by Mr Marsden that RD had no choice but to resign due to professional issues, and had subsequently made a number of unsustainable allegations against Mr Marsden’s firm, the inference being that the termination was acrimonious. The allegations by RD against Mr Marsden personally were of under-aged sexual relations with six clients of his law firm, and that Mr Marsden had supplied RD with prohibited drugs. Mr Marsden, while admitting to a (but not necessarily sexual) relationship with the persons named, denied the allegations of sexual misconduct.
- 4.64 In Commission’s opinion, the information in relation to RD does not support the allegation that Mr Woodhouse or other members of Strike Force Cori ignored exculpatory evidence, failed to seek evidence of corroboration or exercise appropriate discretion when assessing the allegations against Mr Marsden. Nor is there a basis for levelling such an allegation against Inkster in relation to the earlier special investigations precipitated by the *Today Tonight* and *Witness* broadcasts.
- 4.65 Inkster’s initial investigation found no or insufficient evidence to warrant any charges being preferred against Mr Marsden in relation to the under-age sex and drug supply allegations by RD, noting also that it was “uncontested that there is a considerable amount of ill-feeling between RD and Mr Marsden.”⁷³ These recommendations were submitted to the DPP who also considered there was insufficient evidence to prosecute Mr Marsden in relation to the allegations by RD among others.

⁷³ Report by Inkster, July 1995.

- 4.66 During the course of Inkster's second investigation concerning the *Witness* allegations, the Royal Commission supplied Inkster with statements by RD. Inkster concluded that the statements received from the Royal Commission did "not advance the evidence previously reported upon concerning the allegations of [RD]." Inkster then stated, "[n]o further comment on this information is contemplated."⁷⁴
- 4.67 It is plain from the report of the investigation into the allegations aired on the *Today Tonight* program that Inkster was aware of a degree of ill-feeling between RD and Marsden. Documents provided by the Royal Commission to Inkster during the course of the investigation into the *Witness* allegations included information as to the circumstances of RD's departure from Marsden's firm. In the Commission's opinion, there is no foundation for the assertion that police there failed to take account of the circumstances of RD's departure from Marsden's firm.
- 4.68 On the information available to the Commission, RD was not re-interviewed by Strike Force Cori. There are no running sheets or witness statements from or in relation to RD in the brief against Mr Marsden submitted to the DPP. Nor was the DPP asked by Mr Woodhouse to re-consider any of the allegations made by RD. Strike Force Cori running sheets confirm that police did not seek to pursue allegations against Mr Marsden in relation to offences against clients of his firm such as were raised by RD. Accordingly, this aspect of the complaint has no foundation.

"Ronald"

- 4.69 Ronald was another whose allegations of unlawful under-age sex with Mr Marsden were broadcast on the *Today Tonight* program. His allegations, relating to events in or about 1971, were the subject of investigation by Inkster in 1995, and then again in 1996 to 1997 following the broadcast of the *Witness* program and the supply of further information by the Royal Commission.
- 4.70 Mr Woodhouse re-interviewed Ronald on 12 August 1998 in pursuance of his decision to re-interview persons seen by the Inkster enquiry who might be of assistance in furthering new lines of inquiry, which interview was facilitated by reporter Greg Quail of Channel Seven. In the course of further inquiries, Mr Woodhouse came to believe that Ronald was almost 17 years of age rather than 15 years of age when he met Mr Marsden.
- 4.71 Ronald later attended Strike Force Cori premises on 10 February 1999, producing an unsigned statutory declaration purporting to state that his original allegations against Mr Marsden were false. Ronald stated that the document was provided to him by a close associate who had been promised money by Mr Marsden to obtain Ronald's signature on it.
- 4.72 No further investigations appear to have been carried out by Strike Force Cori in relation to the allegations by Ronald that Mr Marsden engaged in unlawful

⁷⁴ *Supplementary Final Report*, Det Insp Inkster, May 1997.

under-age sex. As well, Ronald's allegations did not form part of the brief to the DPP.

- 4.73 To the extent that issues in relation to Ronald have been raised by Mr Marsden in support of the complaint against Mr Woodhouse, there appears no proper basis for them.
- 4.74 In relation to the earlier investigations, Inkster had clearly formed the view, based on such enquiries as had been made, that Ronald was generally lacking in credit. Further, he was unable to corroborate any of Ronald's allegations. Nothing adverse came in relation to action by Inkster or any other police because the view was formed (and independently supported by the DPP) that there was insufficient evidence to take any criminal action against Mr Marsden. It is therefore unnecessary for these matters concerning Ronald to be taken any further.

"Jason X"

- 4.75 Jason X alleged engaging in sexual relations with Mr Marsden on one occasion in 1990 when approximately 17 years of age. His allegations were not referred for advice to the DPP by Mr Woodhouse. In relation to the Strike Force Cori investigation into Mr Marsden, his significance in the main appears to have been as a source of information eventually leading police to Sean Y. Inquiries into the information from Jason X regarding Sean Y were originally undertaken as Jason X had asserted Sean Y introduced him to Mr Marsden. It was therefore reasonable for police to pursue inquiries in respect of Sean Y to attempt to verify Jason X's allegations.

"John X"⁷⁵

- 4.76 As with the allegation by Ronald, Mr Marsden complained that had the allegations by John X been "properly checked out" by police, they "would not have gone any further."⁷⁶ John X made his allegations against Mr Marsden by statutory declaration in January 1995, which he later withdrew, apparently in 1998. His allegations were also the subject of the *Today Tonight* broadcast in March 1995. The John X matters were a subject of the Inkster investigation only, and were not further investigated by Strike Force Cori.
- 4.77 In his final report dated 26 July 1995, Inkster concluded that "the passage of time, the lack of specific dates of the alleged events subject of complaint and [John X's] general lack of credit make it dangerous to recommend criminal charges relating to his complaint." A similar view was expressed in his *Supplementary Final Report* in respect of allegations aired on the *Witness* program.
- 4.78 In view of those conclusions, the complaint that police did not "properly check out" John X's allegations against Mr Marsden finds no support. The allegations

⁷⁵ An allegation by Mr Marsden of improper inducement is considered further at [4.323].

⁷⁶ Barcode 5878413.

were “checked out” in the discretion of the investigating police in the sense of being assessed by Mr Woodhouse who determined not to take it any further. That is not to say that had the police determined to conduct further inquiries, the Commission would conclude that it was improper for them to have done so. The point is that an investigative discretion was exercised in an entirely appropriate way, regardless of whether one might think the investigation should or should not have proceeded further.

“TB”

- 4.79 When alleging that he had under-aged sex with Mr Marsden in the late 1970s, John X also asserted that a person with whom Mr Marsden mixed, by the name of TB, often paid for sex with him.⁷⁷ Mr Marsden suggested that had TB been interviewed by police, it would have shown there was no association.
- 4.80 TB was not interviewed by Strike Force Cori. A number of inquiries in relation to him and another mentioned by John X were made during the earlier Inkster investigations. While it was open to the Inkster investigation to have interviewed TB to verify John X’s statement that Marsden and TB were known to and associated with one another, it seems clear that it was not a necessary avenue of inquiry for the purpose of assessing John X’s reliability. Quite clearly, police had there formed a view of the lack of reliability of allegations by John X without the need to interview TB.⁷⁸ That police did not interview TB is not grounds for criticising the police vis-à-vis the allegations against Mr Marsden.

“Barry”

- 4.81 Mr Marsden asserted that a former client, Barry, who had made allegations against him, suffered from delusions and serious illness, and had been in mental institutions in the past. It was said that no credibility could have been placed upon Barry. The significance of Barry was as a potential corroborating witness for the allegations made by Shane X.⁷⁹
- 4.82 It is obvious from the investigation running sheets that police attempted to contact and speak with Barry for this purpose, and ascertained he had received treatment at Caritas Psychiatric Hospital. Ultimately, police determined that Barry could not be considered a reliable witness.
- 4.83 The brief, as it relates to the allegations by Shane X, appears not to make any mention of efforts by police to contact Barry, nor is there any indication to the effect that it had been determined that Barry could not or would not be available as a potential corroborating witness for Shane X.
- 4.84 The absence from the brief of any corroborating statement by Barry speaks for itself in the sense that it necessarily diminishes the weight that might ultimately be placed on Shane X’s statement. It may have assisted the DPP to have been

⁷⁷ Barcode 5878648.

⁷⁸ Which would also appear to be relevant as to the question of whether police should have pursued further regarding possible criminal conduct by TB himself in respect of John X.

⁷⁹ See also at [4.31].

made aware of the efforts of police to speak with Barry. Had the DPP been minded to recommend charges be preferred against Mr Marsden in relation to the allegation by Shane X, it may also have saved the need for the DPP to issue a requisition for a corroborating statement from Barry. Doubtless Barry's situation and inability to provide reasonable corroboration would have been made known to the DPP at that time.

- 4.85 The likelihood of any charges being recommended was remote in view of the statutory limitation in relation to the bringing of charges under either s 78K or s 78L of the *Crimes Act 1900*,⁸⁰ owing to the fact that Shane X was 17 years old at the time of the alleged offence and a period of more than 12 months had lapsed since the date of the alleged offence (9 years prior). Quite properly, attention was drawn to this fact by Mr Woodhouse in his observations on the brief, and this alone quashes any suggestion that Mr Woodhouse was intent upon having charges preferred against Mr Marsden regardless of countervailing factors.
- 4.86 In the circumstances the Commission can only conclude that no police misconduct is evident from the matters alleged concerning Barry. While it might have been desirable for observations on the matter to have been included in the brief, the omission was of no appreciable significance.

“David X”

- 4.87 Mr Marsden suggested that the police should have been alive to the possibility that David X's allegations against Mr Marsden were false. Reliance was placed upon a statutory declaration made by David X in Mr Marsden's presence on 17 May 1999.⁸¹ After referring to the statement given to Mr Woodhouse on 20 April 1998, the statutory declaration stated, inter alia, “[t]he totality of what I have said is untrue”. It was accompanied by a letter from Dixon Holmes du Pont, Solicitors for David X, to David Y denying statements by the latter that David X was seen leaving in Mr Marsden's car.
- 4.88 While both the statutory declaration and the letter by Dixon Holmes du Pont post-date service of the brief on the DPP on 30 March 1999, the statutory declaration appeared in the DPP's copy of the brief, indications being that it was later provided to the DPP by Mr Lee, Mr Marsden's solicitor.
- 4.89 It is not a fair criticism to suggest that the statutory declaration made by David X in Mr Marsden's presence, which on the appearance of things was not made available to the investigating police, provided a basis upon which the investigating police should have known, going into inquiries on David X's allegations, that they may have been false.
- 4.90 Moreover, whether the later statutory declaration was enough to establish that David X's allegations were “false” is a matter of perspective. Mr Marsden, as the person the subject of allegations, is entitled to protest his innocence and claim their falsity. Objectively, however, acceptance of the claim that the

⁸⁰ See s 78T *Crimes Act 1900*, now repealed.

⁸¹ Barcode 5878694.

allegations by David X were falsely made depends upon the acceptance of David X's subsequent retraction as truthfully made. On one view or the other, David X was not telling the truth. In the eyes of the police, the declaration, had it been available at the time the Strike Force Cori brief was submitted to the DPP, would have at least indicated that David X was an unreliable witness who was prone to changing his version of events.

- 4.91 In the Commission's opinion, the observations on the brief appear to reflect such information as was available to Strike Force Cori when the brief was submitted. Those observations took a balanced approach to the information then available, pointing out not only material potentially corroborative of David X, but also inconsistencies with other material.
- 4.92 The brief included David X's criminal antecedents and a copy of a traffic collision report in relation to a motor vehicle accident involving David X approximately six months after the alleged encounter with Mr Marsden.⁸² Those documents were relevant to an assessment of the veracity of David X's account and thus his credibility. It was entirely appropriate that this information be included in the brief. It refutes the implicit suggestion by Mr Marsden that account was not taken of David X's criminal antecedents.
- 4.93 That David X came forward after speaking with Russell Travis, a prison inmate, raised the possibility of the latter somehow precipitating the allegations. It seems, however, police were not unaware of the risk, and attempts were made to corroborate David X's allegations, with a number of statements apparently gathered to this end, and included on the brief.

"Sean X"

- 4.94 The complaint by Mr Marsden alleged that police failed to have regard to a number of factors affecting Sean X's credibility, including his association with Travis.⁸³ It further disclosed an allegation that police failed to appropriately make inquiries of persons who might have been able to corroborate his allegations. It was also suggested that Sean X may have been induced to cooperate with police by virtue of the availability of sustenance payments. Lastly, it asserted Sean X was induced to cooperate with Channel Seven by the payment of money.
- 4.95 The Commission's jurisdiction does not extend to investigation of any alleged impropriety in relation to the payment of money by Channel Seven to Sean X, and so makes no further comment in this respect.
- 4.96 As regards the suggestion concerning the sustenance payments, it is also not proposed that this be taken any further. This is because the provision of sustenance payments is, *prima facie*, neither improper nor inappropriate. There is no evidence that police used the prospect of sustenance payments as a lure for the provision of information.

⁸² Thereby providing some objective point by which David X's allegations could be fixed in time.

⁸³ See also [5.2]ff.

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- 4.97 The observations on the brief against Mr Marsden in relation to the allegations by Sean X, state he “has numerous previous convictions” and would not make a convincing witness.⁸⁴ The brief annexed a copy of Sean X’s criminal history, the contents of which indicated that he had spent periods of time in prison. An inference is clearly available that police did take account of Sean X’s criminal history.
- 4.98 It must also be inferred that Sean X’s criminal history was not, of itself, considered to be such that Sean X’s allegations should not be forwarded to the DPP for advice. That is understandable in the circumstances. Sean X’s credibility as a witness was but one consideration to be taken into account in deciding whether a prosecution should be commenced.
- 4.99 Further, the mere fact of his association with Travis, while a question to be aware of in assessing his credibility, was not a fact that could, of itself and without more, provide a sufficient basis for dismissing his allegations. Certainly, in circumstances where police were clearly alive to questions regarding his credit, it could not be said that police approached his allegations without a degree of caution in any event.
- 4.100 The allegation that police failed to take adequate account of factors affecting Sean X’s credit is therefore without proper grounds.
- 4.101 Two of the four alleged incidents between Sean X and Mr Marsden were claimed to have taken place at the “253 Sauna” on Oxford Street, Darlington; one at “The Probe” on Oxford Street, Darlington; and the remaining incident upstairs at the Albury Hotel, also at Oxford Street, Darlington. While it was complained that police did not confirm the existence of relevant establishments, it is apparent that police did in fact make inquiries about “253 Sauna”, confirming that, at the time of the alleged offence (c. February 1986), an establishment known by that name had existed, and that the other business named (ie. The Probe) was still operating at the time of the investigation. Additionally, police also conducted inquiries in respect of the location of the third incident, the Albury Hotel, contrary to the assertion by Mr Marsden.
- 4.102 Whether further inquiries, such as with the wider gay community as suggested by Mr Marsden, were reasonably necessary is another matter. Certainly the value of any evidence that might be obtained would have been uncertain, as Sean X had told police there were no witnesses to the alleged assaults and so inquiries were, on one view, reasonably unlikely to turn up direct evidence of any offence.
- 4.103 Despite the complaint that there was “a total failure of the interviewing process and the investigating process”,⁸⁵ it is evident from both the running sheets and the brief that police were not only very much alive to potential difficulties inherent in Sean X’s allegations, but took steps to check the particulars of his allegations. In fact it appears police went to not inconsiderable efforts to corroborate the allegations. Further, these documents quite properly noted that

⁸⁴ Barcodes 6084374-5.

⁸⁵ Barcode 5921105.

the alleged modus operandi in relation to the encounters with Sean X differed significantly from allegations made by others.

“DT”

- 4.104 Mr Marsden suggested that police failed to take account of factors affecting the reliability of DT, his former lover, when they came to assess DT’s allegations against Mr Marsden. Information from DT was in part the basis for a search warrant upon Mr Marsden’s home in 1994,⁸⁶ and the subject of some consideration by Inkster in the first of his investigations.
- 4.105 The complaint would appear of no relevance in relation to the conduct of Strike Force Cori, DT not being mentioned in connection with any of the persons of interest to it.
- 4.106 If the complaint relates to Inkster, it is clear on police documents that Inkster did in fact take account of factors affecting the reliability of the allegations, in particular, DT’s psychiatric condition.
- 4.107 If the complaint is intended to be asserted against former Superintendent Robin Small as the officer responsible for making the search warrant application, the Commission can see no grounds for alleged misconduct. Superintendent Small was acting within the proper bounds of discretion. No suggestion was evident that relevant information was withheld from the justice. Indeed, the fact that additional information was required by the justice prior to issue would appear to answer any contention that the warrant was granted without proper scrutiny.

“Paul”

- 4.108 The gravamen of Mr Marsden’s complaint in relation to Paul is that police placed too much store in his allegations and failed to have regard to factors affecting his credibility.
- 4.109 It is plain from the brief against Mr Marsden in relation to allegations by Paul that police were aware of Paul’s criminal and drug abuse history. They were also aware that he was associated with Russell Travis. The brief indicates that police took these considerations and others into account before referring matters to the DPP for advice.⁸⁷ While the brief did not in terms disclose prior false allegations by Paul, it did raise doubts about the reliability of Paul’s information.⁸⁸ Police were also aware that Paul was a prison informer in other respects.⁸⁹
- 4.110 The brief did not go so far as to say that there was a risk that Paul may have been acting under Travis’s influence, although Mr Marsden seems to raise this as

⁸⁶ See further at [4.360].

⁸⁷ The statutory declaration of Paul withdrawing his allegations post-dated the date of submission of the brief and so could not have been included.

⁸⁸ For example, Mr Woodhouse interviewed Richard in relation to an alleged meeting between Paul and Mr Marsden witnessed by Richard, commenting that Richard was unreliable. Further, that another person cited by Paul as able to corroborate his allegation emphatically denied the incident, and was described by Mr Woodhouse in the brief as “a man of bad character who was facing prosecution” on serious offences.

⁸⁹ Strike Force Cori running sheets HH080103.H, dated 8 January 1999 and PP020299.H dated 2 January 1999.

a factor. Whether this risk might have been more clearly articulated, assuming it was a risk at all, depends upon whether, as a matter of fact, Strike Force Cori generally and Mr Woodhouse in particular, placed too much faith in Travis as an informant. The matter of Woodhouse's relationship with Travis is considered in further detail later in this report.⁹⁰

- 4.111 The Commission is not satisfied that police failed to have regard to factors affecting Paul's reliability. In the Commission's opinion, the approach taken by police in relation to the allegations by Paul was balanced and had regard to all available and relevant evidence.

"Michael"

- 4.112 Michael alleged that he had sex with Mr Marsden in about 1990 when he was approximately 13½ years of age and working as a male prostitute at "The Wall". This allegation did not, however, form part of the brief against Mr Marsden. Rather, Michael's statement was included in the brief because it partially corroborated another alleged victim, Paul.
- 4.113 It was complained that police failed to take "normal precautions relating to prison informers or victims",⁹¹ but it is less than clear what precautions it is said should or could have been taken, particularly in relation to "victims". If it is suggested that police failed to have regard to the fact that he was (according to Mr Marsden) a prisoner informer, it is not clear that this was warranted. Mr Woodhouse's notes of defence documents made available to him by Mr Marsden's lawyers indicated only that he was a prisoner, and reportedly a police informant. Neither fact made Michael a "prison informer" in respect of his allegations against Mr Marsden. If Mr Marsden's complaint is that police did not exercise caution in assessing his information, that too is unwarranted for it was commented on the brief that "at first instance, [Michael] appeared to give some credibility to [other evidence supporting Paul's allegations] but subsequent events have cast serious doubts upon his account".⁹²
- 4.114 Rather, the focus of Mr Marsden's complaint, as it relates to Michael's allegation, would appear to be that police failed to carry out a proper investigation. It was complained that police failed to attempt to corroborate Michael's allegation by obtaining verification of various factual assertions by Michael, such as verifying with school records and other checks and which would have established, so it was said, that Michael, when 13 years of age, was not in Sydney at the time the alleged offences took place.
- 4.115 It needs to be observed that the very fact that Michael was not among the alleged victims whose complaints formed part of the brief, suggests police did not have sufficient confidence in his allegations to warrant their being forwarded to the DPP for consideration with the other allegations. Impliedly a determination had been made by police that Mr Marsden should not be prosecuted in respect of

⁹⁰ See further at [5.2].

⁹¹ Barcode 5921098.

⁹² Barcode 6088562.

allegations made by Michael, nor further advice sought as to possible criminal action against him in this respect.

- 4.116 It is apparent that Mr Marsden is mistaken in asserting that police failed to attempt any corroboration of various aspects of Michael's allegations. Police did in fact conduct inquiries with relevant schools regarding the circumstances of Michael's departure. While these inquiries were inconclusive, it nonetheless refutes the complaint in this respect.
- 4.117 Although a number of documents were supplied from Mr Marsden, only one – an unsigned draft statement purporting to be that of Michael's foster mother – appeared relevant to Michael's whereabouts at the relevant time (c. 1990), and consequently no reliance could be placed upon it. Certainly Mr Woodhouse was also alive to the question of corroborating Michael by way of persons mentioned by him in his allegations, and after speaking to one of the persons mentioned, came to the conclusion that it was difficult to determine where the truth lay.⁹³
- 4.118 In the Commission's opinion, it was appropriate for the Michael material to be included in the brief. Appropriately, Mr Woodhouse drew attention to difficulties associated with relying upon Michael's claims. In so far as Mr Marsden may suggest that Michael was completely unreliable because he could not have been in Sydney at the time of the alleged offences, it would appear to the Commission that the evidence then available did not establish so definite a conclusion.

“Raymond”

- 4.119 Raymond alleged he was sexually assaulted on three occasions by Mr Marsden at both Costello's and a private dwelling in Bondi. The age of the victim at the time was 11 and 12 years old. Mr Marsden questioned aspects of Raymond's allegations, specifically whether the premises at which the assaults were said to have occurred in fact existed or were consistent with his descriptions, the fact that there were inconsistencies in his allegations, as well as suggesting an ulterior motive in that he was then preparing to sue the State of New South Wales.
- 4.120 It is apparent from police records that while Raymond was interviewed by Strike Force Cori police, his identification of Mr Marsden was not considered to be sound, it being noted he had been sexually assaulted on many occasions by any number of males, and freely admitting to working as a child prostitute in the Kings Cross area.⁹⁴ Further, Raymond's allegations were not among those referred to the DPP for advice. In the circumstances, the Commission does not consider that police failed to have due regard to questions affecting the credibility of Raymond.

⁹³ Strike Force Cori running sheet, dated 29 October 1998, relating to interview with Michael.

⁹⁴ Strike Force Cori running sheet, 6 July 1998.

“Sean Y”

4.121 The essence of the complaint as it relates to the Sean Y allegations, may be summarised thus:

- Police failed to take account of factors affecting Sean Y’s credibility and reliability, including that MS, a fellow prison inmate, claimed to have been told by Sean Y that the allegation was an attempt to extort Mr Marsden.
- Police (improperly) induced Sean Y to make the allegation by holding out “a promise to assist in more suitable gaol accommodation”.⁹⁵
- Police failed to take account of Sean Y’s history as a “poofter basher”,⁹⁶ and were this done, it would have been clear he would have assaulted and robbed Mr Marsden rather than engaging in homosexual activity as alleged.
- Police failed to take account of the improbability that Mr Marsden would deposit Sean Y at Liverpool Railway Station, which is not the nearest railway station to Mr Marsden’s home.⁹⁷
- Police failed to check Sean Y’s allegation that Mr Marsden had used an ATM on the morning following the alleged offence.

4.122 It was also said police failed to check the accuracy of Sean Y’s description of Mr Marsden’s home or seek corroborating evidence from potential eyewitnesses at Mr Marsden’s home at that time as to the presence of Sean Y. These particular inquiries are considered later in this Report, being matters also raised in relation to others who made allegations against Mr Marsden: David Y, John Y and David X.⁹⁸

4.123 With the exception of the alleged improper promise to assist Sean Y to obtain more suitable gaol accommodation, which is dealt with at paragraph [4.283] of this Report, the police approach to the above issues appears to have been as follows.

Credibility and reliability issues

4.124 It is clear that police did take account of the factors relevant to Sean Y’s credibility and the reliability of his claims, going so far as to note in the brief that his character and credibility would be at issue. That they were not considered to be of such weight as to warrant police determining that no further action should be taken without advice being sought from the DPP involved the reasonable exercise of discretion. Further, according to the observations on the brief, there were also factors weighing in favour of Sean Y’s reliability:

- Sean Y came to notice, apparently by accident;
- The circumstances of Sean Y’s disclosure about Mr Marsden coming to notice were considered extremely coincidental by police, and apparently taken to suggest that the risk of fabrication was therefore low;

⁹⁵ Barcode 5921098ff.

⁹⁶ In the defamation proceedings, Sean Y admitted he was not a male prostitute but rather a person whose mode of earning was to lure male homosexuals with a promise of sexual favours and then proceed to violently rob them.

⁹⁷ Cf further discussions regarding information from taxi drivers in the area at [4.215].

⁹⁸ See [4.223].

- Sean Y was “not responsible for initiating a complaint against Mr Marsden and he was extremely reluctant to become involved” due to fears, on Sean Y’s part, “for his own safety and security”;⁹⁹
- According to Mr Woodhouse’s assessment, Sean Y’s evidence had “a convincing ring of truth about it”;¹⁰⁰
- Sean Y vehemently denied MS’s allegation that Sean Y was attempting to extort money from Marsden. Relatedly, Kevin West, Assistant Superintendent of Berrima Correctional Centre, expressed his opinion that MS was “one of the most untrustworthy prisoners that I have within Berrima”;¹⁰¹
- Even accepting the assertion by MS that Sean Y was attempting to extort money from Mr Marsden in return for not giving evidence against him, Sean Y did not tell MS that the allegation was untrue. On the contrary, Sean Y told MS that the allegation was true but that he did not wish to go ahead with it.

4.125 It bears noting that Mr Marsden’s reliance upon the veracity of MS’s claim that Sean Y admitted to an intention to extort money from him (Mr Marsden) is undermined by the same argument by which he suggests that police should have placed little to no store in the allegations against himself. MS, as a person who was informing on a fellow inmate, fitted the classic description of “prison informer”. In this regard, coupled with the assessment of the Assistant Superintendent of Berrima Correctional Centre, Mr Woodhouse was entitled to place little store in MS’s claims.

4.126 Sean Y was described as an “informer” in Levine J’s judgment in the defamation proceedings, although his Honour rejected an argument that he was a “prison informer” in making allegations against Mr Marsden.¹⁰² According to the judgment, Sean Y had been visited on numerous occasions by police and members of the NSW Crime Commission for the purposes of informing albeit many of the occasions when he was visited by police were in fact interviews with Strike Force Cori police, and he had also informed on other prisoners to jail authorities.¹⁰³ Mr Woodhouse was also aware of Sean Y’s assistance to the Crime Commission. In this capacity, Sean Y’s status as a prison informer cannot be doubted. That history, whether or not it made Sean Y an “informer” in his claimed capacity as a victim of sexual misconduct, would have been entirely relevant to an assessment of Sean Y’s credit and reliability.

4.127 It is understandable how, when regard is had to these considerations on both sides of the scale, Mr Woodhouse determined it prudent to seek the advice of the DPP. While this was no doubt underpinned by an assessment that Sean Y had no ulterior motive in making allegations when the contrary proved to be true, it must be remembered that Mr Woodhouse did not then have the benefit of the later admissions made by Sean Y in the defamation proceedings. The question

⁹⁹ Barcode 6104933.

¹⁰⁰ Barcode 6104934.

¹⁰¹ Barcode 6341108.

¹⁰² *Marsden v Amalgamated Television Services Pty Limited* [2001], supra, at [2835].

¹⁰³ *Ibid* at [2830].

here is whether, in the circumstances as they existed at the time, the decision by Mr Woodhouse to refer the Sean Y allegations to the DPP was unreasonable. The Commission considers the approach taken by Mr Woodhouse was reasonable in the circumstances.

History of violence towards gays

- 4.128 It was complained that had police taken proper account of Sean Y’s history of violence towards gays, it would have been apparent that sexual relations between Mr Marsden and Sean Y were unlikely. Certainly Mr Woodhouse had been made aware by Sean Y himself that he had committed robbery upon “punters at the Wall”, although not whether Sean Y had a reputation as a “poofter basher”.¹⁰⁴
- 4.129 It is clear that Mr Woodhouse attempted to and did verify the claim by Sean Y that he was a male prostitute. It would have been problematic to draw from Sean Y’s admission that he had committed robberies upon “punters at the Wall” (whether or not it was one and the same as an admission that he was a “poofter basher”, or established that he had a reputation as such) any decisive view as to the likelihood that Sean Y did or did not have sexual relations with Mr Marsden or any other person at a material time. Much would depend on whether the alleged sexual encounter occurred before or after the gaining of notoriety by Sean Y as a “poofter basher” and it is inherently difficult to determine with any precision when a person might have accrued a reputation.
- 4.130 Mr Woodhouse recorded Sean Y’s admission of violence towards “punters” and it may be inferred from this that he was aware of and considered that factor in his overall assessment of Sean Y’s allegations against Mr Marsden. The Commission is not persuaded that an issue of police misconduct arises in respect of this aspect of the complaint.

The railway station

- 4.131 In relation to the alleged failure to take account of the improbability said to lie in Mr Marsden depositing Sean Y at Liverpool railway station (because it was not the closest station to Mr Marsden’s residence), it is difficult to regard this as an issue capable of assuming any great significance. There was certainly evidence of other young males being taken by taxi from Mr Marsden’s residence to Liverpool railway station.¹⁰⁵
- 4.132 Objectively, whether it would have been “improbable” for Mr Marsden himself to have dropped Sean Y off at Liverpool railway station by the mere fact that it was not the closest station to his residence is hard to assess. Ultimately, the police would have been required to speculate upon how far out of his way Mr Marsden would have been prepared to go to suit Sean Y’s convenience. The Commission does not consider that this issue could of itself have been sufficient to preclude submission of a brief.

¹⁰⁴ Interview with Sean Y, 20 April 1998.

¹⁰⁵ See [4.215]ff.

Use of ATM

- 4.133 It is also understandable why it might have been thought appropriate to defer further enquiries pending advice from the DPP in relation to whether Mr Marsden could have used an ATM in 1985 or 1986. Further inquiries would have necessitated the cooperation of Mr Marsden, his accountants and/or the ANZ Bank. It might have been possible for a search warrant to be obtained in order to seize bank records and it is not evident whether this was considered. It must be said, however, that had such an approach been considered and dismissed by Mr Woodhouse or any other of the investigating police the Commission would not necessarily expect it to have been documented.
- 4.134 Mr Woodhouse had experienced difficulties in obtaining information from Mr Marsden during the currency of Mr Marsden's defamation litigation,¹⁰⁶ and so it was not unreasonable to expect similar difficulties in gaining access to banking records for Mr Marsden kept by his accountant or the ANZ Bank, without the issue of a search warrant. Whether it was appropriate to seek the exercise of the coercive powers under a warrant was at all times a matter for the investigating police. The Commission does not regard the failure to have made further inquiries in relation to Mr Marsden's use or lack of use of ATMs as warranting criticism of Mr Woodhouse and Strike Force Cori.

Assessments – Sean Y

- 4.135 The only factor that the Commission regards as being of any real significance is the description of Mr Marsden's house given by Sean Y, considered elsewhere with similar complaints as to the same issue in relation to other alleged victims. In all other respects, police had a proper basis for forming a view that a brief should be submitted seeking advice as to the sufficiency of evidence.

“Edward”

- 4.136 The allegations by Edward were among those submitted by Strike Force Cori to the DPP for advice because Edward had agreed to be re-interviewed by police in relation to his allegations. Edward had participated in both the *Today Tonight* and *Witness* programs. His allegations were investigated by Inkster who determined no further investigation should be conducted in respect of his allegations aired on *Today Tonight*, and formed the view that there was insufficient corroborative evidence in respect of the *Witness* allegations. Edward had earlier withdrawn any further cooperation with the police, preferring instead to deal with the Royal Commission.
- 4.137 The gist of the complaint appears to be that police failed to obtain adequate corroboration to justify the matter being further investigated by Strike Force Cori and referred to the DPP for advice, it being said, inter alia, that the allegations had “no corroborative basis”. This corroboration was said to be

¹⁰⁶ This arose at least in part from a desire on the part of Mr Marsden that such information as was provided to the police might not be compelled to be produced by way of subpoena issued at the instance of the defendant in the defamation proceedings: barcodes 6271697-8.

necessary having regard to matters affecting the reliability of Edward's allegations, such as his criminal record, what was said to be his propensity to make inherently fantastic allegations, suspicion of his involvement in the murder of Frank Arkell, and, no doubt, the outcome of Inkster's investigations. It was also suggested that he was a person who stood to gain by way of a victim's compensation claim and hence had a motive to make false allegations.¹⁰⁷

- 4.138 The contents of the brief in relation to Edward drew attention to inconsistencies in various accounts given by him, including an account given in an application for victim's compensation. The brief noted that Edward failed to inform police or the Royal Commission of his allegation of Mr Marsden's involvement in an international drug racket. The brief also included court records of Edward's conviction for buggery and trespass, which noted he suffered emotional difficulties and contained a recommendation he obtain psychiatric treatment.
- 4.139 The complaint does not otherwise particularise how the Strike Force Cori police might have failed to obtain adequate corroboration. That some steps at least were taken to corroborate his allegations is clear. It therefore appears that the basis of the complaint here is more an allegation of an insufficient basis to refer the matter to the DPP except in one respect. It is said that the police "failed to address the identification question in relation to Edward". It is not altogether apparent what this might refer to apart from, presumably, an alleged failure by police to obtain an old photograph from Channel Seven from which Edward said he identified Mr Marsden. Assuming this is the matter referred to, it would appear unfounded as police requested all photographs held by Channel Seven.¹⁰⁸
- 4.140 However the photographic identification by Edward was not the only means of identification relied on by Edward in his statement to police, and Mr Woodhouse considered other means by which to corroborate Edward's allegation. Further, as Channel Seven had earlier informed NSW Police it would not cooperate in their investigation in relation to another matter¹⁰⁹ until after the conclusion of the defamation proceedings, it was not unreasonable to expect that a similar approach would have been taken in relation to inquiries by Strike Force Cori. The Commission's inquiries did not indicate whether the police request to Channel Seven for the relevant photograph was successful, but if it was not, the preceding may explain why.
- 4.141 The Commission is satisfied that both the observations in the brief and its overall content were sufficient to raise for consideration by the DPP questions about the reliability of information supplied and allegations made by Edward. To the extent that Mr Marsden submits otherwise, this aspect of the complaint is dismissed. As to whether there was a sufficient basis to submit the brief at all, the police were entitled to seek the advice of the DPP as to the sufficiency of the evidence at any time. While such advice is usually sought after police have exhausted relevant lines of inquiry, the Commission considers that in the unique

¹⁰⁷ The complaint itself noted Edward was unsuccessful initially before the Victim's Compensation Tribunal but succeeded on appeal to the District Court.

¹⁰⁸ Barcode 6341373.

¹⁰⁹ The alleged improper disclosure of information to Channel Seven concerning the execution of a search warrant on Marsden's home in May 1994.

circumstances of this case and the intended purpose of the brief, it was not unreasonable to refer a brief in relation to Edward.

“David Y”

- 4.142 It will be recalled that David Y came to attention during the Inkster investigation but was unable to be traced until Strike Force Cori began its inquiries. David Y alleged a total of 15 instances of unlawful under-aged sex with Mr Marsden.
- 4.143 The first occasion on which there was alleged unlawful sexual intercourse between Mr Marsden and David Y was said to have occurred when David Y was almost 14 years of age. On David Y’s account, the incident occurred in the time leading up to 27 October 1983.

Mobile phone number

- 4.144 Mr Marsden drew attention to evidence by David Y in the defamation proceedings “about a business card which had a mobile phone number on it” said to have been given to him soon after the initial offence. David Y had also mentioned this in his earlier statement to police. It was complained that, were police to have inquired further, it would have been ascertained that the telephone number was not available at that time.
- 4.145 In this respect, Mr Marsden is mistaken as it is clear police did in fact inquire as to the availability of the telephone number. Moreover, the results of the inquiry – which confirmed Mr Marsden’s assertion that the number was not then available – were brought to attention in the observations on the brief.
- 4.146 Whether the police should have, on the basis of the discrepancy between David Y’s allegations of the date of the alleged offence, and the time established by the availability of the number, declined to submit the allegation to the DPP is another matter. Police inquiries suggested David Y was out by some three years in his recollection of when the alleged offences occurred assuming, of course, he recalled the telephone number correctly. If David Y was supplied with the number soon after it had been acquired, he would have been 17, almost 18 years of age which, in view of the statutory limitation as to the bringing of charges under s 78K or s 78L, would have weighed heavily against the matter being further proceeded with.
- 4.147 But in the Commission’s view it would be wrong to regard it as improper for police to have submitted a brief to the DPP. The matter of the telephone number was an element that might go to establish David Y was mistaken, hence potentially drawing the statutory limitation into play. In the circumstances, it was not improper to have referred the matter for advice given it was but one potentially corroborative fact, the need to consider the application of the statutory limitation, and in light of the purpose for which the brief was submitted.

The butler

- 4.148 Featuring in two of the instances of alleged unlawful sexual relations between Mr Marsden and David Y was a cook or butler employed by Mr Marsden, who David Y had said was present at Mr Marsden's home when he attended the premises to engage in under-age sexual activities.
- 4.149 Mr Marsden asserts that inquiries would have revealed that the relevant cook or butler was not employed by Mr Marsden until some three or four years after the time indicated by David Y. Strike Force Cori was provided with two statutory declarations by that employee through Mr Marsden and in which he declared he commenced employment with Mr Marsden in 1988, consistently with the assertions by Mr Marsden.
- 4.150 The declarations and an interview with Mr Marsden containing statements to the same effect were included on the brief submitted by Mr Woodhouse, as well as notes by Mr Woodhouse regarding the employment of butlers by Mr Marsden.
- 4.151 It may have been open for the police to have attempted to obtain independent documentation verifying the period of employment of the cook or butler by Mr Marsden. That said, it is understandable why no such enquiries were made if they had no reason to doubt the veracity of the employee's statements. But what is not doubted is that all relevant competing information on this issue was included in the brief, and in the circumstances no complaint is reasonably open.

David Y's 14th birthday

- 4.152 It was asserted that David Y had alleged "that he had had sex with [Mr Marsden] on his 14th birthday" (27 October 1983) but that checks would have revealed he was in custody at the time.
- 4.153 While the police had available David Y's criminal antecedents, it is not apparent from those antecedents whether he was in custody at the material time. The significance of the custody record for David Y was not, however, lost on Strike Force Cori police, who made considerable efforts to obtain access to these records. Not inconsiderable difficulty was experienced in locating and then obtaining access to such records as were available. Records from Bidura Children's Court covering the relevant period were not ultimately obtained until almost two months after the brief had been submitted. Department of Community Services ("DOCS") records were unavailable directly to police, by virtue of having been subpoenaed by Mr Marsden in his civil proceedings. They too were not obtained until either the day before, or the very day, on which the brief was submitted.
- 4.154 Those records indicated David Y was admitted to the Bidura Remand and Assessment Centre on 11 October 1983 and seen at the Bidura Clinic the day before his birthday. While the records give rise to an inference that David Y was in custody at Bidura from 11 October 1983 to 4 November 1983 and hence on his 14th birthday, the question arises as to whether the information disclosed by the DOCS records was available in time to be incorporated into or included into the brief. In view of the time between receipt of the DOCS records and

submission of the brief, the Commission is not satisfied that Mr Woodhouse could have adequately reviewed the records so as to make an informed decision as to whether to include them, let alone provide any meaningful observations.

- 4.155 The Commission considers that, on the basis of information available to Mr Woodhouse at the time the brief was submitted, and excluding from consideration the DOCS records, sufficient doubt existed to have supported referral of the relevant documentation to the DPP to be assessed with the balance of material acquired in relation to the allegations by David Y. There is also little room to doubt that police attempted to verify whether David Y was in custody at the relevant time.

Escape from Dharruk Correctional Centre

- 4.156 What appears to be contended by Mr Marsden is that David Y's claim he was with Mr Marsden at the time of one of the offences "when" he escaped from Dharruk must be incorrect, as David Y was elsewhere in the period immediately following his escape. This was put forward on the basis of a report by TC¹¹⁰ of a telephone call from David Y, purportedly made from Chatswood, on the day following his escape.¹¹¹ However David Y's statement merely asserts that he saw Mr Marsden twice after escaping. Contrary to the construction placed upon it by Mr Marsden, it does not suggest that this occurred immediately after absconding from custody.

Johnnie Walker Blue Label scotch whisky

- 4.157 A further offence is alleged by David Y to have occurred on the evening of the day on which he was released from Dharruk Correctional Centre.¹¹² While not entirely clear, it would appear that this occurred when David Y was approximately 15 years of age. David Y claimed on that occasion to have stolen two bottles of Johnnie Walker Blue Label scotch whisky from Mr Marsden's alcohol cupboard.
- 4.158 It was asserted that David Y's allegations were contradicted by the fact that that particular brand of whisky was not produced until some years after the material time. The present complaint, however, appears goes further than what was advised to police by Mr Marsden prior to submission of the brief. At that time, Mr Marsden raised as a question as to the product's domestic availability, leaving open the possibility of obtaining it by others means. In the present complaint, the impossibility of obtaining the product is squarely raised, when this was not necessarily so in relation to what was advised to police originally.
- 4.159 The Commission does not consider that resolution of the question whether Johnnie Walker Blue Label scotch whisky was available domestically, by duty free, or at all, would of itself have been determinative of whether it was appropriate to include the allegations of David Y in the brief to the DPP.

¹¹⁰ See also [4.11] above.

¹¹¹ 14 May 1984.

¹¹² Approximately December 1984.

Irrespective of whether evidence of when Blue Label scotch whisky could be acquired in Australia was sought, Mr Woodhouse was entitled to form the opinion that advice should nonetheless be obtained from the DPP regarding the sufficiency of evidence as a whole in relation to all the allegations raised by David Y. Such a request for advice was not unjustified having regard to the numerous allegations by David Y, the complexity of the investigation taken overall and its peculiar history including, in particular, the fact that two related briefs had previously been referred to the DPP for consideration.

The donkey

- 4.160 David Y also provided police with a statement that on an occasion when he was about 16 years of age, he was at Mr Marsden's house when a donkey was delivered. Acceptance of the accuracy of David Y's allegations would have put him as observing the donkey in about 1985.
- 4.161 David Y later swore an affidavit¹¹³ admitting to having made false allegations against Mr Marsden, including that his recollection of the donkey arose from Mr Marsden's 50th birthday celebration in 1992 which occurred after David Y was over 18 years of age. Mr Marsden asserts that it was quite publicly known that it was on that occasion he received a gift of such an animal, it being reported in an article in *The Sydney Morning Herald* in 1992, and had police made inquiries, they would have confirmed the absence of a donkey on his property until 1992.
- 4.162 However among the documents in the brief submitted is a statement by the mother of David Y, recalling her attendance at Mr Marsden's home in late 1991, when and where she observed "donkeys and ducks in the backyard". Objectively, this seemingly contradicts evidence relied on by Mr Marsden that a single donkey did not arrive until January 1992, albeit differing by no more than a matter of months.
- 4.163 Neither the brief nor Strike Force Cori running sheets contain any other information relating to the presence or otherwise of a donkey on Mr Marsden's premises at the time of the alleged offence, namely, in 1985. Whether it was necessary for Strike Force Cori to have undertaken further inquiries such as were suggested is a question of degree. Apart from perhaps obtaining a copy of the newspaper article, it would not have been necessary to make further inquiries in light of information obtained from Mr Marsden's solicitor. In any event, Mr Woodhouse's notes of those documents, which were included in the brief, referred to David Y's assertion that when 16 years of age that he had suggested to Mr Marsden he obtain such an animal, and the newspaper article suggesting to the contrary albeit not including a copy. In view of the circumstances, the Commission is not satisfied that this aspect was such as to reasonably preclude submission of a brief.

¹¹³ 10 March 2001.

David Y's former wife

- 4.164 Mr Marsden asserted the police did not attempt to confirm David Y's allegations with his ex-wife and further that in a statement by her, she did not provide evidence corroborative of David Y. The only statement by the former wife available to the Commission from both the brief and papers supplied by Mr Marsden, was made to police on 12 August 1998.
- 4.165 Assuming that the statement is based upon an interview or conversation with police, it seems obvious that inquiries were made as to her knowledge of whether David Y had engaged in any sexual activities with Mr Marsden. She was unable to corroborate sexual activities between David Y and Mr Marsden but was, however, aware of both David Y and John Y's involvement in drugs and child prostitution in a general way from discussions with David Y.
- 4.166 It is perhaps unsurprising that David Y's former wife was unable to provide any further information. While it is undoubtedly the case they were in a relationship prior to getting married in 1990, it cannot be assumed this commenced prior to David Y turning 18 and so she would not necessarily have direct evidence of any contact between David Y and Mr Marsden.

"BL"

- 4.167 David Y stated that following his release from a correctional centre when he was about 14 years old, he befriended a man named BL. David Y said he "looked at [BL] like a father figure and he treated me great, like a son", and would stay at BL's place for up to three nights per week on occasion.¹¹⁴
- 4.168 David Y there alleged that when he was 15 but "close to [his] 16th birthday", he went with BL to the Rex Hotel at Kings Cross, recalling the date to be "about September in 1985". While at the hotel, David Y was allegedly approached by Mr Marsden and later went back to Mr Marsden's home and engaged in sexual activity. However according to BL, the occasion was likely to have been David Y's 18th birthday so far as he was able to recall.¹¹⁵
- 4.169 BL could not say when Mr Marsden and David Y were "involved", being able to state only that he became aware in the late 1980s that both David Y and his brother were involved with Mr Marsden. Mr Marsden relies upon this to raise doubts as to his credibility, suggesting that if the relationship were that close, he should have been able to be more certain. Whether the fact of their father-son type relationship¹¹⁶ gives rise to an inference, as suggested by Mr Marsden, that the evidence of BL was per se unreliable, assumes more than it establishes. It assumes that it was information that David Y would have volunteered to BL in detail, and that if it were not, it must in some way reflect on BL's reliability as a witness. The fact of the relationship and its perceived closeness says nothing as to the regularity of contact nor what David Y might have said to BL, remaining at best, mere speculation without more.

¹¹⁴ Statement of David Y, 14 July 1998.

¹¹⁵ Barcode 6104384.

¹¹⁶ As characterised by Mr Marsden.

- 4.170 Mr Woodhouse expressed the view that “[i]n the event of this conflicting evidence it is unlikely that the circumstances could support a charge(s) arising from this incident.”¹¹⁷ This appears to be a reference to the discrepancy between BL’s and David Y’s accounts of David Y’s age at the time of the alleged incident fixed by reference to the Rex Hotel. Mr Woodhouse added that BL “[was] not seen to be an impartial witness as [BL] was no longer minded to help David Y in any way.”¹¹⁸ There was also evidence that since BL had been interviewed by the police, Mr Marsden and he may have discussed his evidence.
- 4.171 Clearly enough, Mr Woodhouse was alive to factors affecting the reliability of BL’s evidence, even though they may not have been characterised in the same way as Mr Marsden. It is curious that Mr Marsden apparently challenges BL’s reliability. On BL’s own statement, the particular incident of interest was on the occasion of David Y’s 18th birthday, and so did not appear to implicate Mr Marsden in a criminal offence.
- 4.172 In the Commission’s view, there is no room for justifiable criticism of Mr Woodhouse in relation to this aspect of the investigation.

Assessments – “David Y”

- 4.173 From Mr Woodhouse’s perspective, it would appear that the inquiries discussed that might have been undertaken were unnecessary at the point the brief was submitted. Mr Woodhouse did not dispute information he noted from an inspection of relevant documents held on Mr Marsden’s behalf at the offices of Corrs Chambers Westgarth, although this is not to say he accepted it as necessarily true, merely that his inquiries had concluded for the present. If the information was accepted as correct, David Y’s allegations may have been exposed to the DPP as being unreliable or wrong in relation to, at the very least, the time when the alleged offences took place.
- 4.174 Mr Woodhouse, however, had no doubt that such information and related submissions would be made directly to the DPP on Mr Marsden’s behalf. Mr Woodhouse wanted the advice of the DPP on the sufficiency of evidence in relation to this and the other allegations against Mr Marsden, based on the available evidence. He did not want to exclude any particular allegations from consideration on the basis only that there was material forthcoming from Mr Marsden that might be capable of raising doubt regarding the various allegations.
- 4.175 The brief was, in Mr Woodhouse’s mind, a request for advice in relation to a long and complex investigation in which there were a number of “grey areas”.¹¹⁹ The contrary evidence, including that from Mr Marsden, having been indicated in his observations or otherwise included on brief, Mr Woodhouse did not wish to dismiss an allegation out of hand or commit resources to corroborating one version of events or another without first getting advice on the information that would be put before the DPP by both the police and Mr Marsden. This is not to

¹¹⁷ Barcodes 6088014, 6104277.

¹¹⁸ Barcodes 6088014, 6104277.

¹¹⁹ Interview with Michael Woodhouse, 20 December 2002.

say there was an indiscriminate or wholesale referral by Mr Woodhouse to the DPP of all allegations against Mr Marsden received by Strike Force Cori. Quite a number of allegations were not referred as Mr Woodhouse considered them to be unfounded or unable to be proved.

- 4.176 Whether it was necessary for Strike Force Cori to have attempted to further corroborate David Y's allegations in relation to incidental facts before seeking advice from the DPP is a moot point. In all the circumstances, nothing Mr Woodhouse or other police did or did not do in this regard was outside the pale of reasonable judgment.

“John Y”

- 4.177 John Y, the younger brother of David Y, also alleged under-age sexual contact with Mr Marsden on a number of occasions, some of which were in company with his brother.

The lithograph

- 4.178 Mr Marsden asserted that a lithograph which John Y claimed to have seen in his home was not present during the period when the offences were said to have occurred. The assertion, corroborated by a number of witnesses, was that the picture was displayed in his Paddington offices until October 1989.¹²⁰
- 4.179 For present purposes, the question is whether the police should have been alive to the question whether John Y's observation in relation to the picture was correct. Notes by Mr Woodhouse from his inspection of documents made available by Mr Marsden's lawyers observed that the question of the location of the lithograph would be raised in the defamation proceedings.
- 4.180 There does not appear to be anything in the brief to indicate whether the police pursued the question whether John Y may have been mistaken about the date when he first engaged in sexual relations with Mr Marsden, on the basis of the artwork he had seen in his house. In circumstances where Mr Woodhouse had been made aware that evidence was available as to where the lithograph was hanging and when, it presented as an avenue of inquiry that could have been pursued.

Availability of video

- 4.181 John Y said, in relation to his first sexual encounter with Mr Marsden in 1986 or 1987 when he was 15 years of age, that he watched a pornographic video with Mr Marsden. Accepting that the particular video was not produced until June 1989 and not officially available in Australia until at least August 1989,¹²¹ it appears John Y was mistaken about the date on which the alleged “threesome” involving his brother and Mr Marsden occurred. Consequently John Y would

¹²⁰ Barcodes 5878428, 5879130.

¹²¹ Submissions of Corrs Chambers Westgarth Solicitors to DPP, 23 March 2001.

have been 17 years and 11 months when it first became officially available in Australia.

- 4.182 According to the notes made by Mr Woodhouse of documents made available for inspection by lawyers acting for Mr Marsden, Mr Woodhouse was aware of an assertion that the video was not available until 1989. The production date of the video was, in the circumstances, an avenue of investigation that police could have pursued.

Availability of “Special K”

- 4.183 John Y also alleged that when he and his brother, David, engaged in a “threesome” with Mr Marsden,¹²² apparently when John Y was aged 16 and his brother 18 years of age, Mr Marsden used a prohibited drug described as “Special K”. In his inspection of records made available by Mr Marsden’s lawyers, Mr Woodhouse noted the assertion that ““Special K’ was not in use in Australia until 1989”.
- 4.184 In interview with Mr Woodhouse on 29 January 1999, Mr Marsden, while admitting to the use of amyl nitrate and marijuana, denied using or being in possession of any other drugs.
- 4.185 The effect of the Commission’s research is that the assertion by Mr Marsden that Special K did not become available until 1989 appears open to question.¹²³ The issue having been drawn to Mr Woodhouse’s attention, police should have been aware that the availability of “Special K” may have post-dated the date of the allegations by John Y.

The Regent Hotel

- 4.186 In his primary statement on 11 August 1998, John Y alleged, when apparently 16 years of age, that he had sex with Mr Marsden on “several occasions” at “a Hotel in the city”.¹²⁴ Mr Marsden has not denied that he and John Y had a sexual relationship, but differed as to its regularity and where they met and, of course, the year when they had a relationship. On closer examination, it would not appear that the differences raised by Mr Marsden, apart from the year, were such as to give rise to any necessary conclusion that John Y’s allegations were untrue. While Mr Marsden had ascribed to John Y an allegation of a “full-on love relationship occurring mainly at the Regent Hotel in 1988”,¹²⁵ John Y had stated to police that he went to “the Hotel” on two or three occasions only.¹²⁶

¹²² See further at [4.208].

¹²³ “Special K” is a colloquial name given to a drug known as ketamine developed in the 1970s as a medical anaesthetic for both humans and animals. According to research carried out by the National Drug and Alcohol Research Centre at the University of New South Wales, the first instance in Australia of illicit experimentation with ketamine was reported in 1980: www.drugscope.org.uk.

¹²⁴ Barcodes 6088067, 6104226.

¹²⁵ Barcode 5921110.

¹²⁶ Statement of John Y, 27 August 1998.

- 4.187 John Y had alleged the relationship occurred in 1988.¹²⁷ From his statement, it may be inferred that this took place after John Y had turned 16 (3 September 1987) and before he had turned 18 (3 September 1989). A later statement by John Y is perhaps slightly more specific in suggesting the hotel attendances occurred around the time of his 17th birthday (3 September 1988).
- 4.188 Strike Force Cori police conducted searches of Regent Hotel microfiche records for guest accommodation records covering the period 1 October 1989 to 31 August 1990 to ascertain whether there were records in relation to Mr Marsden or John Y, as well as Shane X who had also alleged he had sex with Mr Marsden there when 17 years of age. None of the records searched revealed entries consistent with the identities of Mr Marsden or John Y. The Regent Hotel's guest accommodation records of Mr Marsden's stays were, however, incomplete. Inkster's special investigation records were also searched by Strike Force Cori police, revealing the New South Wales Law Society, of which Mr Marsden was President from 1991 to 1992, had an account with the hotel, although no further documentation was available.
- 4.189 Interviews were also undertaken with hotel staff which disclosed Mr Marsden had attended the hotel in the company of young men. The probative value of these statements was, however, low, in that detail could not be given as to the identities or the age of the young men, nor the relevant dates.
- 4.190 Mr Marsden asserted that inquiries by police would have established that there was no regular booking for him at the hotel during the period of John Y's allegations. Clearly, inquiries were undertaken by police in an effort to establish whether or not Mr Marsden stayed at the Regent Hotel at relevant times. In strict essence their inquiries did fail to establish a regular booking in Mr Marsden's name. However, given the incomplete nature of the Hotel's accommodation records and the recollections, albeit vague, of hotel staff, that result could neither be conclusive of the non-presence of Mr Marsden at relevant times, nor sufficient to dismiss John Y's allegations.

Description of various butlers

- 4.191 Mr Marsden complained that police did not seek a description of various persons, of which John Y mentioned there were at least three, employed as butlers who reportedly drove him to Mr Marsden's home when he was between the ages of 13 and 18.¹²⁸ Initially John Y had referred to a "RSJ", later determined to be RR, as being present as a chauffeur at the house on the occasions of John Y's visits when approximately 16 years of age. In later interviews, when advised RR worked as a butler rather than chauffeur for Mr Marsden at a much later time, John Y conceded he was mistaken in that regard, having confused him with one of the other servants. He did not, however, concede that his memory of the time of the alleged incident was incorrect.

¹²⁷ Barcode 5921110.

¹²⁸ While John Y's initial statement dated his first sexual encounter with Mr Marsden at 15 years, David Y alleged there was an earlier incident involving his brother at age 13 with Mr Marsden.

4.192 The question arises then as to whether the police investigation faltered by not seeking further descriptions of Mr Marsden's servants howsoever demarcated in their duties. Inquiries of police running sheets indicate that police did not seek to make further inquiries of John Y as to whether he could give a more precise description of the chauffeur. At the same time, it is at least arguable that John Y may have exhausted his memory about this issue and further inquiries may not have proved worthwhile. This is a difficult issue to determine after the fact and without having been involved in the interview process. To the extent it may have been a reasonable line of inquiry to pursue – and the Commission is not able to be satisfied either way – it is not regarded as of such an extent as to render the decision to refer a brief unreasonable.

John Y's girlfriend

4.193 John Y stated he moved to Queensland in about 1990. John Y would then have been aged 18 or 19. He allegedly "rang John [Marsden who] offered me a job and a place to live on the proviso that I had sex with him three nights a week."¹²⁹ John Y agreed to the conditions allegedly imposed by Mr Marsden and returned to Sydney to work as a chauffeur for Mr Marsden. According to John Y, this arrangement lasted about six months, after which he commenced a relationship with a female person, during which he continued to see Mr Marsden until he was about 22 or 23.

4.194 Mr Marsden complained about the refusal of Mr Woodhouse to interview the girlfriend. Even assuming John Y did in fact speak with her about events involving Mr Marsden some years before, it seems unlikely she could have provided anything by way of direct evidence of previous alleged events. While there may nevertheless have been some value in interviewing her, it is understandable why Mr Woodhouse may have formed a view that police resources were better directed elsewhere.

Failure to interview chauffeur

4.195 Mr Marsden also complained of the refusal by Mr Woodhouse to interview the person who apparently held a position as chauffeur with Mr Marsden, which John Y took over in about 1991.

4.196 It is not clear what might have been gained from such an interview. While the former chauffeur could have verified when John Y commenced working for Mr Marsden, it seems not to the point as this occurred after John Y turned 18. Assuming the employment relationship was conditioned upon John Y providing sexual services to Mr Marsden, no crime of under-age sex would have been committed.

4.197 In the circumstances the Commission does not consider it unreasonable that Mr Woodhouse declined to interview the former chauffeur.

¹²⁹ Barcode 6104336.

Statutory declaration of John Y

- 4.198 Mr Marsden also complained of the conduct of Mr Woodhouse in relation to his secretary, who had witnessed a statutory declaration by John Y. In this respect, it was complained that if Mr Woodhouse accepted the circumstances surrounding the making of the declaration as told by John Y, and which alleged irregularity in the witnessing of the declaration, he should have been prepared to take action in relation to the secretary.
- 4.199 In relation to the declaration, John Y alleged he was requested by Mr Marsden to declare that he had not seen Mr Marsden with persons under the age of 18 in his house or car while in his employ.¹³⁰ While John Y agreed to do so as it was the truth, he also alleged that Mr Marsden later asked him to declare another stating they had not had sexual relations. John Y says he agreed as he still held fears of what he had said in a tape,¹³¹ and Mr Marsden had promised to “help look after” him. According to John Y, he did not sign either declaration in the presence of a witness as required by law, despite the first declaration purporting to have been duly witnessed by the secretary. The second declaration was not witnessed. An undated letter was also received by Mr Woodhouse from John Y, also to the effect that he had not seen Mr Marsden with any under-age persons while working for him.
- 4.200 Based on information provided by John Y, Mr Woodhouse had initially formed a suspicion that Mr Marsden had drafted, or had been instrumental in the drafting of, the statutory declaration by John Y recanting his allegations, including the provision that he and John Y had “never had any sexual relations”. Mr Woodhouse, it seems, had formed at least a tentative view that the statutory declaration and the circumstances in which it came to be prepared provided evidence of a consciousness of guilt on Mr Marsden’s part. Mr Marsden, for his part, conceded that the statutory declaration may have been prepared within his office but denied being involved in its drafting or even having read it until it was drawn to his attention by Mr Woodhouse some two years after the fact.¹³² Mr Woodhouse went to not inconsiderable lengths to establish whether the document was fabricated for John Y’s signature.
- 4.201 It seems clear that up until the interview with Mr Marsden on 29 January 1999, Mr Woodhouse was strongly suspicious that the statutory declaration had been signed by John Y in circumstances such that he was not in control of its contents nor given an opportunity to properly appreciate and adopt its contents.
- 4.202 To the contrary, however, was the statement and interview given by the secretary. Mr Woodhouse recognised the secretary as a witness of credit, remarking in his observations on brief that while there was strong circumstantial evidence from which to infer impropriety, the secretary presented as a credible witness who would be difficult to challenge. Evidently, Mr Woodhouse had

¹³⁰ Barcode 6104339.

¹³¹ The tape was a recording of comments by John Y aired on 2BL and during which his voice was disguised. His fear was that Mr Marsden would discover it was him making the comments.

¹³² Considered extremely unlikely by Mr Woodhouse (barcode 6088017) and doubtful in light of the secretary’s statement: barcode 6088200.

formed a view that there was insufficient evidence to warrant further inquiries into the witnessing of the statutory declaration by the secretary. Nothing more was necessary. This aspect of the complaint is accordingly without foundation.

- 4.203 It seems odd that Mr Marsden would allege impropriety in relation to the decision not to take action against his secretary – which action seemingly would have comprised the laying of charges – on the basis that Mr Woodhouse might have given credence to John Y’s account of events. The balance of his complaints of police misconduct are predicated on quite the opposite contention – that police should not have so much as referred a brief to the DPP for advice on the potential for charge against him, on the basis of the evidence of persons such as John Y.
- 4.204 The Commission mentions this primarily because of its illustrative value as to the difficulties one can find themselves in when complaining of the way in which police discretionary judgments are exercised. Depending upon the perspective adopted at any particular time by a person standing on the outside and looking in on the judgments and decisions made by police in an investigation, there can be a certain “damned if you do, damned if you don’t” element in their complaints for the police concerned.

Assessment – Corroboration of John Y

- 4.205 In the Commission’s opinion, based upon its examination of the documents of the investigation and the factual circumstances described above, the police did not generally refuse or decline to make inquiries to verify allegations by John Y. Indeed, police records indicate a number of lines of inquiries were pursued with a view to corroborating John Y. That said, there were certain inquiries that might also have been pursued independently by police, based on information made available on behalf of Mr Marsden by his lawyers and otherwise.
- 4.206 However, the Commission comes back to the expectation of Mr Woodhouse, created by the conduct and statements of lawyers pursuing Mr Marsden’s keen interest in the police investigation, that relevant contentions and supporting materials in relation to facts incidental to the reliability of various complainants would be furnished to the DPP directly on his behalf.
- 4.207 In all the circumstances, the Commission does not consider the police to have acted unreasonably or improperly in relation to verification of aspects of John Y’s allegations.

Inconsistencies between John Y and David Y

- 4.208 In his document dated 2 August 2000, Mr Marsden alleged inconsistencies between the dates given by John Y and his brother David Y in respect of their visits to Mr Marsden’s home from Huskisson, for the purpose of engaging in sexual activities as a group in 1988.¹³³

¹³³ Barcodes 5921107-8.

- 4.209 The significance, presumably, is that it undermines the credibility of the brothers, thus diminishing the value of their evidence and the reliability of their claims. Further, it was alleged that police in not interviewing “the girl who was living with him” just prior to that incident necessarily implies the police investigation was inadequate in not seeking evidence of corroboration.¹³⁴ It is not clear from the context of the complaint whether this referred to David Y or John Y.
- 4.210 Clearly enough, David Y and John Y had different recollections as to when they first engaged collectively in sexual activity with Mr Marsden, the former placing it in 1984 while the latter dated it as 1987. At best, the accounts given by David Y and John Y appear confused.
- 4.211 There would also appear to be some minor inconsistencies in the versions of events provided to police by John Y and David Y and their respective girlfriends in 1988 in respect of this incident. These inconsistencies seem, however, to be of no great moment, there being a strong correlation by and large between the versions of events given by the brothers, and their partners. Clearly, police did attempt to establish the veracity of the allegations by David Y and John Y by seeking from their partners information that might be corroborative. While neither was able to confirm in detail the various allegations, the information provided by their partners was not inconsistent with the allegations by David Y and John Y.
- 4.212 In relation to apparent inconsistencies between John Y’s employment and the dates of the alleged incident involving his brother and Mr Marsden, it is also clear police took steps to attempt verify his employment so as to corroborate his allegations. However it is not clear whether an inconsistency arose between John Y’s allegations and his employment. No records were provided to the Commission nor to Mr Woodhouse, and such records as were able to be obtained by Mr Woodhouse were not comprehensive.
- 4.213 It is therefore apparent that police did not fail to seek to corroborate the allegations of David Y and John Y regarding their joint allegations against Mr Marsden, albeit the question of whether the allegation should have been referred for advice remains. Undoubtedly, the inconsistencies in the versions of events do not reflect well upon their credibility.
- 4.214 What flows from this, according to Mr Marsden, is that had these inconsistencies and lack of corroboration been taken into proper account by police, they may have been more disposed to not persisting with the investigation into the John Y allegations and/or not referring a brief in relation to these allegations to the DPP. The Commission is not, however, satisfied that such inconsistencies as may have been were of sufficient significance to have warranted police declining to seek advice from the DPP.

¹³⁴ Barcode 5878428.

Taxis

- 4.215 During the course of their inquiries, Strike Force Cori police traced and interviewed a number of taxi drivers. One provided a statement to police regarding his work as a taxi driver in 1982 and 1984.¹³⁵ He recounted an occasion when he collected a fare late one night from Mr Marsden's home. The passenger was a young man and was escorted from the house by Mr Marsden.
- 4.216 Strike Force Cori police also retrieved a statement to similar effect by another taxi driver obtained by Inkster during the course of his Special Investigation.¹³⁶ He had driven in the Ingleburn area from approximately 1980 to 1990, stating he had driven passengers, usually young males, on a number of occasions from the home of Mr Marsden to either Ingleburn or Liverpool railway stations, generally in the early hours of Saturday or Sunday mornings. Whilst always male, the passengers were never the same person and the driver estimated their ages to be approximately 15 to 17 years old. To his knowledge, other local taxis also received similar jobs, and on occasion had driven a passenger into the city.
- 4.217 A statement by a third driver, made to Inkster and also retrieved by Strike Force Cori police, stated that on at least six occasions he collected fares from Mr Marsden's home who were young males, probably 18 to 20 years old.¹³⁷
- 4.218 Clearly enough, it is not possible to establish the identity of any of the persons collected by the taxi drivers. But the inquiries of taxi drivers do illustrate that Strike Force Cori police did not ignore avenues to corroborate the various objective facts included within the allegations by David Y, and others such as David X who claimed to have been taken by taxi from Mr Marsden's home.

Potential eyewitnesses

- 4.219 Mr Marsden complained the failure by police to interview John Adams and his family, said to have been staying with him for a period between 1985 and 1986, and police assigned to guard his home during 1985, indicated an inadequate investigation.
- 4.220 The brief noted the Sean Y offence allegedly occurred when the Adams were living at Mr Marsden's home and police officers were guarding the premises. Whether the evidence of these potential eyewitnesses was sufficient to refute Sean Y's allegations is open to question, let alone support a decision not to refer the allegations for advice. Evidence from the Adams could not have been conclusive in so far as there was no certainty they would have seen every person coming and going from Mr Marsden's house. Similarly, the police guards were unlikely to be in a position to provide conclusive evidence as they did not record the names of all visitors. On their own admission, their logs were not comprehensive and significant time had passed. Further, evidence from the police guards would not have been of any value if the alleged offence involving Sean Y in particular occurred in the final two months leading up to the time

¹³⁵ Barcode 6341525.

¹³⁶ Barcode 6341840.

¹³⁷ Barcode 6341845.

when he was 15½ years of age (January and February 1986). On Mr Marsden's account, the guards had left in December 1985.

- 4.221 In a similar vein, Mr Marsden raised the fact that neither David Y nor John Y ever referred to police guarding John Marsden's house in 1985 despite purportedly being there during that period of time. He also suggested the lack of any mention by either brother of the Adams was significant. While statements by the Adams were provided by Mr Marsden, these were confined to a much later point in time and did not confirm their presence at Mr Marsden's home in 1985-86. However, if it was the case that these persons did not see the brothers when they attended Mr Marsden's home, then the reverse might also follow – the brothers for their part did not see those persons, and so could not and did not mention them.
- 4.222 In the result, the Commission is not satisfied that it would have been necessary at the time the brief was submitted to have traced and interviewed the Adams nor the police guards for the purpose of seeking to establish whether they saw the brothers or Sean Y attend at Mr Marsden's house.

Description of Mr Marsden's house

- 4.223 It was complained that police made no efforts to confirm the layout of Mr Marsden's house, the description of which figured in a number of allegations. In particular, it was asserted that inquiries would have revealed inconsistencies between those descriptions and the actual state of Mr Marsden's house, as it was undergoing substantial renovations during the material times. It was said that police might have interviewed the Adams, who were staying with Mr Marsden for a period, or his gardener or the police guards to verify the fact of renovations, or undertaken checks with Liverpool Council.
- 4.224 In relation to David X, whose allegations pertained to incidents in approximately 1987, the observations on brief clearly indicated police were aware the description of the house was incorrect, stating he “provides a limited description of Mr Marsden's house, indicating *incorrectly* that he believed it to be single storey.”¹³⁸ [emphasis added]
- 4.225 In relation to Sean Y, whose allegations date to 1985, it was observed on brief that he had “accurately describe[d] the house.”¹³⁹ At the time the brief was submitted, Mr Woodhouse had interviewed Mr Marsden, and had information concerning the layout of the house from a former employee, a visitor to Mr Marsden's home, and a statement by David Y.
- 4.226 It seems likely that Mr Marsden's house was either under or had just completed renovations at the relevant time, thereby giving rise to a possible inconsistency in Sean Y's description. While no inquiries appear to have been made to check whether Sean Y's description of the house was consistent with the renovations undertaken, it was nonetheless observed in the brief that Sean Y had accurately

¹³⁸ Barcode 6088705.

¹³⁹ Barcode 6088650.

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described the house. As against this, Mr Woodhouse properly included notes from his inspection of material made available by Mr Marsden's lawyers regarding, inter alia, the renovations and potential for corroboration from the Adams and police guards.

- 4.227 The use of the word "accurately" was not entirely without foundation, as Sean Y's description was consistent with some features in the information, limited as it was, available to Mr Woodhouse concerning Mr Marsden's house. Nevertheless, it was perhaps a loose word to use in the absence of more definitive information as to its layout at the relevant times. That said, the Commission is satisfied it was not employed with any intention to mislead the DPP. Furthermore, the absence of further inquiries by the investigating police did not occur in a vacuum, given Mr Woodhouse was aware that potentially contrary information would be provided to the DPP by Mr Marsden's solicitors.
- 4.228 Moreover, it was not unreasonable that police should have sought the DPP's advice on the whole of the available evidence in relation to Sean Y. At least one scenario that was not necessarily contradicted by issues about the state of renovation of Mr Marsden's home was the alleged offence in January or February 1986.
- 4.229 In relation to the brothers David Y and John Y, their allegations concerned events in 1985 and overlapping the same period of renovations. It was similarly suggested that the brothers must have been mistaken as to attending in 1985 as neither referred to those renovations nor the consequent disruption to the house in the way of tools, tarpaulins and the like.
- 4.230 In relation to John Y, it was complained that the bedroom described as being the scene of allegations by him did not exist at the relevant time, as it was not built until renovations begun in June or July and completed in December of 1985. In relation to David Y, the complaint relates to a limited number of the later allegations made by David Y only, as of the 15 allegations made, seven appear to have occurred in 1983-84 and predate the renovations.
- 4.231 The description of the house given by John Y regarding his first sexual contact with Mr Marsden, apparently when 15 years of age and in 1986, is similar to that given by David Y in relation to the earlier offences. Mr Marsden's complaint of the investigation of John Y's allegations appears to proceed upon an incorrect assumption, namely that John Y's allegation was in 1985 before completion of the renovations, rather than 1986. John Y did however accept he may have in fact had sex with Mr Marsden in company with his brother at an earlier time as well so raising the issue of the renovations.
- 4.232 It is apparent from a number of documents in the brief, including the interview with Mr Marsden on 29 January 1999, that police were or should have been aware that the architecture of the house was a relevant factor to be taken into account in respect of David Y and John Y. After the interview with Mr Marsden and examination of documents made available by Mr Marsden's lawyers, Mr Woodhouse would have been on notice that the accuracy of their descriptions would be at issue.

- 4.233 The need to check the descriptions given by the brothers presented as a reasonable line of inquiry. Whether, however, the investigation and, inferentially, the submission of the brief was improper on that account, was a question to be considered in light of all the information then gathered by police, the purpose for which the brief was submitted and the unique circumstances of the case.

Descriptions of motor vehicles

- 4.234 A common factor in a number of allegations against Mr Marsden was that the complainant had been driven to Mr Marsden's home. Mr Marsden alleged that police failed to check the descriptions given by purported victims against the vehicles actually owned by Mr Marsden, referring in particular to allegations made by Shane X, David X, Paul and the brothers John Y and David Y.
- 4.235 The descriptions of Mr Marsden's car given by Shane X,¹⁴⁰ David X, Paul and John Y appear inconsistent with the vehicles owned or said to be owned by him at the material times. In relation to the remaining complainants, the descriptions given were insufficient to enable any conclusion to be drawn that they were inconsistent with RTA records.
- 4.236 It is however apparent that police did attempt to verify the various allegations containing descriptions of motor vehicles owned or driven by Mr Marsden. Certainly the issue was raised in discussions between Mr Woodhouse and Mr Marsden's legal representatives and during which the latter offered to supply RTA records to Mr Woodhouse. No documents were eventually provided, nor did Mr Woodhouse prompt for these documents.
- 4.237 While not undertaking RTA inquiries for vehicles registered to Mr Marsden personally, inquiries were conducted by police in relation to vehicles registered to companies associated with Mr Marsden.¹⁴¹ Further Mr Woodhouse has indicated he was confident that information about vehicles registered to Mr Marsden personally would have come to the attention of the DPP via the solicitors acting on Mr Marsden's behalf.
- 4.238 Mr Woodhouse also indicated that even were inquiries made, they would not have been conclusive in determining whether the investigation of allegations by those who described vehicles owned or driven by Mr Marsden might be proceeded or not (as Mr Marsden suggests), for it could not exclude the possibility Mr Marsden might have used a vehicle not registered to him at the material time. In the result, it was not a matter that Mr Woodhouse dismissed as of no consequence, and it was observed on the brief, in relation to David X at least, that police were aware that the description was incorrect.
- 4.239 Although in a more normal investigation searches as to vehicles registered to Mr Marsden personally might have been conducted by police, the lack of such inquiries in the peculiar circumstances of the Strike Force Cori was

¹⁴⁰ In relation to Shane X at least, Mr Marsden admitted in interview with police on 29 January 1999 that he owned a car such as that described by Shane X.

¹⁴¹ Barcode 9331161.

understandable. The Commission is not satisfied that the omission to make these inquiries, bearing in mind Mr Woodhouse's view that such details would be provided by Mr Marsden to the DPP, together with his doubt as to whether such inquiries would have been conclusive in any event, meant it was unreasonable to submit the brief in relation to the various allegations.

Allegedly discredited complainants

- 4.240 Mr Marsden suggested that Strike Force Cori police misconducted themselves when they pursued investigations into allegations on the basis of assertions made by persons who, in his view, had been discredited. He cited Franca Arena, CD2, Deirdre Grusovin and Russell Travis.¹⁴² The complaint somewhat glosses over the fact that Arena and Grusovin were conduits for rather than the source of the allegations, hence doubts as to their credibility as opposed to that of the actual source, would not quite be to the point.
- 4.241 If it was Mr Marsden's intention to suggest Strike Force Cori should not have conducted any further inquiries or assessed information from these sources, this would plainly be incorrect.

Franca Arena

- 4.242 At least in relation to Franca Arena, Mr Woodhouse was in fact bound to give specific consideration to the information provided by Arena, and to pursue any new matters arising therefrom, this being the brief of Strike Force Cori.
- 4.243 The observations also indicate that, quite properly, Mr Woodhouse took an independent approach towards the assessment of the information that had been provided by Arena. He did not immediately discount its worth on the basis of its source, nor did he pursue an investigation into matters that had already been determined by Inkster as not worthy of further inquiry. Mr Woodhouse's investigation of matters relating to Mr Marsden focused only on matters in relation to which new information had come to light.
- 4.244 Again, it seems clear that the approach taken towards this information was appropriate in the circumstances. Matters did not go uninvestigated by virtue of the identity of the person from whom the information had been received. Nor, appropriately, were resources devoted to a full investigation where initial inquiries indicated no need for this course of action.
- 4.245 The Commission has reviewed all other available Strike Force Cori running sheets regarding the provision of information by Arena to the Strike Force. It is not necessary to describe in detail each instance of the information provided and how the information was managed, suffice it to say that they are numerous. The Commission holds no concerns that police afforded them any special treatment on account of the source of the intelligence being Arena.

¹⁴² Matters relating to Travis are discussed elsewhere in this Report.

Royal Commission informant CD2

- 4.246 In relation to CD2, the allegation is one of impropriety or misconduct in the overall investigative approach of Strike Force Cori, the CD2 allegations not being directed against Mr Marsden. In this respect, the complaint echoes the wider allegations noted earlier in this Report by suggesting Strike Force Cori was not disposed towards proper investigation of allegations of paedophilia or was intent upon pursuing persons accused of such despite the nature or strength of available information.
- 4.247 The Commission is not, however, disposed to review unrelated inquiries undertaken by Strike Force Cori simply to ascertain whether there might be any basis to Mr Marsden's assertions. Certainly its inquiries as reported herein have not suggested any such concerted or biased mode of operation so as to necessitate such a step. Rather, the Commission has undertaken a more limited review in relation to the following to determine whether there was any weight accorded to the information provided which might at least establish a foundation to infer an improper investigative approach.
- 4.248 In the Commission's opinion, there is no support whatsoever for the complaint that Strike Force Cori placed too much faith or reliance in allegations made by CD2. As with the allegations put forward by Arena, it would appear that the approach taken by Strike Force Cori and Mr Woodhouse in particular was entirely professional. Assessments of intelligence appear to have been conducted in a dispassionate and objective manner. Appropriate steps appear to have been taken to advance the assessment and investigation of information provided by CD2 without any form of excessiveness, bias or predisposition on the part of investigators.

Deirdre Grusovin

- 4.249 Ms Grusovin facilitated the provision of information to Strike Force Cori by Ilan. Strike Force Cori running sheets indicate that Ms Grusovin was further involved in the provision of information to the Strike Force.
- 4.250 The Commission does not discern any bias whatsoever on the part of Mr Woodhouse or other Strike Force Cori police in the assessment or handling of allegations emanating from Ms Grusovin. To the extent that a complaint is made to the contrary by Mr Marsden, it is without proper foundation.

Assessments***Credibility of witnesses – "prison informers"***

- 4.251 Most if not all of the complainants against Mr Marsden were either prisoners or former prisoners, or had criminal records. That fact, of and by itself, could not be enough for the investigating police to dismiss allegations out of hand and take inquiries no further. Even the most notorious person can be a victim of crime and the role of the police in an ordered society is to investigate alleged crime regardless of the social stature of the complainant. Moreover, in circumstances

where the offences allegedly occurred at a stage of complainants' lives when, as young teenage males, many were prostituting themselves on the streets and using drugs, that they were to have fallen foul of the criminal justice system in their later adult lives could hardly be surprising.

- 4.252 Nevertheless, the criminal antecedents of the complainants, including their present or past incarceration, was a factor to be taken into account by the investigating police in assessing their allegations and making further inquiries. Naturally that involved the exercise of discretion and good judgment in seeking appropriate corroboration of allegations, where corroboration was reasonably open to be obtained.
- 4.253 It was, however, suggested by Mr Marsden that not only should Strike Force police have exercised a greater degree of caution in proceeding given the earlier Inkster investigations, it was in fact dangerous for the police to have even acted on information received in some cases without some other evidence.¹⁴³
- 4.254 The Commission cannot accept the validity of such a suggestion in the area of a criminal investigation. The purpose of an investigation is, after all, to discover relevant evidence, and that will often involve acting upon an allegation in the sense that further inquiries are undertaken. An investigation can take many turns, as leads are uncovered and pursued. In some cases, a once promising lead might be dismissed after further inquiries. But if the police could be said to be behaving improperly by acting upon any particular allegation or following any particular lead, it is easy to understand how they could become hamstrung. That a person may provide information which should be viewed with some caution given its provenance does not preclude police from reasonably and rightly concluding that it might be capable of advancing their inquiries, and acting accordingly.
- 4.255 Accordingly, the Commission cannot accept that the investigative discretions of police are so narrowly confined as Mr Marsden suggests. Moreover, no real question of danger arises where police receive a complaint, make further inquiries in the exercise of their discretion, and ultimately seek the advice of the DPP as to whether any criminality is revealed or whether any further inquiries should be undertaken.
- 4.256 In Chapter 2 of this Report the Commission touched upon Mr Marsden's characterisation of various complainants against him as "prison informers", by virtue of the mere fact they were imprisoned at the time of making statements to the police. The Commission indicated its view that a person's status as a prisoner when making a complaint as a victim of alleged criminal conduct does not properly attract to them the mantle of "prison informer".
- 4.257 Whether or not it is proper for relevant complainants to be characterised as prison informers, it would be an error to consider police to be bound in the exercise of their investigative discretions by rules applicable to the treatment of evidence by prison informers at the criminal trial stage, whether derived from

¹⁴³ Barcode 5878422.

the common law principles of *Pollitt*¹⁴⁴ or s 165 of the *Evidence Act 1995*.¹⁴⁵ Moreover, those principles do not postulate that the evidence of prison informers is inadmissible or not to be believed, but rather acceptance of its reliability is to be approached with caution.

- 4.258 Stripped back to its bare essence, the duty of investigating police is to investigate alleged crime and present prima facie cases to the courts. The courts then determine matters of guilt or otherwise according to principles and discretions applicable to the reception or rejection of the evidence, and the weight to be attributed to particular forms of evidence as a mode of proof. It is easy to see how the imposition of principles applicable at the curial stage, essentially as rules to be followed in a police investigation, could in many instances have severe consequences for the effectiveness of police inquiries and ultimately the public interest. In many respects, police would not merely be investigators, but purportedly judge and jury as well, in determining whether matters should proceed to the courts.
- 4.259 The Commission similarly rejects the proposition that “[t]he length of time since the allegation and the difficulties surrounding proof in such circumstances”¹⁴⁶ or delay in complaint acts as some bar to inquiries that might reasonably be undertaken by police.
- 4.260 The authority advanced by Mr Marsden in support of this proposition – *R v Littler*¹⁴⁷ – is concerned with the prejudice inherent at the trial stage where an accused person is forced to stand trial on charges of some antiquity, and the police have not made reasonable inquiries to turn up potential witnesses and to obtain corroboration one way or another. In that kind of circumstance, an accused will merely be faced with an uncorroborated allegation by the complainant, and have little ability to locate and call rebuttal witnesses in their own right.
- 4.261 This was far from the situation in relation to Mr Marsden. Not only were no charges laid, what the police were doing in the investigation was attempting to establish whether allegations were in fact true and could be corroborated, locate and interview potential witnesses, and ultimately determine whether any prosecutions or further investigations might be warranted. That was precisely the kind of reasonably thorough approach the court considered not to have occurred on the facts in *Littler*. In the case of Mr Marsden it must also be noted that, while some allegations went back to the 1980s, there was no apparent lack of witnesses to relevant events one way or another, nor could it be reasonably suggested that he was unable to meet the allegations head on.

¹⁴⁴ *Pollitt v The Queen* (1992) 174 CLR 558.

¹⁴⁵ The section requires the giving of a warning to a jury in relation to certain classes of unreliable evidence, including in criminal proceedings that of a witness who is a prison informer: s 165(1)(e) *Evidence Act 1995*.

¹⁴⁶ Barcode 59210934, 592111-2.

¹⁴⁷ [2001] NSWCCA 173.

Corroboration

- 4.262 The essence of the various complaints was that had Mr Woodhouse conducted a more thorough investigation, it is likely he would have formed an opinion that there was insufficient evidence to warrant a brief of evidence being furnished to the DPP. The fact that the brief was submitted before these lines of inquiry were followed through necessarily meant, according to Mr Marsden, that the brief was deficient.
- 4.263 The intention of Mr Woodhouse to have Mr Marsden charged was also evidenced, according to Mr Marsden, by the attempt by Mr Woodhouse to stay his defamation proceedings against Channel Seven.¹⁴⁸ According to Mr Marsden, further evidence of the desire on the part of the Mr Woodhouse that Mr Marsden be charged and prosecuted, lack of evidence to the contrary notwithstanding, was evident in his decision not to resist a subpoena for production issued in the defamation proceedings on 18 January 1999 at the request of Channel Seven.¹⁴⁹ Lawyers for Mr Marsden went so far as to suggest that the decision by Mr Woodhouse to provide an affidavit to Channel Seven in relation to the circumstances surrounding the decision by NSW Police not to resist that subpoena, evidenced that Mr Woodhouse was “in league with Channel Seven”.¹⁵⁰
- 4.264 Ultimately, the question is whether Mr Woodhouse was obliged to make further inquiries on the basis of information supplied by Mr Marsden’s legal representatives. Mr Woodhouse has asserted this was unnecessary in the circumstances. The information made available by Lee, Mr Marsden’s legal representative, was included in the brief. What was requested from the DPP was a preliminary advising as to the sufficiency of evidence. Mr Woodhouse did not rule out the possibility that further enquiries might be required, but preferred in the circumstances to obtain DPP advice before taking further steps.
- 4.265 In relation to the balance of the possible inquiries, it would appear that police were not impeded from pursuing appropriate inquiries. Mr Woodhouse did not pursue these lines of inquiry for the following reasons:
- It was considered adequate that the brief advert to information obtained from Mr Marsden and Corrs Chambers Westgarth in circumstances where he was confident that the relevant source material was going to be supplied directly to the DPP by Mr Marsden’s legal representatives.
 - He had not charged, and did not intend to charge, Mr Marsden. Whether Mr Marsden was going to be prosecuted was a matter for the DPP.
 - The brief sought advice as to the sufficiency of evidence. It did not recommend that Mr Marsden be charged for any specific offences. Mr Woodhouse accepted that further inquiries might be necessary subject to advice and requisitions from the DPP.

¹⁴⁸ Interview with J R Marsden, 14 January 2003.

¹⁴⁹ As to which, see [4.379] below.

¹⁵⁰ Interview with M Lee, 30 January 2003.

- 4.266 The Commission does not doubt that it is incumbent upon investigating police to pursue reasonable lines of inquiry to shed light on the relevant circumstances before any decision is made to prefer any charges and regardless of whether the likely information might be inculpatory or exculpatory. Prior to submission of the brief, Mr Woodhouse was presented by Mr Marsden with a number of potentially exculpatory lines of inquiry during his inspection of files made available by his lawyers.
- 4.267 Not all of these lines of inquiry were capable of being pursued by Mr Woodhouse, at least at the time the brief was submitted. In particular, the Commission is not satisfied that police were able to obtain records of DOCS in relation to Michael. It would appear that this document had been subpoenaed by legal representatives acting for Mr Marsden. Further, the Commission is not satisfied that police could have made further inquiries of John Y as to a more precise description of the chauffeur. This is because Mr Woodhouse had given an undertaking to Lee, as part of a condition of obtaining access to documents held by Corrs Chambers Westgarth, that he would not seek to re-interview any of the alleged victims just prior to submission of the brief.¹⁵¹ That undertaking was given in circumstances where Mr Woodhouse had presently concluded his inquiries, was on the point of referring matters to the DPP, and did not intend any further interviews pending advice from the DPP. His assurance to Mr Marsden's solicitors did not, to his mind, preclude further inquiry should the DPP so recommend. But it was anticipated that such documents as he inspected which might give rise to further inquiries would be submitted to the DPP in any event, although this did not occur until the evidentiary phase of the defamation proceedings was concluded almost two years later.
- 4.268 In order to provide some additional context for the decision to refer for advice, it is useful to again note that from 29 September 1998, Mr Marsden's legal representatives were advocating to the Commissioner of Police that "the appropriate course would be for the Police to refer the matter to the DPP for advice as to whether any action should be commenced" following any interview with Mr Marsden.¹⁵²
- 4.269 Two factors figure largely in the Commission's assessment of the standard of police conduct displayed during the Strike Force Cori investigation:
- That the purpose of submitting the brief was to seek advice in relation to allegations where there were many areas of conflicting and uncertain evidence, so as to inform their decision not only as to the prospect of any prosecution, but also whether to proceed at all with further investigation; and
 - The certainty in Mr Woodhouse's mind that representations based on evidence gathered by and on behalf of Mr Marsden would be submitted directly to the DPP.
- 4.270 The Commission accepts that the decision he made not to pursue these lines of inquiry before submitting the brief, was a reasonable decision made in good

¹⁵¹ Barcode 6271699.

¹⁵² Barcode 6326487.

faith. This is particularly so having regard to the requests made on Mr Marsden's behalf by his legal representatives for the brief to be submitted to the DPP.

- 4.271 Furthermore, the Commission accepts that Mr Woodhouse was placed into a position where he had no choice but to rely on Mr Marsden and his legal representatives furnishing material directly to the DPP where Mr Woodhouse had himself been denied photocopy access to this material.
- 4.272 In the Commission's opinion, there was no attempt whatsoever on the part of Mr Woodhouse or any other member of Strike Force Cori to have Mr Marsden prosecuted "come hell or high water". Nor was there any attempt by Mr Woodhouse or other members of Strike Force Cori to mislead the DPP by furnishing a brief that was less than complete. Mr Woodhouse submitted all information available to him that he considered was of relevance to an independent determination being made as to whether there was sufficient evidence for any charges to be preferred against Mr Marsden or to warrant further inquiry. This included notes of information as to the further lines of inquiry obtained from Mr Woodhouse's inspection of files made available by Mr Marsden's lawyers.
- 4.273 In the light of all relevant circumstances, the Commission is not persuaded that the decision not to pursue the further inquiries was unreasonable or affected by malice. This is especially so given attention was drawn to the particular issues in the brief itself, and the legitimacy of Mr Woodhouse's belief that relevant source documents would be provided directly to the DPP by lawyers acting on Mr Marsden's behalf, as indeed happened.

ALLEGED IMPROPER ATTEMPTS TO OBTAIN EVIDENCE

"Shane Y"

- 4.274 On 1 June 1998, Mr Marsden made a statutory declaration in which he asserted, inter alia, that he had been informed by SC that Shane Y had told her that "the Police were trying to get [Shane Y] to use [Marsden's] name in allegations concerning a Mr [B]".¹⁵³
- 4.275 Police subsequently commenced an internal investigation into Mr Marsden's allegation that CPEA¹⁵⁴ investigators involved in the investigation of paedophilia allegations against B had placed undue influence on Shane Y to nominate Mr Marsden as a perpetrator of assaults on Shane Y. Both Shane Y and SC were interviewed, and written reports were obtained from the involved CPEA investigators.
- 4.276 The following findings in relation to the internal investigation were made:¹⁵⁵

The information disclosed in this inquiry does not disclose any oppressive behaviour by the Police from the Child Protection Agency towards [Shane Y] to include the

¹⁵³ Barcode 5356579.

¹⁵⁴ Child Protection Enforcement Agency.

¹⁵⁵ Barcode 5370266.

complainant in the investigation of complaints made by [Shane Y]. *By his own admissions [Shane Y] admits that he was the one that nominated Mr Marsden which appears to be in direct opposition to the information relayed to [SC] by [Shane Y]. [emphasis added]*

- 4.277 On this basis, it was concluded that “investigators from the Child Protection Enforcement Agency acted ethically and followed correct procedures in their investigations involving [Shane Y]”, and no further action recommended.
- 4.278 Following an invitation by the Ombudsman to comment on the internal investigation, Mr Marsden took issue with the process adopted. The Ombudsman then sought the Commission’s advice as to whether it might be preferable for Commission to consider the question of possible improper or inappropriate conduct by police involved in the Shane Y matter.
- 4.279 The Commission subsequently undertook an assessment of the matter. The then Assistant Commissioner Sage later wrote that he was “satisfied that the investigation into Mr Marsden’s complaint has been carried out in a thorough and proper manner and the conclusion arrived at is amply justified by the material in the report.” Mr Sage also stated:¹⁵⁶

... To the extent that there are any shortcomings in the manner of the investigation, most notably the method of interviewing [SC] and [Shane Y] as opposed to that of Senior Constables Hill and Blackmore [who were required to complete reports without being subject to questioning], I am not of the view that this casts doubt on the soundness of the final conclusion.

Further there is nothing raised in response to the investigation and report by Mr Marsden that in my view in any way calls into question the finding made ... in relation to the central complaint.

- 4.280 The Assistant Commissioner observed that the central plank of the investigation remained that of Shane Y’s own interview. Whilst not suggesting SC had done otherwise than relay a full and truthful account, it did not necessarily follow that what Shane Y said to her was to be accepted as truthful. In particular, it was said:

... I cannot agree with the submission that “at the end of the day, throughout his record of interview” [Shane Y] says that the police wanted him to say “John Marsden” and that the police wanted John Marsden’s name. There is no doubt that [Shane Y] gives conflicting responses on the central question of who was responsible for the inclusion of Mr Marsden’s name in the statement.

- 4.281 As regards the “harassment” allegation, the Assistant Commissioner concluded that “there is nothing arising from either matter or when looked at together that would justify a conclusion of overall police harassment of Mr Marsden.” The two matters were the Shane Y and Jason Y complaints. The Assistant Commissioner reasoned as follows:

In both instances the available material suggests Mr Marsden’s name was mentioned in the context of allegations of criminal offences by each of the respective complainants themselves ... independent of any prompting, intimidation, pressure or the like from the investigating police concerned. Having said that it would be naive and indeed incorrect to suggest that the police were not in any way interested in Mr Marsden as a possible subject of their investigations. Clearly they were and I do

¹⁵⁶ Barcode 5423497.

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not think they would suggest otherwise. However it does not follow from this concession that any such investigation amounts to harassment of Mr Marsden at least to the extent that that involves police intimidating [Shane Y] or bribing [Jason Y] witnesses to adversely name Mr Marsden.

Whatever subtle nuances if any, may have been (incorrectly) suggested, inferred or understood during the interview process between the police and complainants concerned, on the material available in these two instances, there is not in my view any pattern or methodology exposed that in any way may be seen as a campaign of harassment by police against Mr Marsden in the investigation of the allegations concerned. Indeed, there is in fact material that suggests to the contrary.

4.282 In the circumstances, the Commission is not satisfied that police attempted to place any pressure on Shane Y to make allegations against Mr Marsden. Nor is the Commission satisfied that police failed to have proper regard to factors that might have affected the reliability of Shane Y's allegations.

"Sean Y"

4.283 In relation to Sean Y, Mr Marsden alleged that a promise had been made to assist in more suitable gaol accommodation for Sean Y, the inference being this was in some way an inducement to falsely accuse Mr Marsden.

4.284 It was said in the judgment of the defamation proceedings:¹⁵⁷

2678 [Sean Y] then was cross-examined as to his "informing". He saw Superintendent Woodhouse on four occasions, was visited by members of the NSW Crime Commission and the Police Service on several occasions and agreed that he, as a prisoner, would get some advantage by informing on other people. [footnote omitted]

4.285 In his conclusions about the evidence given by Sean Y, Levine J stated:

2830 [Sean Y] is an informer. During the period 20 April 1998 to 17 September 1998 alone, [Sean Y] was in custody and was visited by members of the NSW police service or representatives of the NSW Crime Commission no less than 6 times for the purpose of informing. He has informed on other prisoners to jail authorities and is an informer for the NSW Crime Commission, believing all the time that being an informer whilst being a prisoner would gain him some advantage.

2831 [Sean Y] told the Court that when Superintendent Woodhouse came to see him in prison in early 1998 Woodhouse made no mention of Mr Marsden. [Sean Y] said that he saw that "an opportunity" had arisen and made a statement containing allegations of sexual misconduct against Mr Marsden. He said that "Mr Woodhouse made it clear to me that there could be arrangements made whereas I could be placed in a more suitable environment". Those arrangements were made. [Sean Y] was transferred to another prison and over a period of time he came to be on first name terms with Superintendent Woodhouse. He was not "backward" in asking Woodhouse for assistance (see Exhibit CD).

2832 In light of [Sean Y]'s status as an informer, his evidence should be treated with added caution.

4.286 Sean Y came to the attention of Strike Force Cori when police were looking for a potential victim of Mr Marsden, identified to them by a first name only. It was thought it might be Sean Y based on his criminal antecedents and description. While Sean Y was not the person police were searching for, in the course of

¹⁵⁷ *Marsden v Amalgamated Television Services Pty Limited* [2001], supra, at [2678].

their interview with him Sean Y volunteered, seemingly “out of the blue” and striking police as pure coincidence, that he had also been a victim of Mr Marsden when 15 years of age.

- 4.287 Sean Y also expressed concerns about his safety in Goulburn gaol. In relation to a later visit to secure a statement, Mr Woodhouse recorded Sean Y’s continuing concerns as to his safety in Goulburn, the prison being described by Sean Y as extremely violent, and his fear that he could be at risk if it was suspected he was cooperating with police in respect of their inquiries. Mr Woodhouse advised Sean Y that while he would discuss a change of prisons with prison staff to ensure he was not put at increased risk by his assistance, a change would be difficult given his security classification following an earlier escape. In particular, Mr Woodhouse recorded that he gave Sean Y no assurances as to a transfer.
- 4.288 Undoubtedly, Mr Woodhouse made representations to prison authorities regarding Sean Y’s security concerns while he was at Goulburn Gaol. It also seems clear that the subsequent transfer of Sean Y to Berrima Correctional Centre was influenced, at least in part, by these representations. It is also undoubted that Mr Woodhouse had no part in the later transfer of Sean Y from Berrima to Junee Correctional Centre.
- 4.289 In the Commission’s view, there appears to be no basis for criticism of Mr Woodhouse in relation to the representations he made to have Sean Y transferred away from Goulburn Gaol. The suggestion by Mr Marsden (if that is what it is) that Mr Woodhouse improperly induced Sean Y to make allegations against Mr Marsden by holding out the promise of better gaol accommodation, is without basis.
- 4.290 Sean Y was, as Levine J was to later conclude in his judgment upon the defamation proceedings, an opportunist and “a liar and a fabricator”.¹⁵⁸ Although these conclusions appear to have been in reference to Sean Y’s credibility as an accuser against Mr Marsden, the witness’s history as an informer to the police and NSW Crime Commission appears to have added to his Honour’s unfavourable view of the reliability of his evidence.¹⁵⁹
- 4.291 In the Commission’s view, the mere fact a person has acted as an informer to police does not automatically place a black mark against his or her reliability. Nor, per se, would an expectation by the informer that a benefit may be derived from providing assistance to the authorities. Caution is of course required to be exercised in relation to their information, in the light of that possibility and other attendant circumstances. But, as elsewhere mentioned in this Report, the very valuable role played by informers in the investigation of crime is recognised by high public principle.

¹⁵⁸ *Marsden v Amalgamated Television Services Pty Limited* [2001], supra, at [2891].

¹⁵⁹ His Honour, however, rejected the submission on Mr Marsden’s behalf that Sean Y’s status as a prisoner made him a “prison informer” in relation to his evidence of sexual conduct with Mr Marsden. See [2835] of the judgment.

- 4.292 What will undoubtedly prove damaging to an informer's credibility is the eventuality that information provided proves to have been deliberately false or misleading. It is not apparent whether, in the contest between private interests before him, Levine J received evidence as to the veracity of information provided by Sean Y in his capacity as an informer to the police and the Crime Commission. Even if the admission of such evidence within the narrow compass of the civil litigation would have been possible, it is doubtful that the parties would have had the capacity to put that evidence before the court.
- 4.293 But to bring an overall perspective to this discussion, it must not be forgotten that Levine J was not casting judgment upon criminal charges brought by the police on the strength of Sean Y's allegations. No charges ensued from the police treatment of such allegations. What the investigating police did was to refer the allegations, together with a range of others, in a brief for advice to the DPP.
- 4.294 In the Commission's view, it would not be appropriate to reason from Levine J's later assessment of Sean Y's credibility that Mr Woodhouse, in receiving the allegation and considering aspects of its reliability before referring the matter to the DPP for advice, acted improperly or with ulterior motives.

"Richard"

- 4.295 In relation to a statutory declaration made by Richard on 18 May 1999, it was complained by Mr Marsden that police interviewed him knowing he had been to the hotel where he had presumably been drinking, and also supplied him with lunch, and alcohol during and after the interview. That, so it appears suggested, was an improper inducement to Richard; further, that it was improper in any event for police to have been supplying alcohol to a witness. A later declaration made by Richard, subscribed and declared before a partner of Mr Marsden, adds allegations that Mr Woodhouse pressured and coerced Richard to speak against Mr Marsden, and gave him money. Richard was a potential corroboration witness in respect of Paul although only to the extent that Paul had told him that he had a relationship with Mr Marsden.
- 4.296 Mr Woodhouse recorded that Richard seemed worried about his pending interview with police, because he had left a telephone message beforehand while in an intoxicated state. Of the interview, Mr Woodhouse noted that Richard was fearful of Mr Marsden and the consequences of giving evidence against him, and it took some time to gain his confidence.¹⁶⁰ While a statement was obtained, Mr Woodhouse nonetheless held substantial doubts as to his value as a witness, and considered he would be simply too unreliable to call as a witness.
- 4.297 While not able to be confirmed on the documents available to the Commission, it is certainly possible that Mr Woodhouse gave Richard money as a form of sustenance payment to purchase lunch. Given the time of day, this would not have been an unreasonable thing to do, nor on its face improper. It also seems likely Richard was affected by alcohol at the time of the interview. However the

¹⁶⁰ Barcodes 6088609-10.

Commission cannot be satisfied that Mr Woodhouse provided any money to Richard for the purpose of Richard purchasing alcohol, or as an inducement. Acceptance of that allegation would rely upon the uncorroborated account of Richard of the events of that day, and in relation to which he has no recollection.¹⁶¹

“Ilan”

- 4.298 It would appear that Ilan came to the notice of Strike Force Cori as a result of a proposal that the Royal Commission disseminate to the police information provided by Ilan. Mr Marsden was then acting for Ilan in relation to whether he consented to the dissemination of the Royal Commission’s holdings. His consent was ultimately not forthcoming.¹⁶²
- 4.299 No statement by Ilan was included within the brief and Ilan was not among the alleged victims of Mr Marsden on whom the brief focussed. It would therefore appear that Mr Woodhouse had determined there was insufficient evidence to warrant a request for advice in relation to Ilan’s allegations. At the time that the brief was submitted, Ilan had a number of convictions for dishonesty, drug offences and solicitation offences.
- 4.300 The issues raised by Mr Marsden’s complaint are twofold:
- That Mr Woodhouse improperly pressured Ilan to make allegations against Mr Marsden, among others; and
 - As a result of this improper pressure or the inducement in return for his assistance, the information provided by Ilan should necessarily be regarded as unreliable.
- 4.301 The alleged “assistance” also involved Ilan speaking with Robert allegedly another under-age victim of Mr Marsden, in order to encourage him to cooperate with police. It seems that police facilitated this by informing Ilan of the prison in which Robert was then located.
- 4.302 Judging by the contents of the Strike Force Cori running sheets, it is clear that Mr Woodhouse did not encourage or pressure Ilan to assist police by contacting Robert. Rather, Ilan took on this role of his own volition. Mr Woodhouse determined that no incentives or rewards were to be held out or offered to Ilan. He took care to document this determination.
- 4.303 There is no evidence that Ilan was improperly pressured by Mr Woodhouse to become a participant in his inquiries in relation to Mr Marsden apart from the assertions of Mr Marsden. While it is clear there were matters involving persons other than Mr Marsden about which Ilan did not wish to provide a statement, Mr Marsden’s declaration in relation to the provision of information about himself is non-specific. A statutory declaration by Ilan himself, made on 20 January 2000 and witnessed by a solicitor from Phillips Fox Lawyers, is silent

¹⁶¹ Nor, would it seem, does he recall anything of the making of the statutory declarations adverse to Mr Woodhouse: interview with Commission Officers, 2 October 2003.

¹⁶² *Strike Force Cori Final Report*.

on the question as to whether the approaches by Mr Woodhouse could have been construed as improper or over-zealous.

4.304 The Commission accepts the contents of the Strike Force Cori running sheet and is satisfied that no further inquiries in relation to this complaint are warranted. While Mr Marsden questioned the propriety of police asking for, or at least accepting the assistance of Ian, if indeed that occurred, such strategies are not, however, uncommon in criminal investigations nor prima facie improper, although there are undoubtedly risks of which police must be aware and guard against.

“Ian”

4.305 Among the persons who appeared in the *Witness* program screened on 7 May 1996 was Ian. Ian, under the pseudonym, “Steve”, stated that he observed Mr Marsden attend Costello’s “to pick up boys”.

4.306 In his *Supplementary Final Report* on the special investigation that followed the *Witness* broadcast, Inkster referred to a statutory declaration made by Ian on 11 April 1996 which stated that Mr Marsden was “a regular frequenter of the Castello [sic] Night Club and ... a person who used the club for the purpose of unlawful sexual intercourse with under aged male prostitutes.” The statutory declaration “outline[d] [Ian’s] experiences whilst working as a male prostitute out of the Costello Night Club.” According to a transcript of a tape-recorded interview with Graham David which formed part of the statutory declaration, Ian had not had sex with Mr Marsden.

4.307 On 8 February 1997, Ian was interviewed by police as part of the Inkster special investigation. Then aged 39, Ian asserted that he had sex with Mr Marsden on one occasion when he was “14, 14 and a half, I think” in contradiction of his earlier declaration. The incident allegedly occurred at Mr Marsden’s house. Ian denied having ever had sex with Mr Marsden at Costello’s.

4.308 Ian was not called to give evidence in the defamation proceedings. Moreover, Ian was not among the victims that formed the basis of the brief prepared by Strike Force Cori. Nor, in fact, does either the statutory declaration made by Ian on 11 April 1996 or the record of interview held on 8 February 1997 appear in the brief. As well, Strike Force Cori running sheets do not contain any mention of Ian. It seems clear that Ian was not the subject of inquiries by Mr Woodhouse in particular or Strike Force Cori more generally.

4.309 The complaint concerning Ian appears to be twofold. First, it was suggested that police improperly attempted to induce Ian to make allegations against Mr Marsden by suggesting that victims compensation may be available. Secondly, it was suggested that police harassed Mr Marsden in that they carried on a baseless investigation of his allegations.

4.310 Contrary to Mr Marsden’s assertion, inquiries by the Commission indicate Ian made no victim’s compensation claim in respect of alleged unlawful under-aged sex with Mr Marsden. Ian had, however, made a claim in relation to another matter in 1993. It is unlikely then that police induced Ian to make allegations

with the prospect of a victims compensation claim given Ian was already at least generally aware of his rights in this regard. Further, the lack of any relevant compensation claim by Ian removes the foundation for Mr Marsden's assertion that Ian's allegations were motivated by the prospect of gain. In the circumstances, it is not considered necessary to further pursue this particular allegation.

- 4.311 Finally, the interview of Ian conducted on 8 February 1997 formed part of the investigation by Inkster, not Mr Woodhouse. It appears to have been the first occasion on which Ian was formally interviewed by police as part of the special investigation following the *Witness* broadcast, in which Ian appeared. There was good reason why the interview should have taken place. There being no evidence of Strike Force Cori having further pursued the allegation by Ian, there would also appear to be no basis for the suggestion by Mr Marsden that he was subjected to an investigation without a proper foundation in this respect.

“Jason Y”

- 4.312 Mr Marsden raised the issue of improper behaviour by CPEA police in relation to an interview with Jason Y, during which Jason Y made allegations implicating Mr Marsden in sexual misconduct. It was alleged that Detective Sergeant Panich, on one prison visit to Jason Y, gave him money in the amount of \$50.00 on three occasions,¹⁶³ twice secreting the money inside a packet of cigarettes, as an inducement to Jason Y to provide or manufacture false evidence against Mr Marsden. An accompanying statutory declaration by Jason Y dated 15 September 1998 also asserted that Jason Y had never met Mr Marsden, and that his earlier statement to Panich was a lie.
- 4.313 It is not entirely clear how Jason Y's statutory declaration came about and the circumstances remain somewhat grey. What is apparent is that Jason Y's statutory declaration found its way to Mr Marsden soon after it was made. According to Mr Marsden himself,¹⁶⁴ he then asked a barrister to visit Jason Y in prison to discuss the declaration. That visit occurred on 24 September 1998, when Jason Y signed an authority for the barrister to report back to Mr Marsden on their discussions and for Mr Marsden to provide a copy of the report to “whomever he sees fit”.¹⁶⁵ He also signed a note indicating that he did not wish to be interviewed by police “unless my lawyer is present”.¹⁶⁶
- 4.314 The police report on the internal investigation of Mr Marsden's allegations against Detective Sergeant Panich notes that during an initial police interview, at which Jason Y was represented by the barrister, Jason Y indicated that he had given his declaration to the barrister. At the barrister's request, the interview was suspended so that he could have a confidential conversation with Jason Y, after

¹⁶³ In relation to the first occasion only, the amount was reported as between \$35 and \$50: issues as identified by G Richmond, Office of Internal Affairs.

¹⁶⁴ Barcode 5394422.

¹⁶⁵ Barcode 5715886.

¹⁶⁶ Barcode 5715880.

which Jason Y said that he had not given the declaration to the barrister, but to a third person who he refused to name.¹⁶⁷

- 4.315 While readily conceding him to be a friend, Mr Marsden advised that the barrister was acting independently.¹⁶⁸ Objectively, however, that view is open to question. In the Commission's experience it is unusual for a complainant or witness in a police investigation under no jeopardy of charges themselves to have legal representation. It is more unusual for legal representation to be facilitated by the person the subject of their allegations. That said, whatever might have been the situation there is no property in a witness and, in the absence of any evidence to the contrary, nothing improper was involved on Mr Marsden's part in the barrister's approach to Jason Y.
- 4.316 The internal police investigation concluded that none of the issues could be proven, but found, as a result of admissions made by Panich, that Panich gave Jason Y the sum of \$15 while at Kirkconnell on 5 June 1998. Panich made the payment to enable Jason Y to repay a tobacco debt, reportedly doing so "as an act of kindness" and that "Jason" was not expected to do anything in return". Panich stated that he was unaware that it was an offence to convey money to a prisoner. The investigation report further stated that while Jason Y was deliberately untruthful, it was highly likely that the information was given freely.
- 4.317 The Commission monitored the internal investigation, and was satisfied it was carried out in a thorough and appropriate manner and that the findings were supported by the material in the report. It is not correct, contrary to the assertion by Mr Marsden that the Ombudsman and the Commission "found nothing wrong". Something wrong was found, which came to light by virtue of Detective Sergeant Panich's frank admission that he had given a small sum of money to Jason Y. In the circumstances the Commission considered the action proposed to be taken against Detective Sergeant Panich – managerial counselling – appropriate. Against the submissions of Mr Marsden, both the Commission and the Ombudsman considered that Detective Sergeant Panich's conduct was not such as to require his removal from investigations concerning Mr Marsden.¹⁶⁹
- 4.318 Unsatisfied with the Commission's assessments of the police investigation, Mr Marsden complained of impropriety against the Commission to the Inspector of the Police Integrity Commission, who conducted a preliminary investigation into the matter. On 14 November 2000 the then Inspector, the Hon M D Finlay QC, published a report whereby he accepted that the Commission's assessments of relevant issues concerning the police investigation were reasonably open, and dismissed Mr Marsden's complaint.¹⁷⁰
- 4.319 While Jason Y was not among the alleged victims of Mr Marsden whose allegations formed part of the substantive brief, his statements making allegations against Mr Marsden were evidently included because they were thought to be relevant. This was entirely appropriate.

¹⁶⁷ Barcode 5715867.

¹⁶⁸ Barcode 5878425.

¹⁶⁹ Barcode 5559970.

¹⁷⁰ Barcodes 5727885-96.

- 4.320 Were it the case that Mr Woodhouse had possession of a copy of Jason Y's later statutory declaration recanting the contents of the statements to police, depending upon Mr Woodhouse's reasonable judgment, it would have been appropriate either for this document to also have been included, or for the earlier statements by Jason Y to be withdrawn entirely. Strike Force Cori running sheets however reveal no evidence to indicate Mr Woodhouse or Strike Force Cori had been provided with a copy of the statutory declaration by Jason Y recanting his allegations. There are no observations on the brief which throw any further light on whether Mr Woodhouse did or did not have possession of a copy of that statutory declaration at the time the brief was submitted.
- 4.321 The running sheets do, nevertheless, evidence that Mr Woodhouse was aware of the existence of the statutory declaration and the general nature of its contents prior to the brief being submitted. He had visited Jason Y in gaol in the weeks before submission of the brief, during which visit Jason Y had spoken of attempts to persuade him not to give evidence for Channel Seven in the defamation proceedings, and of threats against him he believed to be orchestrated on Mr Marsden's behalf. Mr Woodhouse had also requested a copy of the statutory declaration in the same month the brief was submitted, although there is no indication that he received it.
- 4.322 The Commission is not satisfied that Mr Woodhouse was able to obtain a copy of the statutory declaration by Jason Y recanting his allegations against Mr Marsden before submission of the brief. While ideally it might have been preferable had the brief made mention of the statutory declaration, balanced against this was Mr Woodhouse's anticipation that the declaration and other materials in the possession of Mr Marsden's lawyers would be submitted directly to the DPP, with accompanying submissions.

"John X"

- 4.323 Mr Marsden asserted that John X had claimed that police had told him he would stand to receive a significant sum by way of a victim's compensation claim. A similar allegation was that police had circulated a questionnaire through Goulburn and Berrima gaols in an apparent attempt to induce prisoners to make complaint. Little information was forthcoming to substantiate the existence of such a questionnaire, or support any link between it and the John X allegations, the source apparently being Mr Marsden himself.¹⁷¹ Further, the Commission is not satisfied on the information before it that police involved in Inkster's investigation, nor Strike Force Cori police, offered any such inducements to potential complainants.

¹⁷¹ Barcode 5654612.

“David X”

- 4.324 It was complained that David X “lied to the Police because he felt under pressure” when he had alleged having sex with Mr Marsden some months before he turned 17 years of age.¹⁷²
- 4.325 David X subsequently retracted his original allegations against Mr Marsden by way of a statutory declaration dated 17 May 1998, and in which he denied lying in making his earlier allegations, asserting rather that he had made a legitimate mistake.
- 4.326 If the contents of the statutory declaration are to be accepted, there can be no substance in the allegation that David X was persuaded to make the allegation against Mr Marsden because he was pressured by police. There is no other evidence in support of the complaint against police. Bearing in mind the contents of the statutory declaration, the Commission does not consider it necessary to further pursue this issue.

“Sean X”

- 4.327 By statement dated 30 April 1999, Sean X retracted earlier allegations that he had had sex with Mr Marsden when he (Sean X) was under-age. At the same time, Sean X asserted that Strike Force Cori police had said to him that his “parole would be pulled and other things may happen”, which Sean X states he interpreted to mean false charges would be made against him. According to Sean X, his wife had formed similar impressions about his conversations with police.
- 4.328 The Commission interviewed both Sean X and Mr Woodhouse in relation to the circumstances of the interview and the assertion that police had improperly compelled Sean X to make his original allegations against Mr Marsden. Mr Woodhouse denied that any improper pressure was brought to bear on Sean X by himself or any other police present at the interview.
- 4.329 The account of events given by Sean X during the Commission’s inquiries differed significantly from his statement dated 30 April 1999. In particular, he now denies that police ever said that “if [he] didn’t help them [his] parole would be pulled and other things may happen to [him].” While maintaining his belief that he was being improperly pressured, he admits it to be the product of what he inferred from statements by police during a number of meetings and in particular a meeting between Mr Woodhouse, himself and his wife, rather than any explicit threat.
- 4.330 It is difficult to track with any degree of clarity the occasions on which Sean X met with police and who was present at these meetings. The running sheets do not however record any meeting attended only by Mr Woodhouse, Sean X and his wife, albeit records appear incomplete in this respect. To the best of his recall, Mr Woodhouse’s memory is that he was personally involved in one interview only with Sean X, that being conducted with other officers present.

¹⁷² Barcode 5921105.

- 4.331 To the extent that Sean X may have felt threatened, it was as a result of a perception he had formed. The apparent willingness of Sean X to recant and/or modify his various allegations gives rise to a need for particular care when assessing their reliability.
- 4.332 In the result, the Commission is not satisfied that any improper pressure was brought to bear on Sean X by Mr Woodhouse or other police.

“Paul”

- 4.333 Mr Marsden brought to attention that on Paul’s release from gaol in Junee, officers from Strike Cori picked him up and drove him to his parent’s Sydney home, noting that it had struck Paul’s parents as an extraordinary thing for the police to have done.
- 4.334 It is unclear precisely what is intended by this observation. It may, however, be inferred that Mr Marsden suggests that it evidences improper conduct by police, in that Paul was afforded a benefit in return for making allegations against Mr Marsden.
- 4.335 The running sheets speak for themselves as to the reason why police took the step of collecting Paul from Junee Correctional Centre and conveying him to Sydney. The Commission is not satisfied that it constituted the provision of any sort of improper benefit. Clearly enough, it was a measure taken with a view to ensuring Paul’s safety in circumstances where he was assisting police with their inquiries and had claimed to be the subject of death threats.¹⁷³
- 4.336 There is no evidence that police checked Paul’s claims of such threats with prison officials. But in the Commission’s view it was unnecessary for the police to launch into an investigation into the veracity of Paul’s claims, in preference to simply adopting caution and conveying him to Sydney. In any event, it remains pure speculation on the part of Mr Marsden to suggest that the purpose of Paul being collected and conveyed to Sydney was improper per se, let alone as a basis for inferring some kind of benefit sufficient to induce Paul to make allegations against him. Accordingly, the Commission dismisses any allegation of impropriety in this regard.

ATTEMPT TO STAY DEFAMATION PROCEEDINGS

- 4.337 Mr Marsden places much significance upon the seeking of the Solicitor General’s advice on behalf of Mr Woodhouse as to whether his defamation proceedings could be stayed or adjourned pending the criminal investigation. In Mr Marsden’s view, such an approach by Mr Woodhouse was improper because it showed that Mr Woodhouse wanted criminal charges to proceed before the civil proceedings.
- 4.338 Even if this was the case, the Commission has difficulty discerning what in principle issue of police misconduct might have been involved in a desire by

¹⁷³ Strike Force Cori running sheet, P020299.H dated 2 January 1999.

Mr Woodhouse to obtain advice as to whether civil proceedings could be put on hold pending the hearing of criminal charges. No conduct inimical to the rights of Mr Marsden as a prospective criminal defendant would be apparent from any such circumstances.

- 4.339 To the contrary, if criminal charges against Mr Marsden were in fact contemplated by Mr Woodhouse at the time, it is not difficult to see why it would have been in the interests of Mr Marsden for the criminal matters to be dealt with prior to civil proceedings covering the same subject matter. That course would have been accommodating of Mr Marsden's basic rights as a criminally accused person, in proceedings for which he would have been entitled to exercise, totally without prejudice, his right to silence and not give any evidence at all in answer to the relevant allegations. On the other hand, evidence given by Mr Marsden as the plaintiff in the civil proceedings could have been used against him in any subsequent criminal proceedings, or in further investigations leading to the adduction of evidence against him in those proceedings.
- 4.340 In any event, there is no evidence that as at December 1998 or at any later time, Mr Woodhouse was ready to lay charges against Mr Marsden. In fact, quite the contrary appears to be the case.
- 4.341 What motivated Mr Woodhouse in requesting the Solicitor General's advice was a concern that the defamation proceedings might prejudice any later criminal proceedings against Mr Marsden, if any were to be brought. While not entirely clear, it would appear that this concern lay either in an apprehension that the evidence of key witnesses might be contaminated or, alternatively, that a verdict in the civil proceedings may not necessarily have regard to all available evidence. Also exercising Mr Woodhouse's mind was a concern that publicity generated by the civil proceedings might, for more than one reason, have the effect that no criminal prosecution could ever be proceeded with. This was certainly not an unreasonable concern in the circumstances, and one which, were it the case that Mr Marsden was in fact about to be charged, would seem to render the need for advice all the more reasonable.
- 4.342 It also seems apparent to the Commission that the vigour with which the defamation proceedings were approached by both Mr Marsden and his opponent posed significant difficulties for the police in their investigation. Not only were many demands placed upon Mr Woodhouse and other police to present investigation materials to the court, witnesses who were already inherently open to question on matters of credit and reliability¹⁷⁴ were being approached by the respective parties to support their case in the civil proceedings.
- 4.343 In these circumstances, many statements and versions of events given to the investigating police came to be changed, such that it proved inherently difficult for the investigating police to objectively assess where the true facts on any particular matter might lie.

¹⁷⁴ Most if not all having criminal records and serving or had served gaol terms.

- 4.344 In the Commission's view, Strike Force Cori serves as an example of the dangers potentially posed to the public interest objectives of a criminal investigation by the simultaneous pursuit of private interests by parties to civil proceedings dealing with the same or similar subject matter. That is not to say the parties to the defamation proceedings were acting improperly, or that the law as it presently stands allows civil proceedings to be stayed in the mere anticipation or possibility of criminal charges. It is nonetheless an observation about the context of Strike Force Cori which, to the Commission's mind, bears making.
- 4.345 The Commission is bound to conclude that there is no proper basis to suggest Mr Woodhouse's motivation in seeking the Solicitor General's advice was in any way improper or inappropriate.

ALLEGED IMPROPER DISCLOSURES OF CONFIDENTIAL POLICE INFORMATION

- 4.346 Common to a number of the matters considered in the following section is the allegation that police provided information to or otherwise assisted by providing the names of alleged victims to Channel Seven, the defendant in the defamation proceedings brought by Mr Marsden. The complaint implied an association between police and Channel Seven resulting in police either improperly favouring the defendant or acting so as to disadvantage the plaintiff in those proceedings.

ALLEGED IMPROPER SUPPLY OF DAVID Y'S NAME BY WOODHOUSE TO GREG QUAIL

- 4.347 Mr Marsden asserted David Y admitted that Quail of Channel Seven had said he had been given David Y's name by Mr Woodhouse, and that David Y also stated he would not have made allegations but for the fact he might thereby gain some benefit.¹⁷⁵ The basis for the allegation was a declaration sworn by David Y on 10 March 2001 and filed on behalf of Mr Marsden in the defamation proceedings.¹⁷⁶
- 4.348 Strike Force Cori investigation sheets record that on 2 October 1998 Quail, in the course of assisting in the preparation of the Channel Seven defence to the defamation proceedings, contacted Mr Woodhouse and advised, inter alia, that on the basis of information provided to him by Deirdre Grusovin, he was seeking to contact the brothers David Y and John Y.¹⁷⁷ It is further recorded that Mr Woodhouse then halted the discussion, stating that as police had interviewed the brothers who were then potential police witnesses, no further attempt should be made to contact them, to which Quail agreed.

¹⁷⁵ Barcode 5878413.

¹⁷⁶ It was further alleged by Mr Marsden that David Y was often given money in the amount of \$50 in the form of sustenance payments during the police investigation. See further at [5.14]

¹⁷⁷ Strike Force Cori Running sheet MW021002.H, dated 2 October 1998.

4. CONDUCT OF STRIKE FORCE CORI INVESTIGATIONS

- 4.349 In December 1998, Mr Woodhouse, on being made aware that Quail was again seeking to contact the brothers in support of Channel Seven's defence, wrote to solicitors for Channel Seven to advise that they reconsider their intention to interview the brothers given their status as potential witnesses in a current criminal investigation.¹⁷⁸ He also advised the brothers that the issues the subject of investigation should not be discussed with either party to the defamation proceedings. Mr Woodhouse had also written to Mr Marsden in September 1998, who was then apparently not aware of the police interest in the brothers, to advise Mr Marsden that the brothers were the subject of his investigation.¹⁷⁹
- 4.350 However solicitors for Channel Seven, considering it imperative to contact the brothers in the defence of their client, proceeded to seek interviews with the brothers. As a result, Mr Woodhouse expressed his reservations in an internal memorandum to NSW Police Legal Services as to the course being taken by Channel Seven and the potential that any criminal prosecution would thereby be rendered unviable.
- 4.351 Based on the Commission's acceptance of the investigation running sheets and correspondence referred to, it is not apparent that Mr Woodhouse was disposed towards providing any assistance to Channel Seven. On the contrary, his intention was to ensure that his investigation and any resultant prosecution was not jeopardised by the defamation proceedings.
- 4.352 Mr Marsden's assertion that Mr Woodhouse provided David Y's name to Quail tends to suggest that Mr Woodhouse was attempting to provide positive assistance to Channel Seven in the defamation proceedings brought by Mr Marsden. The material before the Commission leads it to firmly conclude to the contrary.
- 4.353 The issue of contact having been raised by Quail on information sourced otherwise than from police, Mr Woodhouse felt it was necessary to inform Quail that statements had been taken from David Y and John Y. Accordingly it overstates the position to assert Quail "had been given [David Y's] name by the police",¹⁸⁰ for it incorrectly suggests police acquainted Quail with the brothers.
- 4.354 Furthermore, it is apparent that, in supplying the full names of David Y and John Y to Quail, Mr Woodhouse was motivated to ward off Channel Seven and Mr Marsden from attempts to approach these witnesses.
- 4.355 Incidental to the events discussed above is a question regarding the manner in which statements by David Y and John Y, requested by them to assist in interviews in February 1999 with Channel Seven for the purpose of their defence to the defamation, were released.
- 4.356 Mr Woodhouse did so after first obtaining their consent to the release of copies of their statements, a necessary and appropriate step. There was no good reason why Mr Woodhouse should not have acceded to a request on their behalf for the

¹⁷⁸ Barcode 6351205.

¹⁷⁹ Barcode 6331380.

¹⁸⁰ Barcode 5878413.

statements to be supplied so that they might be used as an aide-memoire during interviews arranged by Channel Seven's lawyers in the defamation proceedings. Nevertheless, while Mr Woodhouse reposed a degree of trust in Quail which may not have been unwarranted and the precaution was taken of placing the statements in sealed envelopes on the understanding they be handed to their makers, it may not have been entirely appropriate for the statements to have been passed on through Quail.

ALLEGED IMPROPER REFERRAL BY POLICE OF "SHANE X" TO CHANNEL SEVEN

4.357 In his letter to the Inspector dated 9 July 2001, Mr Marsden wrote that:

... from reading the police running sheets and reading [Shane X]'s evidence that it was the police who referred [Shane X] to Channel Seven and it was the police who assisted [Shane X] to go to Channel Seven and it was the police who encouraged [Shane X] to go to Channel Seven.

4.358 The Commission has reviewed all Strike Force Cori running sheets and the evidence of Shane X in the defamation proceedings. In none of these documents has the Commission been able to discern evidence to the effect that the police referred Shane X to Channel Seven or encouraged him to contact Channel Seven. The Commission is unaware of any other information or evidence in support of the assertion by Mr Marsden that police were instrumental in putting Shane X in touch with Channel Seven.

4.359 In the circumstances, the Commission proposes to take no further action in relation to the suggestion of police misconduct implicit in Mr Marsden's remarks.

DISCLOSURES OF INFORMATION BY FORMER SUPERINTENDENT ROBIN SMALL

4.360 By letter dated 26 October 1998, Mr Marsden informed the Ombudsman that his solicitors acting in the defamation proceedings had received "internal police documents" from solicitors for Channel Seven, which documents were neither in the public domain nor the subject of a subpoena by the defendant's solicitors.

4.361 These documents were the statements of DT, which alleged, inter alia, both use and supply of drugs, and that of SW, which tended to corroborate those allegations, as well as that of Superintendent Small regarding a search warrant executed upon the home of Mr Marsden on 19 May 1994, then a member of the Police Board.

4.362 The suggestion by Mr Marsden was of some collusive or improper relationship between NSW Police and Channel Seven, under which the documents were passed.

4.363 The relevant warrant was granted on the basis of the statements by DT and SW, and further information as requested of police by the issuing justice in the way of corroboration of certain details in those statements. Despite the satisfaction of

the issuing justice as to the sufficiency of grounds to support the warrant, police senior to Small were cautious as to the validity of its grant. The warrant's execution was subsequently delayed pending further advice, despite Small's concern that delay would risk Mr Marsden becoming aware of the intended search.

- 4.364 The warrant was eventually executed some two days after its issue but not before Mr Marsden became aware that allegations had been made by DT, and had been requested by police to make himself available to report to police. The search did not discover any prohibited drugs, although Small was of the opinion that some trace vegetable matter detected in a wall cavity and insufficient for analytical purposes, was likely the residue of cannabis which had been stored there.
- 4.365 Small was later relocated, and came to the view that this was in some way the result of influence wielded by Mr Marsden and other persons on his behalf. Small was given some support in this by Ms Deirdre Grusovin, then a member of Parliament, and eventually provided copies of documents relating to the search to her. When contacted by media for comment, most significantly Quail of Channel Seven who was about to broadcast the *Today Tonight* episode raising allegations against Mr Marsden, Small declined to comment or consent to an interview.
- 4.366 There is no evidence to suggest that Small intended or envisaged, when supplying the documents to Ms Grusovin, that they should eventually be passed to journalists or any other person engaged on behalf of Channel Seven. Small's purpose in providing the documents to Ms Grusovin was to obtain the "real reason" for his forced transfer from King Cross Patrol to Newtown Patrol.
- 4.367 Accordingly, the Commission is not satisfied that Channel Seven's access to the relevant police documents came about as a result of some collusive or improper arrangement by police. While the circumstances that motivated Mr Small's disclosure to Ms Grusovin might have been understandable from his perspective, it nevertheless appears that the disclosure was improper and unauthorised, and was considered to be so by NSW Police.¹⁸¹

ATTENDANCE OF CHANNEL SEVEN REPORTER AT POLICE INTERVIEW

- 4.368 In a Strike Force Cori running sheet created on 17 July 1998, it is suggested that Mr Woodhouse may have allowed a Channel Seven reporter, Quail, to sit in on a police interview with Edward conducted for the purpose of investigating offences allegedly committed by Mr Marsden. While this might be understandable in circumstances where a potential witness or complainant reposed a degree of trust in the journalist and requested his presence during an interview, it becomes less so where the journalist is engaged by the defendant in civil proceedings brought by an alleged perpetrator. Quail was not, however, a

¹⁸¹ Barcodes 5707553, 5707524.

person with no prior involvement, in that it was through him that Edward was introduced to police.

- 4.369 It was not complained that Quail had improperly obtained information for the benefit of Channel Seven during the course of introducing Channel Seven witnesses to the police. The Commission nevertheless considered it appropriate to make further inquiries in relation to the circumstances of the initial meeting between Woodhouse, Edward and Quail.
- 4.370 There is little evidence to indicate that the initial meeting was conducted to undertake any detailed exploration of his allegations. Nor was Quail present at subsequent meetings between Edward and police where this did occur. In view of the circumstances, the Commission is satisfied that the purpose of Quail's presence at the first meeting was to introduce Edward to Mr Woodhouse only for the purpose of assisting the investigation, and involved no improper advantage to Channel Seven.

ALLEGED IMPROPER REFERRAL OF DAVID X TO CHANNEL SEVEN

- 4.371 During the course of inquiries as part of Operation Tower in 2003, information was received as part of an unrelated investigation that Mr Woodhouse had introduced David X to Quail. The implication that Mr Woodhouse may have assisted Channel Seven by putting alleged victims of Mr Marsden in touch with defendant, resonated with allegations by Mr Marsden that police had also provided Channel Seven with an entrée to David Y and Shane X.
- 4.372 Knowledge of David X represented a significant advantage to Channel Seven in its defence of the defamation proceedings. On 22 March 1999, Channel Seven had sought leave in the defamation proceedings to amend its defence to add grounds relating to a number of alleged victims of Mr Marsden (D17 to D25) none of whom had, until that point in time, been mentioned previously. One of the new alleged victims was David X.
- 4.373 It would appear that police did invite David X to contact David Price, a solicitor acting for Channel Seven. This occurred after David X brought to the attention of police a threat received in relation to his giving evidence in the defamation proceedings in February 1999. It is reasonable to infer that the purpose of the invitation to David X was to enable Channel Seven to be informed of a threat to a potential witness. It also appears police did provide David X with Quail's telephone number, but it is apparent that by this stage Quail was already aware of David X's identity.
- 4.374 David X had suggested that the invitation occurred much earlier than the receipt of the threat and at the time of the initial meeting with police in April 1998. His evidence in this respect is, however, somewhat inconsistent. Neither Mr Woodhouse nor another Strike Force Cori officer in attendance agree that, when David X was seen on 17 April 1998, he was invited to contact Quail. Nor is there any documentary evidence to support David X's claim. Furthermore, the reliability of David X as a witness is quite clearly in question.

4.375 In the result, the Commission is not satisfied that Mr Woodhouse or any other member of Strike Force Cori improperly attempted to place David X into contact with representatives of Channel Seven.

OPERATION MASON – ALLEGED LEAK BY POLICE TO CHANNEL SEVEN

4.376 By letter to the Ombudsman dated 4 July 2000, Mr Marsden requested an investigation into an allegation that “information has been leaked to [Channel Seven], or provided to them, by certain police involved in the police operation ‘Operation Mason’”.¹⁸² Operation Mason concerned an allegation that John X had deliberately made false allegations against Mr Marsden. It also involved an investigation into an alleged attempt by KR and MB to pervert the course of justice.

4.377 The particular information alleged to have been leaked was knowledge of the existence of certain listening device tapes said to have been obtained pursuant to authority granted under the Commonwealth Listening Devices Act, hence enabling Channel Seven to call for them by way of a subpoena in the defamation proceedings. Transcripts of telecommunications interceptions obtained pursuant to the Commonwealth *Telecommunications (Interception) Act 1979* were also produced by solicitors acting for NSW Police in the defamation proceedings. It seems clear on the face of the transcript of the defamation proceedings that the defendants were aware of the names of KR and MB prior to issue of the subpoena. It should also be noted that the issuer of a subpoena need not be aware of the existence of particular material, nor even its particular nature in order to seek its production under subpoena.

4.378 The Commission has not sought to obtain a copy of the subpoena, and will give further consideration to this matter if and when Mr Marsden provides a copy of the subpoena. It is not considered necessary, for the purpose of finalising this report focussing as it does on matters in relation to Strike Force Cori and Mr Woodhouse in particular, that this matter be finally resolved.

ALLEGED BIAS AND FAILURE TO CLAIM PUBLIC INTEREST IMMUNITY IN RESPONSE TO SUBPOENA

4.379 This aspect of Mr Marsden’s complaint concerns alleged impropriety on the part of police in the comparative response to subpoenas issued on behalf of Mr Marsden and his opponent in the defamation litigation, Channel Seven. The complaint was articulated at paragraph 7(f) of a letter by Mr Marsden to the Hon M D Finlay QC dated 9 July 2001 (emphasis in bold added):¹⁸³

It is true that I have received the most publicity because of the defamation. The defamation arose as a result of the original publicity by Deirdre Grusovin. However, at that stage there were only two persons involved, they were [Ronald and John X]. Both if properly checked out would not have gone any further. It was then at that stage that **the police through the Crown Solicitor’s Office** in a matter (sic –

¹⁸² Barcode 6196646.

¹⁸³ Barcode 5878413.

manner) that may or may not be appropriate **provided Channel Seven’s solicitors with the names of the numerous other persons that they were investigating and the defamation got out of control and this information was given to the police with the Crown Solicitor’s approval when the investigation was not at an end, when there was no corroboration in relation to the various persons making the allegations and when the police were still investigating it. A most unusual situation as you appreciate because normally the police would claim privilege or Crown immunity in relation to such information and, in fact, when my lawyers subpoenaed the material, that is exactly what the police did. They claimed immunity.** This is extremely interesting that throughout the proceedings the police say there is a line of investigation they claim immunity, yet somehow or other arrangements were made between the Crown Solicitor’s Office and Channel Seven’s lawyers. As the Trial Judge said “Well, it was an arrangement.” The important issue is how come that arrangement occurred when the normal policy is to claim immunity. Further it is interesting that information that was forthcoming involved persons who even the police thought were making false allegations. The police did not even question the writer in relation to some of those persons. In fact, if one looks at the allegations to police by [Jason Y] then one will note that [Jason Y] at no stage (before being interviewed by Channel Seven) made any allegation that he, himself, had had sex with the writer [emphasis added].

4.380 The complaint thus appears to be twofold:

- That the police agreed, in an improper “arrangement” in relation to a subpoena issued on behalf of Channel Seven on 18 January 1999, to release the names of “numerous other persons” against whom it was alleged Mr Marsden had committed child sex offences. Yet when the same information was captured by an earlier subpoena issued on behalf of the plaintiff, the police claimed and successfully resisted production on grounds of public interest immunity. It is apparent that Mr Marsden’s reference to “numerous other persons” is to 12 “new” complainants whose statements to police were ultimately produced under the Channel Seven subpoena.
- That it was otherwise improper and an act of bias against Mr Marsden for the police to have produced material containing allegations that were uncorroborated or untested.

The alleged “arrangement” and failure to claim public interest immunity

4.381 Mr Marsden draws a long bow in asserting impropriety against police in relation to an improper “arrangement” concerning the production of documents under the Channel Seven subpoena. Effectively the same allegations were vigorously agitated on his behalf in the defamation proceedings, and were comprehensively considered by the Trial Judge, Levine J. His Honour ultimately rejected each and every allegation of impropriety and, in referring to the making of an “arrangement” between police and legal representatives of Channel Seven, regarded it as “conforming with accepted practice”.

4.382 Accordingly it might appear that no further examination concerning the circumstances of the “arrangement” is required by the Commission. In a real way that is correct. However, the Commission is in a position to clarify additional matters in relation to relevant circumstances and for the sake of completeness and finality will do so in this Report.

The Marsden subpoena of 13 October 1998

4.383 On 13 October 1998, Mr Marsden’s legal representatives caused to be issued a subpoena directed to the police. Paragraphs (1) to (28) of the schedule fell under headings which referred to seven named individuals and required the production of documents in relation to statements “in relation to Marsden, paedophilia and/or ‘Costellos’ nightclub”, and “all records of interview” given by each person, together with “[a]ll records in relation to investigations by the New South Wales Police Service about” the seven named persons.

4.384 Relevantly, paragraph 29 was headed “John Marsden” and required the production of:¹⁸⁴

All records, files, documents, correspondence, memoranda, statements, statutory declarations, records of interview, file notes, computer print-outs, computer disks, audio-tapes and video tapes in relation to John Marsden of [address] from January 1994 to date.

4.385 Paragraph 30 required the production of all records etc. in relation to Mr Marsden arising from the investigations by Inkster “from about January 1994 to December 1997”, and paragraph 31 “all records” in relation to “Costellos”.

The Channel Seven subpoena of 18 January 1999

4.386 The relevant Channel Seven subpoena was issued on 18 January 1999. On its face it had a broader purview than the Marsden subpoena, or at least was more specific in requiring the production of documents in relation to some 10 individuals whose names had not appeared anywhere in the schedule to the Marsden subpoena. In contrast with the terms of paragraph 29 of Marsden’s subpoena, paragraph C of the schedule specifically required the production of documents in relation to Mr Woodhouse’s investigations, namely:¹⁸⁵

Investigations carried out under the supervision of Superintendent Michael Woodhouse of the Child Protection Enforcement Agency into allegations that Marsden had committed criminal offences by engaging in sexual intercourse with young male prostitutes who were under the age of 18.

4.387 Amongst the materials caught by this paragraph were statements by 12 complainants relating to allegations against Mr Marsden which, according to Mr Woodhouse, were then potentially subject to ongoing investigations and/or “a report to the Director of Public Prosecutions or other consideration of criminal prosecution”.¹⁸⁶

Did the Marsden subpoena capture the statements of the 12 complainants?

4.388 On an objective reading of the Marsden subpoena, it is questionable whether paragraph 29 captured these statements, or at least all of them. The paragraph appears to have had two possible interpretations. On one view, it required the production of materials in relation to police investigations in so far as they

¹⁸⁴ Barcode 5370484.

¹⁸⁵ Barcode 5394721.

¹⁸⁶ Affidavit sworn 2 March 1999 para 25(c): barcode 6247484.

involved records of interview, correspondence and other forms of communications between police and Mr Marsden. On the other, although no specific mention was made of Mr Woodhouse's inquiries, the paragraph purported to require production, amongst all other police records obtained from 1994, of all Strike Force Cori materials relating to investigations of Mr Marsden gathered to that date (13 October 1998). This latter interpretation appears to have been adopted by Mr Marsden and, in his affidavit evidence to the court, by Mr Woodhouse himself.¹⁸⁷

- 4.389 In may seem odd that Mr Marsden would have been seeking the production of Strike Force Cori materials relating to the then ongoing investigation of allegations against him, given the potential danger to his interests inherent in those documents being produced to the court and potentially available for inspection and use by his opponent in the litigation. After all, Mr Marsden vigorously resisted the production of the same materials under Channel Seven's later subpoena. Moreover, if it was Mr Marsden's intention to require the production of all Strike Force Cori materials, it appears to the Commission that at least some of the statements by the 12 complainants were not captured by the subpoena, given the cut-off date of 13 October 1998 and the fact that some statements were made after that juncture.¹⁸⁸
- 4.390 In any event, for reasons that will become apparent, it is not necessary for the Commission to express any concluded view on whether Mr Marsden's subpoena captured any or all of the statements by the 12 complainants. For present purposes the Commission will proceed on the basis that the statements were captured.

The claim of public interest immunity in response to the Marsden subpoena

- 4.391 A claim of public interest immunity was raised in objection to the Marsden subpoena. The claimant was not the Commissioner of Police (to whom the subpoena was effectively directed), but the Attorney General for New South Wales. The circumstances, which the Commission is now at liberty to reveal, were as follows.
- 4.392 One of the seven persons named in the schedule to the Marsden subpoena was "Stephen X". During the course of the Royal Commission's inquiries under its paedophilia reference, Stephen X had assisted the Commission in the capacity of a confidential informer. He had earlier given a two-part interview with police and, in investigations conducted by the Royal Commission, wore a listening device on his person during conversations with Mr Marsden. Stephen X was, in every sense, a confidential police and Royal Commission informer.
- 4.393 Audio-tapes and documents obtained as a consequence of such assistance by Stephen X were subsequently communicated by the Royal Commission to the police for further investigative action, and hence captured by the Marsden subpoena.

¹⁸⁷ Affidavit sworn 14 April 1999, para 18: barcode 6247461.

¹⁸⁸ Barcode 6247484.

- 4.394 It is well entrenched that confidential informers occupy an “exalted position” under the principles of public interest immunity, the rationale being that if the anonymity of informers is not protected the flow of intelligence about crime and its perpetrators will stop. Unlike other species of public interest immunity, the resolution of a claim based on the informer rule does not involve any balancing exercise between competing public interests. Where the identity of an informer is at stake the balance will already have been struck in favour of non-disclosure, save and except only where disclosure could help show that an accused in a criminal trial is not guilty. The paramount position of the informer rule and the limited exception relating to criminal proceedings means that disclosure of an informer’s identity can never be ordered in civil proceedings.¹⁸⁹
- 4.395 A claim of public interest immunity in objection to the production of such materials under the subpoena was accordingly made under an open affidavit sworn by a senior officer of the Attorney General’s Department, on behalf of the Attorney General.
- 4.396 This approach was taken because Mr Marsden himself had knowledge that Stephen X had been interviewed by officers of the Royal Commission, although he was not at that time aware of Stephen X’s status as a confidential informer. Had the claim been advanced in the name of the Police Integrity Commission (in its capacity as the custodian of the records and remaining matters of the Royal Commission) it may well have been an easy step for any person with knowledge of Stephen X’s contact with the Royal Commission to infer that of the seven persons named in the subpoena, he was the subject of the claim.
- 4.397 In addition, the fact that the claim was made on the basis of the informer rule was not revealed in the open affidavit. Again, this was done because the mere revelation of the nature of the claim might have served to convey the very information that the public interest required to remain secret.
- 4.398 The substance of the public interest immunity claim was detailed in a confidential affidavit sworn by the then Assistant Commissioner of the Police Integrity Commission, Mr Sage.
- 4.399 On 24 December 1998 the public interest immunity claim was upheld by Ireland J. In relation to the objection to the subpoena that it was without any legitimate forensic purpose, his Honour appears to have upheld only paragraph 31, which was originally expressed to require the production of all records etc. in relation to “Costellos”. By agreement between Mr Marsden’s lawyers and the police, the subpoena had been narrowed and this particular call limited to such records in relation to Costello’s as were known to Detective Inkster and the Child Protection Enforcement Agency. In his judgment on Mr Marsden’s challenge to the propriety of the Channel Seven subpoena, Levine J was to later observe that this agreement between the plaintiff and the police was precisely

¹⁸⁹ See for example *Cain v Glass (No 2)* (1985) 3 NSWLR 230; *R v Smith* (1996) 86 A Crim R 308; *Attorney-General for NSW v Stuart* (1994) 34 NSWLR 667.

the same kind of arrangement as was made between the police and the defendant in relation to its subpoena.¹⁹⁰

- 4.400 Paragraph 29 of Marsden's subpoena, which objectively may or may not have captured such materials relating to the 12 complainants as existed at the time of its issue, was not pressed by Mr Marsden's lawyers.¹⁹¹ Accordingly, it never became necessary for any objection on the grounds of public interest immunity as might then have existed from the perspective of the investigating police to be raised and determined in relation to these materials.
- 4.401 As a consequence of the way in which the public interest immunity claim had to be made, neither Mr Marsden nor his legal representatives could have been aware of its precise nature, whether it was made in relation to an informer or informers, or on some other ground recognised by the principles of public interest immunity.
- 4.402 For abundant clarity, the Commission might add that nothing in the way in which the matter was proceeded with was unusual in the light of the procedures applicable to claims of public interest immunity. As a purely public privilege, a claim of public interest immunity may be made by any person whether a party to the relevant proceedings or not. The claim may be raised by the court itself if no claim is made and it is clear there may be serious injury to the public interest.¹⁹² A claim of public interest immunity does not involve an inter partes dispute such that the party upon whose behalf a relevant subpoena has been issued, or any other party or person, may properly assert a right to cross-examine the deponent to an affidavit in support of the claim.¹⁹³ Such an affidavit can properly be and is frequently required to be tendered to the court on a strictly confidential basis to avoid the certainty or risk of public disclosure of the very information sought to be protected from disclosure as a matter of public interest.¹⁹⁴
- 4.403 Nor should it be thought that a claim of public interest immunity can be made on the whim of an investigating police officer, or any public officer or public authority. Under guidelines issued by the Premier's Department, the Solicitor General for New South Wales must approve the making of any claim of public interest immunity on behalf of a government body.

The police response to the Channel Seven subpoena

- 4.404 In so far as the Channel Seven subpoena touched upon materials relevant to the Strike Force Cori investigations (paragraph C), the initial position of the police appears to have been settled during a conference at the Crown Solicitor's Office on 20 January 1999. Mr Woodhouse provided instructions that documents relating to investigations into allegations by John Y and David Y, together with those relating generally to Strike Force Cori, should not be produced on the basis that they may ultimately come to form part of his report to the DPP. More

¹⁹⁰ See *Marsden v Amalgamated Television Services Pty Limited* [1999] NSWSC 619 at [421]-[423].

¹⁹¹ Barcode 6403401.

¹⁹² *Young v Quin & Ors* (1985) 59 ALR 225.

¹⁹³ *Young v Quin & Ors*, supra; *Attorney-General for NSW v Stuart* (1994) 34 NSWLR 667.

¹⁹⁴ *NCA v Gould* (1989) 90 ALR 489.

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specifically, the documents formed the subject matter of still ongoing investigations.¹⁹⁵

- 4.405 On 25 January 1999 a further subpoena was issued on Mr Marsden's behalf. This subpoena also captured documents concerning the ongoing police investigation of allegations made by John Y and David Y (paragraphs 1 to 3).
- 4.406 At a subsequent conference on 27 January 1999 it was resolved, in relation to what by then were two subpoenas:
- To produce Strike Force Cori material upon which police did not intend to rely in further investigations and for which no claim of public interest immunity arose;
 - That documents relating to the David Y and John Y's allegations [common to both subpoenas] and other material relating to allegations against Mr Marsden that could form the basis of a report to the DPP [including the statements of the 12 complainants captured by the Channel Seven subpoena] could be produced after 29 January 1999, subject to any claim for public interest immunity which might exist.
- 4.407 The date of 29 January 1999 was significant because Mr Woodhouse was to interview Mr Marsden on that day, after which he would be assessing whether the need for any further investigations arose.
- 4.408 In this light, apart from matters pertaining to Stephen X, it is apparent to the Commission that any claim of public interest immunity as might then have existed and been made in response to the Channel Seven subpoena concerned potential prejudice to the investigations, as opposed to informer privilege.
- 4.409 On 29 January 1999 solicitors in the employ of the Crown Solicitor's Office met with legal representatives for Channel Seven in an attempt to settle issues under the subpoena. It is apparent that Channel Seven agreed to narrow the call under relevant parts of the subpoena on the understanding that documents might be produced under other parts, depending upon the state of play with Mr Woodhouse's investigations. The proposed production included the statements of the 12 complainants. This was to be characterised by Mr Marsden's legal representatives as the "secret" meeting in which an "arrangement" was struck whereby the police agreed to support Channel Seven's attempt, via a subpoena with no legitimate forensic purpose, to "fish" for "dirt" on the plaintiff.¹⁹⁶
- 4.410 On 1 February 1999, having conducted his interview with Mr Marsden, Mr Woodhouse again met with representatives of the Crown Solicitor and confirmed the situation regarding production under both subpoenas. His instructions relevantly were that production could occur as foreshadowed on 27 January 1999.¹⁹⁷

¹⁹⁵ Affidavit of Michael Woodhouse, sworn 14 April 1999, paras 7-10.

¹⁹⁶ See *Marsden v Amalgamated Television Services Pty Limited* [1999], supra, at [245]-[249].

¹⁹⁷ Barcodes 6271696-7.

The claim of public interest immunity in relation to the Channel Seven subpoena

- 4.411 Although the Channel Seven subpoena captured the same material relating to the then confidential informer Stephen X, to the Commission's direct knowledge the legal representatives of Channel Seven agreed not to call upon that aspect of the subpoena. Accordingly, no public interest immunity claim was required to be raised at that time nor, as events transpired, any other time.
- 4.412 At or at least shortly after the time of issuing the subpoena the legal representatives of Channel Seven were aware that Stephen X had covertly assisted the police and Royal Commission in their inquiries. It appears that Channel Seven first became aware of Stephen X, who was a former client of Mr Marsden's, by virtue of information provided by RD to the producers of the *Today Tonight* program. However, information about Stephen X's role as a covert informer was not public in any wider sense and, at that stage, he had indicated no wish to publicly reveal himself as an informer and maintained concerns for his and his family's safety should his status as an informer be publicly revealed.¹⁹⁸ The Commission accordingly maintained the claim of public interest immunity, through its instructions to the Crown Solicitor.
- 4.413 In February 2000 Stephen X ultimately appeared as a witness on behalf of Channel Seven in the defamation proceedings and voluntarily revealed his role as an informer.¹⁹⁹ Prior to that (on 14 February 2000) his legal representative had written to the Commission, enclosing a statutory declaration by his client which expressly indicated that he no longer wished his informer status to be maintained.²⁰⁰ In the circumstances the public interest immunity claim was not pressed.
- 4.414 A claim of public interest immunity cannot be waived²⁰¹ nor is it in any sense a private privilege, notwithstanding it exists for the protection of current and prospective informers. However, the basis for a claim can evaporate where the informer himself or herself is intent upon disclosing their role. That happened in Stephen X's case when he appeared as a witness in the defamation proceedings and gave evidence about his informer status.

Judgment upon the motion to set aside the Channel Seven subpoena as an abuse of process

- 4.415 On 12 March 1999 a motion on Mr Marsden's behalf was filed in court seeking to have the defendant's subpoena set aside on the basis that it constituted an abuse of process. The so-called "arrangement" was the subject of a very comprehensive judgment delivered by Levine J on 23 June 1999.²⁰²

¹⁹⁸ 5470/70.

¹⁹⁹ See *Marsden v Amalgamated Television Services Pty Limited* [2001], at [1947]ff.

²⁰⁰ Barcode 5588645.

²⁰¹ *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394; *Special Minister of State v Quin* (1984) 3 FCR 293; *Australian Securities Commission v Zarro* (1992) 34 FCR 427.

²⁰² *Marsden v Amalgamated Television Services Pty Limited* [1999], supra.

4.416 Levine J ultimately concluded that there was no improper “arrangement” or “secret deal” between the police and lawyers acting for Mr Marsden’s opponent in the proceedings. What had occurred in relation to the production of documents to the court under subpoena was entirely unremarkable. His Honour, after rejecting the plaintiff’s submissions as to lack of any legitimate forensic purpose behind relevant parts of the defendant’s subpoena, stated:

[515] ... I do not find there to have been agreement between the solicitors for the defendant and the Police as articulated in the plaintiff’s submissions. On the evidence, I am unable to find any “secret” deal; the arrangement conforms with the practice and was founded, in my view, I find, in a sensible approach to potential disputation and litigation on the issue of production.

[516] Further, I cannot accept that the purpose of the Police in providing this material was to thwart the trial and have it adjourned. I can conceive of no reason why the Police would wish to do so. The more so is this the case in the context of there being no evidence of Mr Marsden having been charged; of there being evidence that the Crown advised against the Police seeking a stay of proceedings, and up to now there being no evidence of the outcome of Mr Woodhouse’s report in March to the DPP.

[517] ... the practice of having meetings and making arrangements with recipients of subpoenas as to production of documents is an accepted one. Similarly it is accepted that when one party embarks upon that exercise that party does not inform its opponent. This is not a matter of a “secret meeting”; it is a matter of usual practice. Indeed, it is a practice which I accept on the evidence so entrenched, and indeed, recommended by the decisions in addition to that of myself referred to above, that it can operate concurrently with the provisions of the SCR Pt 37 r 11 which only provides for the alteration of the time specified in the subpoena for attendance and production. The Rule is otherwise silent.

[518] The trenchant criticism made of the Police Service with respect to the assertion of a claim for public interest immunity is misconceived in the end, and on the evidence, on my view. Of course it is clear law that it is not for the Police to state that documents are protected by public interest immunity; that is a matter only for the Court (Sankey v Whitlam [(1978) 142 CLR 1]). It is quite open to the Police in what I regard as legitimate discussions with the party issuing the subpoena to indicate that in respect of documents caught by the subpoena that those documents would be the subject of a claim for public interest immunity. In the face of a statement to that effect by the Police, it is perfectly open to the party issuing the subpoena to choose not to litigate that claim. That does not amount to the abrogation to the Police by the Police of the function of the Court. I do not understand Mr Woodhouse to have been seeking to assert that the documents “affected by public interest immunity” were in fact protected as a matter of law by that doctrine. His position was that in the event that the subpoena was called upon a body of material would be subject to such a claim. The defendant was entitled to elect not to litigate such a claim.

[519] What in reality I find to have occurred, on the evidence, can be described as a “windfall” for the defendant ...

4.417 As to claims that the police had been biased in favour of Channel Seven in their response to the respective subpoenas, at paragraph [522] of the judgment Levine J said:

As to the charge of the lack of partiality [sic] on the part of the Police, this is founded in what is perceived to be the Police response to the plaintiff’s subpoena dealt with by Ireland J on 24 December 1998 and their response to the defendant’s subpoena of 18 January 1999. The critical feature of the history of events is the interview of the plaintiff by the Police on 29 January. Shortly stated, that changed virtually everything as far as the Police were concerned. Indeed, it can be seen that as at that date (and the subsequent further meetings with Mr Lee), the Police had put

to Mr Marsden all that they had to put to him and provided him with an opportunity of which he availed himself to deal with the allegations. If that important fact is kept in mind there is no reasonable basis upon which the charge of partiality can be made against the Police Service.

- 4.418 It is not clear whether at the time of his judgment Levine J was aware of the precise circumstances of the public interest immunity claim in relation to the earlier Marsden subpoena (ie. that it concerned a single informer). The Commission would think not, given Ireland J's judgment did not recite the precise grounds for the claim, nor for reasons that will already be apparent could those grounds be published without threat to the public interest.
- 4.419 It would seem that Levine J's conclusions in relation to the alleged failure of police to claim public interest immunity were in response to claims by Mr Marsden's counsel which largely centred upon the materials relating to the 12 new complainants. The position reached during Mr Woodhouse's conference with solicitors in the employ of the Crown Solicitor's Office on 27 January 1999 was that these and other materials could be produced after Mr Woodhouse's interview with Mr Marsden on 29 January 1999, subject to any public interest immunity claim as might then persist. Levine J's judgment clearly indicates his acceptance of the fact that the circumstances of the police investigation had changed after 29 January 1999, such that no claim of public interest immunity was open to be made. An appreciation of that fact, Levine J said, left no room for any reasonable allegation against police of partiality towards the defendant.
- 4.420 It is implicit from all this that the only kind of public interest immunity claim contemplated by the investigating police in relation to the 12 new complainants concerned the prejudicial effect that premature disclosure of their allegations might have on the police investigation. Of course, had a claim of informer privilege arisen in relation to the 12 complainants it would have existed both before and after 29 January 1999, and at any other material time – such a claim only ceases to exist where the identity of an informer becomes public knowledge, or where disclosure is ordered by the court in a criminal trial.

Were the 12 complainants “informers”?

- 4.421 Judging by the present complaint, which harks back to submissions made on Mr Marsden's behalf before Levine J, a misconception appears to persist that the 12 complainants were in truth “informers” whose consent should have been obtained by police prior to the production of their statements to the court, and in the absence of which police were duty-bound to keep their identity secret.²⁰³
- 4.422 In the Commission's opinion any such idea is fallacious. It can only be predicated upon the erroneous notion that a person who makes a statement to police as a complainant of alleged criminal conduct is one and the same as an informer. The Commission is aware of no such principle, whether from its own experience as an investigative body or on any judicial authority.

²⁰³ *Marsden v Amalgamated Television Services Pty Limited* [1999], supra, at [280].

- 4.423 The mere fact that a person makes a statement to the police does not qualify the person as an informer. Indeed, indications will usually be to the contrary. The bedrock to a person's status as informer is the need for their assistance to police to be kept secret. A fundamental purpose in the taking of a statement by police involves its potential use as a proof in a criminal prosecution. Indeed, the statements by the subject 12 complainants found their way into the Strike Force Cori brief to the DPP, by which advice as to the sufficiency of evidence to lay charges was being sought.
- 4.424 The absurdity involved in any proposition that the maker of a witness statement is prima facie entitled to protection under the informer rule is easily illustrated. The police would be duty bound to keep their identity secret. That would not only tend to defeat the purpose of the taking of a statement in the first place, but if the fallacy were to be taken to its logical conclusion under the strict principles of the informer rule, the person's identity could only be revealed in the limited circumstance where it could help to establish the *innocence* of the accused. The identity of the witness could not be revealed as a fundamental proof of guilt in the prosecution's case, and the administration of criminal justice would be farcical.
- 4.425 Furthermore, to the Commission's knowledge is there no residual rule, principle or logic which holds that the maker of a statement to police is required to give their consent before the police are properly enabled to produce their statement to a court under a valid subpoena.

Assessments – Bias in approach to Channel Seven subpoena

- 4.426 No inconsistency was involved in the raising of public interest immunity in respect of the relevant subpoenas issued on behalf of Mr Marsden and Channel Seven. In both cases, a single claim was asserted, not by the police, but by or on behalf of this Commission. The claim related to the identity of a single informer.
- 4.427 However, it proved necessary to press the claim and have the court rule upon it in the case of Mr Marsden's subpoena, given his opponent's agreement not to call upon its subpoena in that particular respect and Stephen X's eventual decision to reveal himself as an informer.
- 4.428 No claim of public interest immunity was ever made to the court in relation to the 12 complainants, let alone one that related to their so-called status as "informers". In the Commission's opinion, there is no basis to characterise such complainants as informers. Had Mr Marsden's subpoena required the production of materials relating to these complainants, there existed the potential for a claim of public interest immunity to be made by the police on the basis of prejudice to then ongoing investigations. However, the basis for any such claim evaporated after Mr Woodhouse's interview of Mr Marsden on 29 January 1999, and accordingly was not available to be made in response to the Channel Seven subpoena.
- 4.429 In all the circumstances of the relevant Marsden and Channel Seven subpoenas, Mr Woodhouse and the Police Service sought and obtained advice and guidance from the Crown Solicitor. The Commission has no reason at all to think that the

Crown Solicitor acted other than in an entirely proper way. The judgment of Levine J reveals, and in all respects it is the Commission's opinion, that there was nothing in the manner in which the respective subpoenas were approached to suggest any police impropriety whatsoever.

Production of “uncorroborated” statements

- 4.430 The second aspect of Mr Marsden's allegation carries the suggestion that it was improper for the police to have produced material containing allegations that were uncorroborated or untested.
- 4.431 If this is the contention, it is not one that the Commission is prepared to accept. It is unaware of any legal principle whereby a person to whom a subpoena is directed may validly resist the production of documents on the basis that information contained therein is untested or uncorroborated.
- 4.432 Here, the statements of 12 complainants were captured by the Channel Seven subpoena. The contents of the statements were clearly relevant to the subject matter of the proceedings, as Levine J found in ruling that the Channel Seven subpoena was supported by a legitimate forensic purpose. That ruling having been made, and no claim of public interest immunity then being available, the subpoena was valid and the police had no proper basis to refuse to produce the statements.
- 4.433 Putting that conclusive fact aside for one moment, that statements or documents caught by a subpoena might arguably contain information of insufficient or unreliable probative value to facts in issue in the relevant proceedings does not beget a proper ground for their non-production. While it has been said that the only legitimate purpose of requiring the production of documents under a subpoena can be to add, in the end, to the relevant evidence in the case,²⁰⁴ that does not mean that documents required to be produced under subpoena must be in admissible form, or admissible at all. It will be enough merely if information contained in any relevant document might lead to the adduction of evidence in some other admissible form.²⁰⁵ In the case of an uncorroborated allegation contained in a document, such further steps might well involve gaining any necessary corroboration.
- 4.434 Moreover, uncorroborated or untested allegations are not inadmissible per se. Like all information of potential relevance to the facts in issue in a proceeding, it falls to be determined by the court whether any particular piece of evidence should be admitted, first in the light of the test of relevance and then any applicable exclusionary rules or discretions. Accordingly, it cannot be a proper argument in bar of production under a valid subpoena to say that a document or its content is inadmissible or potentially inadmissible at trial, whether by virtue of lack of corroboration or for any reason.

²⁰⁴ *National Employers' Mutual General Association Limited v Waind and Anor* [1978] 1 NSWLR 372.

²⁰⁵ *R v Saleam* (1989) 16 NSWLR 14.

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- 4.435 The Commission cannot conclude without commenting upon a contradiction inherent in this particular assertion of police impropriety, which in its opinion is illustrative of the underlying lack of merit in relation to Mr Marsden's allegations concerning the police approach to the respective subpoenas issued by himself and Channel Seven.
- 4.436 Mr Marsden himself asserts that the "uncorroborated" statements of the 12 complainants were caught by the earlier subpoena issued on his behalf. Accordingly, he caused steps to require their production to the court. Any such production was only obviated by his lawyers' agreement not to call upon paragraph 29 of the subpoena. That agreement was later described by Levine J as precisely the same kind of "arrangement" as Mr Marsden alleged to have improperly been made between the police and his opponent in the defamation litigation. It seems to the Commission that, whatever the police might have done or not done in relation to either subpoena, they could not have avoided criticism according to the sway of Mr Marsden's interests in the litigation.

5. PARTICULAR INVESTIGATION ISSUES

- 5.1 Apart from the general allegations of misconduct specified as the amended purpose of the Operation Tower investigation, two particular matters were also specified.²⁰⁶ These are examined in the following sections.

RELATIONSHIP BETWEEN WOODHOUSE AND RUSSELL TRAVIS

- 5.2 Mr Marsden complained about “the way [Woodhouse] has dealt with former prisoner Russell Travis in Goulburn and other gaols, and the relationship between he and Russell Travis”, asserting there was a close association between Mr Woodhouse and Travis and support for Travis over and above normal police protocol and characterising it as “totally inappropriate”. It was specifically complained that a letter of support for Travis was provided by Mr Woodhouse in breach of police guidelines and principles. Moreover, it was contended that as Travis was known to be unreliable and a “notorious serial accuser”, police should have not have been paying heed to his allegations and, it might be inferred, viewed with scepticism any persons who associated with Travis in gaol.²⁰⁷
- 5.3 Mr Marsden also asserted information regarding Travis’ credibility, said to underlie a decision by the defendants in the defamation case to not rely upon Travis, must have been provided by police sources to the defendants. No evidence was provided in support of this assertion.
- 5.4 It is not in dispute that there was a considerably heightened need for corroboration in relation to claims by Travis. Certainly Mr Woodhouse was aware of the need for caution in relation to Travis. Mr Woodhouse had available to him not only information gleaned from Travis himself and other alleged victims of Mr Marsden such as Paul and David X, but information that had been disseminated by the Royal Commission, which included admissions by Travis himself of his own involvement in child sexual assault. Naturally enough, these admissions give rise to questions affecting Travis’s reliability as a witness. It is also evident, however, from Royal Commission records, that information supplied by Travis to the Royal Commission was, in a number of respects at least, able to be corroborated.
- 5.5 It is also clear that Mr Woodhouse wrote to prison authorities making certain representations regarding Travis’s circumstances, and spoke with and wrote to Travis on a number of occasions. However there does not appear to be a proper basis on which to assert that Mr Woodhouse was doing other than discharging his obligations towards Travis as a police informant, and ensuring Travis’s safety was not compromised by disclosure of the fact of his assistance to police. Nor is it apparent that a relationship had developed between Mr Woodhouse and Travis that was too “close”. While Mr Woodhouse might have been sympathetic

²⁰⁶ See at [1.21].

²⁰⁷ Barcode 5771807ff.

to Travis's claim that he was wrongly convicted of offences – and the Commission expresses no finding either way in this respect – there is no evidence, apart from Travis's own letter to the Parole Board dated 29 October 1998, that Mr Woodhouse was actually of the opinion that Travis was innocent of the crime of which he was convicted.

- 5.6 To the extent that it is suggested by Mr Marsden that Travis's credibility had been so thoroughly annihilated that there was no proper foundation for Mr Woodhouse to have placed any reliance on information supplied by Travis, much less cultivate a relationship with him that was purportedly supportive and "close", the Commission disagrees. Such a characterisation fails to acknowledge the volume and value of the intelligence supplied by Travis.
- 5.7 Travis's credibility was undoubtedly an important question to be constantly borne in mind when assessing intelligence supplied by him. His status as a prison informer made it necessary for the police to exercise high levels of caution in relation to his various allegations. However neither the *ICAC Report on Investigation into the Use of Informers* nor the remarks by the High Court in *Pollitt* (to which legislative recognition was given in s 165 of the *Evidence Act*), both of which were cited by Mr Marsden, suggest that information supplied from prison informers should be ignored. Rather, it is necessary to employ layers of safeguards when dealing with such persons. These caveats do not appear to have been lost on Mr Woodhouse.
- 5.8 Finally, there appears no evidence, even taking into account documents provided by Mr Marsden, to support his allegation that the relationship was anything other than a professional one or involved conduct outside normal police protocol. Certainly there is no basis for inferring a corrupt or even inappropriate relationship between Mr Woodhouse and Travis.
- 5.9 It remains only to examine whether there was adequate compliance with relevant informant management procedures. Strike Force Cori records reveals Travis was not registered as an informant.
- 5.10 On one view, Travis fitted the category of persons who, *prima facie*, should be treated as a registered informant. In one capacity, he was a convicted criminal supplying information about the criminality of others. But in another capacity, Travis was a complainant and witness in that he was providing information about alleged assaults upon himself.
- 5.11 Elsewhere in this Report the Commission expressed its views as to whether a claimed victim of criminal conduct is to be properly regarded as a "prison informer" by the mere fact of their incarceration at the time of making the complaint. As a civilian, such a person would not, properly speaking, be an "informer", but rather a complainant with criminal antecedents. Put simply, a person can be an informer or prison informer in certain respects, but not in others.
- 5.12 Regardless of the nomenclature one attaches to a person such as Travis – complainant, witness or informer – what is important in the reception and treatment of claims by a person with a prison record (and, obviously, serious

criminal antecedents), or who is or has been an informer or prison informer in any other capacity, is the exercise of an appropriate level of care and caution. As indicated above, the Commission considers Mr Woodhouse to have discharged this onus.

- 5.13 Moreover, it is obvious from correspondence that, at least as at April 1999, Mr Woodhouse had considered whether Travis should be treated as a registered informant. He determined this was not desirable, reasoning that it might encourage association with other criminals. Mr Woodhouse also noted Travis had not supplied any information of value for more than three months at that point. These appear to the Commission to be adequate reasons for the decision not to treat Travis as a registered informant.

PAYMENTS TO DAVID Y

- 5.14 In his correspondence to the Inspector dated 9 July 2001, Mr Marsden stated:²⁰⁸
- [David Y] alleges and it is admitted that Detective Woodhouse on a number of occasions paid him sustenance up to an amount of \$50 on each occasion.
- 5.15 The complaint appears to suggest some manner of impropriety in the fact of the payments. This would appear to assume that, were the payments made, it was for an improper purpose, presumably to induce David Y to make allegations against Mr Marsden, and that the benefit offered was sufficient to do so.
- 5.16 It does seem clear that David Y received payments from Mr Woodhouse on two occasions. Diary notes kept by Mr Woodhouse also clearly record that the payments were made for sustenance purposes as was noted in the complaint. As the Commission has previously indicated, such payments are not *prima facie* improper in that provisions exist in police guidelines for them. There is no evidence before the Commission to suggest that the provision of sustenance by Mr Woodhouse was motivated by any improper purpose. Nor is it considered that the minor amount of money involved would suffice to induce David Y to initiate or continue with such allegations as were made in any event.
- 5.17 It is necessary to add some remarks about David Y's status. The most apt description of David Y's status was as a potential witness. The *Commissioner's Instructions* did not proscribe the payment of sustenance expenses to witnesses. In the result, there appears to have been no failure by Mr Woodhouse or any other members of the Strike Force Cori investigation team to have complied with policy or procedure, and such payments as were made were duly recorded.

²⁰⁸ Barcode 5878428.

6. CONCLUDING ASSESSMENTS AND OPINIONS

- 6.1 While the course of the Commission's investigation encompassed myriad allegations of misconduct by police, thematically they concerned the conduct of Strike Force Cori investigations against Mr Marsden in bad faith and without proper grounds.
- 6.2 In the light of the independent nature of the office of police constable and the predominant role of discretion in the conduct of police investigations, in considering whether any live issues of police misconduct arise from Mr Marsden's allegations, the Commission has been chiefly concerned to assess whether relevant police investigative decisions, actions or inactions were reasonably open at the time.
- 6.3 Absent unlawfulness or breach of clear standards of propriety, as a matter of high public interest, police must be allowed to conduct inquiries in the reasonable exercise of the discretions vested in their office as they see fit. The key element being the discovery of the truth, the police must proceed without fear or favour and not waiver from that path as a result of the demands of any vested interest. It is only where investigations are conducted within such philosophical parameters that the public's confidence in police can be ensured.
- 6.4 In the wash-up to its examination of Mr Marsden complaints, the Commission is moved to observe that his challenges do not stem from circumstances fairly giving rise to real issues of impropriety in police investigations of allegations made against him. Mr Marsden has vociferously protested his innocence of the allegations and, like any citizen the subject of criminal allegations, Mr Marsden is and has always been entitled to the presumption of innocence until proven guilty in a court of law. But the Commission has found his various claims of police misconduct to be lacking in objective and dispassionate foundation when considered in the light of the overall circumstances of the Strike Force Cori investigations. Certainly, the premises underlying some of Mr Marsden's challenges seem to carry a "damned if you do, damned if you don't" element for the police concerned.
- 6.5 The submission of the Strike Force Cori brief to the DPP was claimed to be improper, or to evidence harassment and improper motives. Mr Marsden's lawyers, however, had been urging that very course to the police from early in their investigations.
- 6.6 It was also argued that there were parallels between Mr Marsden's case and the charging of a judicial officer. In the latter case, however, the alleged impropriety involved a failure to seek the DPP's advice before charging, in contrast to Mr Marsden's circumstances.
- 6.7 Police were alleged to have been biased against Mr Marsden in their response to subpoenas arising from his defamation proceedings against Channel Seven. One such instance involved the conduct of negotiations in relation to a subpoena issued by the defendant, as a result of which it was agreed between lawyers

acting for the police and Channel Seven that documents would be produced under some paragraphs of the subpoena, whereas other paragraphs would not be called upon. The making of this “arrangement” was declared by the Supreme Court to have been in accordance with accepted practice with regard to subpoenas. Produced under the subpoena were documents containing allegations by 12 complainants against Mr Marsden. In addition to alleging impropriety in the making of an arrangement declared valid by the court, Mr Marsden alleged that it was improper for the police to have produced these uncorroborated materials damaging to his case. Yet, by an earlier subpoena, Mr Marsden himself had purportedly required the production of the same documents, which production was obviated (subject to any objection otherwise available) only by an “arrangement” between the police and Mr Marsden’s lawyers of the precisely the same kind as was made between the police and his opponent in the litigation.

- 6.8 During Strike Force Cori inquiries, Mr Marsden, through lawyers acting in his interests, raised concerns with the police concerning the objectivity of their inquiries. In one instance objection was taken to the questioning of a witness. Mr Marsden made overtures to the Commissioner of Police, through a sympathetic police officer, to have the inquiries stopped. Although there was nothing improper about Mr Marsden’s defence of his interests, an objective investigation is best achieved without the person the subject of allegations seeking to look over the investigator’s shoulder.
- 6.9 Police were also alleged to have placed too much store in the evidence of “prison informers”. In the Commission’s view this is a misconceived description of a person who, from gaol, makes an allegation to police as a claimed victim of sexual misconduct in their previous civilian life. However, in at least one instance, Mr Marsden’s argument that the police should not have treated allegations of a complainant seriously rested upon claims by a person who was, in the true sense, a prison informer.
- 6.10 In relation to many of these so-called “prison informers”, statements were procured from them on Mr Marsden’s behalf retracting their allegations to police. In Mr Marsden’s view this suggested that the allegations against him had been improperly induced by police, largely by the promise of benefit, and otherwise supported his argument as to the inappropriateness of police placing any significant reliance upon discredited claims. The objective circumstances merely show that complainants changed their stories after making allegations to the investigating police.
- 6.11 Complaint was also made about the failure of police to pursue certain lines of inquiry incidental to the claimed circumstances of sexual misconduct by Mr Marsden, before the submission of a brief to the DPP. The majority of documents and statements in relation to such matters were retained in the possession of Mr Marsden’s lawyers. Mr Woodhouse was led to believe by the indications of Mr Marsden’s lawyers that these materials would be provided directly to the DPP on Mr Marsden’s behalf. Not only did this occur, but the brief prepared by Mr Woodhouse fairly contained references to the materials.
- 6.12 In conclusion, it is clear that Strike Force Cori involved the investigation of serious allegations which, by their nature, were difficult to establish or dismiss

out of hand. Having reviewed voluminous materials pertaining to relevant police inquiries and Mr Marsden's allegations in an investigation which has consumed considerable time, expense and resources, the Commission is firmly of the view that the investigations were not initiated with any intention to target or harass Mr Marsden but, as a matter of public record, in clearly appropriate circumstances.

- 6.13 Despite the distractions the police were required to deal with, investigations were conducted in an appropriate, reasonably thorough and unbiased manner. On no occasion did any of the investigating police, most notably Mr Woodhouse, exercise their investigative discretions in an unreasonable or malicious way, nor pursue ulterior motives in seeking to charge Mr Marsden regardless of the available evidence.
- 6.14 No impropriety or improper motive was involved in the submission of a brief of evidence by Mr Woodhouse to the DPP. By the brief, the DPP was asked to advise whether, on the basis of inquiries to that point, sufficient evidence existed to warrant any criminal charges, or whether any further investigations should be conducted. Far from being indicative of malice, such a course manifested Mr Woodhouse's caution to ensure that no charges were inappropriately laid against Mr Marsden.
- 6.15 Mr Marsden may believe improper motives to have been behind the decision to initiate Strike Force Cori in so far as it concerned the investigation of allegations of sexual misconduct against him, and the failure of police to pursue inquiries as he or his lawyers would have liked. However, it is the Commission's view that credit falls to the investigating police for maintaining an appropriate degree of independence and objectivity in their inquiries.
- 6.16 It will be to the satisfaction of the public interest when an independent and, in all reasonable respects, appropriate police investigation into serious allegations is conducted. In all the circumstances, the Commission is of the opinion that such an investigation occurred in relation to the allegations against Mr Marsden.

7. AFFECTED PERSONS

- 7.1 A person against whom, in the Commission’s opinion, substantial allegations have been made in the course of, or in connection with, an investigation, is an “affected person” for the purposes of a Report to Parliament by the Commission.²⁰⁹
- 7.2 Section 97(2) of the PIC Act requires the Commission to include in a report to Parliament in respect of each “affected person” a statement as to:
- ... whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:
 - (a) the prosecution of a person for a specified criminal offence,
 - (b) the taking of action against the person for a specified disciplinary offence,
 - (c) the taking of action (including the making of an order under section 181D of the *Police Service Act, 1990*) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services or otherwise terminating the services of the police officer,
 - (d) the taking of reviewable action within the meaning of section 173 of the *Police Service Act, 1990* against the person as a police officer.
- 7.3 The Commission is of the opinion that each of the following is an “affected person”:
- Former Commissioner of Police, Peter Ryan QPM
 - Superintendent Robert Inkster
 - Former Superintendent Michael Woodhouse

FORMER COMMISSIONER OF POLICE PETER RYAN

- 7.4 The Commission considers former Commissioner Ryan to be an affected person by virtue of the allegation by Mr Marsden that, in establishing the Strike Force Cori investigation, he set in train a process where Mr Marsden was subjected to police harassment or, in Mr Marsden’s words, “double jeopardy”.
- 7.5 The Commission has found no evidence to justify Mr Marsden’s allegations against Mr Ryan. Accordingly, pursuant to s 97(2) of the PIC Act it is not of the opinion that consideration should be given to the taking of any form of action whatsoever against Mr Ryan.

SUPERINTENDENT ROBERT INKSTER

- 7.6 The Commission considers Superintendent Robert Inkster to be an affected person as he was the subject of an allegations that he:
- acted in an unfair, discriminatory and negligent manner in focusing his inquiries into allegations of paedophilia against Mr Marsden to the

²⁰⁹ s 97(3) PIC Act.

7. AFFECTED PERSONS

exclusion of investigating others for involvement in criminal offences, namely, Phillip Russell and Edward; and

- improperly provided information to Channel Seven.

7.7 The Commission has found no evidence of any police misconduct in the special investigations carried out under the command of Superintendent Inkster. Accordingly, pursuant to s 97(2) of the PIC Act it is not of the opinion that consideration should be given to the taking of any form of action whatsoever against Superintendent Inkster.

FORMER DETECTIVE SUPERINTENDENT MICHAEL WOODHOUSE

7.8 The Commission considers former Detective Superintendent Michael Woodhouse to be an affected person as he was the subject of various allegations of misconduct in the carrying out of investigations under Strike Force Cori, including that he:

- behaved with bias or prejudice in investigating Mr Marsden;
- investigated allegations against Mr Marsden to the exclusion of investigations against others;
- ignored exculpatory evidence or failed to seek evidence of corroboration or to exercise appropriate discretion when assessing the veracity of allegations against Mr Marsden;
- ignored or was unaware of prosecution guidelines issued by the Director of Public Prosecutions concerning the statutory limitation on the bringing of certain charges;
- improperly attempted to obtain evidence;
- acted with bias in favour of Mr Marsden's opponent in defamation proceedings;
- failed to comply with proper procedures or otherwise had an improper relationship with informer Russell Travis; and
- failed to comply with proper procedures in respect of the payment of two amounts of \$50.00 to David Y.

7.9 The Commission has found no evidence to support the allegations against former Detective Superintendent Woodhouse, nor any other form of misconduct in the carrying out of Strike Force Cori investigations into allegations against Mr Marsden. Accordingly, pursuant to s 97(2) of the PIC Act the Commission is not of the opinion that consideration should be given to the taking of any form of action whatsoever against Mr Woodhouse.

APPENDIX 1 – STATUTORY FRAMEWORK

ROLES AND FUNCTIONS OF THE COMMISSION

- 1.1 The Commission was established under the Act on the recommendation of the Royal Commission into the NSW Police Service. The principal functions of the Commission, set out in s 13(1) of the Act, are:
- (a) to prevent serious police misconduct and other police misconduct;
 - (b) to detect or investigate, or manage other agencies in the detection or investigation of, serious police misconduct;
 - (c) to detect or investigate, or oversee other agencies in the detection or investigation of, other police misconduct, as it thinks fit;
 - (d) to receive and assess all matters not completed by the Police Royal Commission, to treat any investigations or assessments of the Police Royal Commission as its own, to initiate or continue the investigation of any such matters where appropriate, and otherwise to deal with those matters under this Act, and to deal with records of the Police Royal Commission as provided by this Act. As far as practicable, the Commission is required to turn its attention principally to serious police misconduct.

POLICE MISCONDUCT

- 1.2 The expressions “police misconduct” and “serious police misconduct” are not specifically defined by the Act. They nevertheless include the following types of conduct:²¹⁰
- (a) police corruption,
 - (b) the commission of a criminal offence by a police officer,
 - (b1) misconduct in respect of which the Commissioner of Police may take action under Part 9 of the *Police Service Act 1990*,
 - (c) corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* involving a police officer,
 - (d) any other matters about which a complaint can be made under the *Police Service Act 1990*.

INVESTIGATIONS

- 1.3 In matters where the Commission determines to carry out an investigation (whether or not in the nature of a preliminary investigation), it has a wide range of powers at its disposal in order to acquire information. For example, the Commission may:
- require public officials and public authorities to produce statements of information;²¹¹
 - require any person (whether or not a public official or public authority) to produce documents or other things;²¹²

²¹⁰ See subs 5(2) PIC Act.

²¹¹ s 25 PIC Act.

²¹² s 26 PIC Act.

- enter public premises;²¹³
- obtain search warrants;²¹⁴
- obtain warrants under the *Telecommunications (Interception) Act 1979 (Cth)*;
- obtain warrants under the *Listening Devices Act 1984*;²¹⁵ and
- require persons to attend and give evidence before a hearing of the Commission, either in public or in private.²¹⁶

REPORTS REGARDING A COMMISSION INVESTIGATION

When does the Commission report regarding an investigation?

- 1.4 In circumstances where the Commission has conducted a public hearing for the purposes of an investigation, the Commission must prepare a report to Parliament in respect of the matter to which the public hearing related.²¹⁷ In its discretion, the Commission may also prepare a report to Parliament in relation to any other matter that has been, or is, the subject of an investigation.²¹⁸ A report to Parliament must be furnished to the Presiding Officer of each House of Parliament as soon as possible after the Commission has concluded its involvement in the matter, unless it is considered desirable, in the public interest, for the making of the report to be deferred.²¹⁹ The Commission may report only to Parliament and to no other person or body.

Components of a Report to Parliament regarding an investigation

- 1.5 A report to Parliament in relation to an investigation will generally contain a number of components. Under section 97(1) the Commission is authorised to include statements as to any of its assessments, opinions and recommendations, and the reasons for any of its assessments, opinions and recommendations. The Commission must then, in respect of each “affected person”, make a statement as to whether or not consideration should or should not be given to the prosecution of persons (including police officers) for criminal or disciplinary offences and, in the case of police officers, certain other forms of disciplinary action.²²⁰ An “affected person” is a person “against whom, in the Commission’s opinion, substantial allegations have been made in the course of or in connection with the investigation concerned”.²²¹

²¹³ s 29 PIC Act.

²¹⁴ s 45 PIC Act.

²¹⁵ s 50 PIC Act.

²¹⁶ s 38 PIC Act.

²¹⁷ subs 96(2) PIC Act.

²¹⁸ subs 96(1) PIC Act.

²¹⁹ subss 96(3), (4) and (5) PIC Act.

²²⁰ subs 97(2) PIC Act.

²²¹ subs 97(3) PIC Act.

Recommendations and opinions that consideration be given to the prosecution of a person for a criminal or disciplinary offence

- 1.6 If, in the Commission’s opinion, the available evidence is sufficient to establish a prima facie case in respect of a criminal or disciplinary offence then, except in one very limited circumstance discussed below, it is the Commission’s approach to recommend that consideration should be given to the prosecution of a person for a specified criminal or disciplinary offence. Such a recommendation will be made to the relevant prosecutorial authority, for example, the New South Wales Director of Public Prosecutions. The Commission will not have regard to considerations, such as whether there is a reasonable prospect of conviction, or public policy considerations when deciding whether to make such a recommendation. These, and other discretionary considerations, are appropriately matters for the relevant prosecutorial authority. That said, the Commission may make findings or express opinions as to the veracity of evidence received from individual witnesses.
- 1.7 The circumstances in which the Commission may, in the exercise of its discretion, decline to furnish or defer furnishing a brief of evidence to the relevant prosecutorial authority are:
- where it is considered that to do so is likely to be counterproductive to the Commission’s
 - pursuit of its principal statutory functions; or
 - where the relevant person has already been considered for or has been prosecuted in
 - relation to the same, or substantially the same, subject matter and evidence, and it would
 - be unnecessary or duplicitous for the Commission to make a recommendation that consideration should be given to additional prosecutions.

Statements regarding “affected persons”

- 1.8 Subsection 97(2) of the Act requires that:
- The report must include, in respect of each “affected person”, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:
- (a) the prosecution of a person for a specified criminal offence,
 - (b) the taking of action against the person for a specified disciplinary offence,
 - (c) the taking of action (including the making of an order under section 181D of the *Police Act 1990*) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services or otherwise terminating the services of the police officer,
 - (d) the taking of reviewable action within the meaning of section 173 of the *Police Act 1990* against the person as a police officer.
- 1.9 Where substantial allegations are made against a person, whether a police officer or not, in the course of or in connection with an investigation in respect of which the Commission intends to Report to Parliament, the Report to Parliament must

include a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to prosecution of the person for a specified criminal or disciplinary offence and, if the person is a serving police officer, whether consideration should be given to:

- the taking of action (including the making of an order under s 181D of the *Police Service Act 1990*) against the police officer with a view to dismissing, dispensing with the services or otherwise terminating the services of the police officer;²²² and
- the taking of “reviewable action” within the meaning of s 173 of the *Police Service Act 1990* against the police officer.²²³

Recommendations and opinions regarding disciplinary action against police

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

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

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

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

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

²²² subs 97(2)(c) PIC Act.

²²³ subs 97(2)(d) PIC Act.

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

Other types of recommendations and opinions

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

APPENDIX 2 – PARTICULARS OF COMPLAINT

Extracted from Letter from the Commission to the Inspector of the Police Integrity Commission dated 21 September 2001.

GENERAL

1. The Strike Force Cori investigation subjected Marsden to “double jeopardy” by reinvestigating allegations that were the same or similar to those investigated by Detective Chief Inspector R K Inkster (as he then was).

HARASSMENT

2. Strike Force Cori investigations of the same or similar allegations against Marsden as were investigated by Inkster’s Special Investigation amounted to harassment, as:
 - 2.1. the investigation was necessarily without foundation given the findings of the Inkster investigation as confirmed by the ODPP opinion;
 - 2.2. Commissioner’s Ryan’s decision to appoint Mr Woodhouse to investigate those allegations (said to be a “reinvestigation” by Mr Marsden) was due to political pressure by Ms Arena, who was motivated by personal issues.

BIAS/DISCRIMINATION

3. Police were biased against Marsden in that:
 - 3.1. Strike Force Cori had a “clear focus on charging John Marsden come hell or high water”.
 - 3.2. Police assumed that because Marsden was gay, he must also be a paedophile.
 - 3.3. Police assumed Marsden was guilty of the offences alleged, and this was manifest in or resulted in improper investigation practices by police or police misconduct.
 - 3.4. That police adopted an improper approach of targeting people on the basis of “where there is smoke, there’s fire” which, contrary to normal investigations, involved police proactively seeking complainants against Mr Marsden that police should have wary of in view of their background. This amounted to or demonstrated a “campaign” to have Mr Marsden charged and convicted even though innocent of the allegations.

IMPROPER OR INADEQUATE INVESTIGATION

4. In contravention of proper policing practice and established law, there was a general direction by senior police to Strike Force Cori that corroboration was not required in investigating Marsden.

Neglect of duty

5. Police neglected their duty by investigating Marsden despite the absence of evidence of corroboration and to the exclusion of others in relation to whom there was more cogent and compelling evidence of criminality. In particular:

- 5.1. Police failed to lay charges against TC despite admissions of supply of (prohibited) drugs and engaging in under-age sex.
- 5.2. Police failed to investigate CH'S admission of having engaged in under-aged sex.
- 5.3. Police failed to investigate PR's admissions during the defamation proceedings of engaging in under-age sex.
- 5.4. Police failed to investigate Edward for perjury as a result of his admission during the defamation proceedings of his lies told in Royal Commission hearings regarding Marsden's involvement in an alleged international drug racket.
- 5.5. Police failed to investigate Neville's "best friend, flatmate and companion or even to seek his name, particularly when it was ascertained he was a highly respected member of the legal profession."
- 5.6. Mr Woodhouse failed to remove Panich from Strike Force Cori despite the fact that he had breached prison regulations and the Informers Policy when he had given cigarettes and money to prisoner Jason Y.

No legal foundation for criminal charges

6. Mr Woodhouse failed to realise that (until informed by Assistant Commissioner Clive Small) that complaints of sexual misconduct committed upon persons aged between 16 and 18 years of age at the time of an alleged offence was subject to a 12 month limitation period for the bringing of charges.

Improper attempts to obtain evidence

7. Police put words into the mouths of alleged victims and held out inducements to encourage or pressure people to make allegations against Marsden:
 - 7.1. Police pressured Shane Y into making (false) allegations against Marsden.
 - 7.2. Woodhouse induced Sean Y to make allegations against Marsden by promising to "obtain a better gaol and protection in gaol".
 - 7.3. Police induced Richard to make false allegations with lunch, alcohol and "benefits".
 - 7.4. Police pressured Ilan to be interviewed against his will and further, improperly sought or utilised the assistance of Ilan in its investigation.
 - 7.5. Police induced or sought to induce Ian to make allegations against Marsden by informing him of the availability of victims compensation benefits.
 - 7.6. Jason Y did not volunteer allegations against Marsden but was led to do so by police raising his name with him. Jason Y was also given money by police.
 - 7.7. Woodhouse (improperly) made several sustenance payments to David Y, each of \$50.
 - 7.8. David X lied to the police because he felt under pressure from the police to do so.
 - 7.9. Police threatened Sean X to the effect that they would "pull" his parole and "other things may happen" if he did not assist them.

7.10. Police provided benefits to Paul.

Due regard to factors affecting creditability of complainants

8. Police did not adequately consider or give sufficient weight to factors affecting the reliability and credibility of those making allegations against Mr Marsden, such as the fact they were prison informers, persons with criminal records or persons otherwise with little or no credit. In particular:

Prison and prison informants and associations

- 8.1. Police failed to take account of the fact that Michael was a prisoner.
- 8.2. Police failed to take account of the fact that Jason X was encouraged to provide information through W2 (Marsden infers that W2 is without credit) and was a prison informer.
- 8.3. Police failed to take account of the fact that Sean Y was a prisoner and an associate of Russell Travis and Jason Y, both of whom are without credit, and of his history of assaults upon male homosexuals.
- 8.4. Police failed to take account of the fact that DR was encouraged to make allegations against Marsden by Russell Travis, and that Travis has no credibility.
- 8.5. Police failed to take account of the fact that Sean X was an associate of Travis.
- 8.6. Police failed to take account of the fact that Paul was a prison informer, a close associate of Russell Travis and a heavy heroin user and that he (and his partner) had previously made false allegations.
- 8.7. Police failed to take account of the fact that Ronald was referred to police by a solicitor who was without credit.

Criminal history

- 8.8. Police failed to take account of or give sufficient weight to the fact that David Y, John Y, Raymond, Sean X, Edward had criminal histories.

Ulterior motives

- 8.9. Police failed to take account of the fact that TC may have lied about Marsden to divert attention from his own illegal involvement with an under-age John Y.
- 8.10. Police failed to take account of the fact that RD had motive to lie about Marsden arising from the circumstances of the termination of his employment by Marsden's firm.
- 8.11. Police failed to take account of the fact that CH had motive to lie about Marsden as a result of being struck-off the roll of solicitors when Marsden was the President of the New South Wales Law Society.
- 8.12. Police failed to take account of the fact that Ronald had motive to lie about Marsden as Marsden had acted for Ronald's estranged wife against him in defended family law proceedings.
- 8.13. Police failed to take into account the fact that Raymond was preparing to sue the State of New South Wales for abuse.

Psychiatric/medical/drug abuse

- 8.14. Police failed to take account of the fact that Raymond has a history of psychiatric illness.
- 8.15. Police failed to take account of factors affecting Edward’s credibility: a psychiatric condition, the opinion of another police officer as to his reliability as a witness, suspicion of his involvement in the murder of Frank Arkell, and that he had made inherently fantastic allegations.
- 8.16. Police failed to take account of the fact that Shane X was inherently unreliable as a combination drug abuser and addict, that his memory was likely affected by his drug use and a head injury, and did not seek relevant medical records.
- 8.17. Police failed to take account of the fact that Barry was delusional and without any credit.

Vexatious complainants

- 8.18. Police failed to take account of the fact that Arena’s allegations were sourced from the discredited Russell Travis, and that she was discredited by the Nader Commission.
- 8.19. Police failed to take account of the fact that C2 was “a vexatious litigant who would say anything about high profile judicial figures”.

Other matters

- 8.20. Police failed to take account of the fact that DT admitted to Marsden he told lies about Marsden to police.
- 8.21. Police failed to take into account that Raymond changed his story to the police on two occasions.
- 8.22. Police failed to take account of Shane X’s unreliability in that he was a known stand-over man at the Wall.
- 8.23. Police failed to take account of the statement of a person who had worked at the Wall between August 1991 and December 1992 but had never met Marsden. That persons had also spoken with other sex workers who while claiming to have done “a job” with Marsden, were not able to “substantiate their allegations”.

Corroboration – ignoring or not taking account of exculpatory information/inconsistent evidence

- 9. In investigating the allegations against Marsden made by persons of questionable credibility and reliability, police failed to pay due regard to inconsistencies in their allegations or other known factors affecting the credibility of their allegations. In particular:
 - 9.1. Police failed to take account of the fact that Michael could not identify Marsden to police.
 - 9.2. Police ignored evidence contrary to Raymond’s assertions that there was no bar named Costello’s in 1972 and, if there was such a bar, it was not owned by JM at that time and there were no cubicles.

- 9.3. Police failed to take account of the fact that Ian retracted earlier allegations against Marsden.
- 9.4. Police failed to take account of the fact that Jason Y admitted to making false allegations against Marsden.
- 9.5. Police persisted in their investigation of allegations by Shane X despite information from the Regent Hotel that Marsden did not stay at the hotel at the time of the alleged offence.
- 9.6. Police did not take adequate account of the fact that, Shane X could not locate the room in the hotel in which the alleged encounter with Marsden took place, nor locate the service lift in which Marsden and Shane X allegedly travelled.
- 9.7. Police failed to take account of the fact that Shane X's description of the room did not match any room in the hotel.
- 9.8. Police failed to take account of the fact that David Y's assertion – that he once escaped from Dharruk and went to Marsden's Campbelltown home – conflicts with TC's reports to the effect that when David Y escaped Dharruk he made contact with TC.
- 9.9. Police failed to take account of the fact that David Y's version of events conflicted with his brother's version of events in respect of: (1) whether they travelled from Huskisson for "threesomes" with Marsden; (2) an allegation that Marsden kept cocaine in his bedroom.
- 9.10. Police failed to take account of the fact that John Y's girlfriend in Huskisson made no mention of Marsden despite otherwise knowing the names of other persons with whom he was involved as a prostitute.
- 9.11. Police (improperly) failed to inform Marsden that they had made enquiries of the Regent Hotel regarding the allegations by Shane X.

Corroborating/exculpatory witness or other avenues of inquiry not pursued

10. In investigating the allegations against Marsden made by persons of questionable credibility and reliability, police failed to make inquiries which would have shown their allegations contained inconsistencies or otherwise could not have occurred as alleged. In particular:

House renovations

- 10.1. Police failed to seek evidence from police officers performing guard duties at Marsden's home in 1985 in relation to renovations, and whether they might be able to corroborate or disprove the presence of persons making allegations.
- 10.2. Police failed to check David X's description of Marsden's Campbelltown home which was incorrect.
- 10.3. Police failed to verify Sean Y's description of Marsden's house at the time of the alleged offence, which could have been checked with Marsden's gardener or by reference to Liverpool Council records.

- 10.4. Police failed to take account of the fact that David Y's description of Marsden's bedroom could not have been correct because of renovations.
- 10.5. Police failed to check (Liverpool) Council records as to whether John Y's description of (the plan) of Marsden's bedroom was correct.

Car descriptions

- 10.6. Police failed to check David Y's description of the car owned by Marsden at the time of the alleged offence which was incorrect.
- 10.7. Police failed to check that Shane X's description of the car owned by Marsden at the time of the alleged offence which was incorrect.
- 10.8. Police failed to check David X's description of the car owned by Marsden at the time of the alleged offence which was incorrect.
- 10.9. Police failed to check Jason X's description of the car owned by Marsden at the time of the alleged offence and his description of the colour and description of Marsden's house, both of which were incorrect.

Regent Hotel

- 10.10. Police did not seek to check the hotel's records to corroborate the alleged encounters between Mr Marsden and Shane X, John Y and Ian.
- 10.11. Police failed to interview New South Wales Law Society staff regarding whether Marsden, at one time President of the Law Society, had a booking for the Regent Hotel at the relevant time.
- 10.12. Police failed to interview staff at the Regent Hotel in relation to how Marsden's car appeared at the rear entrance of the hotel when he and Shane X allegedly left the hotel.

Others

- 10.13. The police made no enquiries as to premises at 32 Waverley Crescent, Bondi Junction (the alleged second home of Costello's) to establish whether it was ever used as a solicitor's office and corroborate Raymond's allegation.
- 10.14. Police failed to investigate whether Marsden used the ATM on the morning after the alleged encounter with Sean Y.
- 10.15. Police failed to make inquiries which would have shown David Y was in custody at the time of the alleged encounter with Marsden on David Y's 14th birthday, 23 October 1983.
- 10.16. Police failed to make inquiries which would have shown Marsden did not keep a donkey at his premises at the time of the alleged encounters with David Y.
- 10.17. Police failed to verify the mobile telephone number referred to in relation to David Y's allegations, which would have shown it was not available until some years after the alleged encounter.
- 10.18. Police failed to take account of the fact that a person working as a butler for Mr Marsden whom David Y claimed to have met during one of the incidents did not commence employment until some years after the alleged encounter.

- 10.19. Police failed to take account of the fact that David X had never met Marsden contrary to David Y's assertion that he introduced David X to Marsden.
- 10.20. Police failed to take account of the fact that assertions of David Y as to when he resided in Huskisson and Nowra were incorrect.
- 10.21. Police failed to inquire as to the availability of the whisky that David Y allegedly stole from Marsden's house in 1986-87, which was not produced until 1989 and not available in Australia before 1990.
- 10.22. Police failed to inquire as to the location of the lithograph that John Y allegedly saw at Marsden's home at the time of the alleged offence, which would have established it was not displayed there at the relevant time.
- 10.23. Police refused to request access to a personal letter from John Y to Marsden.
- 10.24. Police failed to check when John Y was employed by Marsden.
- 10.25. Police failed to check when John Y resided in Huskisson.
- 10.26. Police failed to seek a description of the butler employed by Marsden said to be there by John Y during the relevant period of time (1985-88).
- 10.27. Police failed to make inquiries as to the availability of a video allegedly viewed by John Y at the time of the alleged offence.
- 10.28. Police failed to check when the drug "Special K", said to be used by Marsden during the alleged offence against John Y, came onto the Australian market.
- 10.29. Police failed to check Shane X's allegation regarding Marsden's use of a mobile telephone in the hotel; in fact, the only mobile telephone used by Marsden at the time of the alleged offence was mounted in his motor vehicle.
- 10.30. The offence alleged by Sean X was said to have taken place at a gay sauna; police failed to make inquiries which would have shown that the sauna did not exist at the time in question, nor did they seek to interview any members of the gay community regarding the sauna.
- 10.31. Police failed to seek corroboration as to whether Marsden is uncircumcised.
- 10.32. Evidence obtained from BL, a close associate of John Y, did not provide good corroboration because he could not name the dates or times when John Y was involved with Marsden.

Persons who should have been interviewed

- 10.33. Police failed to interview Michael's parents as to his whereabouts at the time of the offence alleged, nor seek Michael's DOCS file or obtain information about Michael's whereabouts from his boarding school.
- 10.34. Police failed to seek corroboration from the person with whom Michael was alleged to have been in company when, at 13½ years of age, he travelled to Sydney and had his alleged encounter with Marsden.
- 10.35. Police did not seek to interview David Norman (a solicitor employed by Marsden) who allegedly accompanied Ilan to Marsden's home.
- 10.36. Police failed to interview persons associated with Ronald.

- 10.37. Police failed to seek to confirm David Y’s allegations with his wife.
- 10.38. Police failed to interview the girl living with John Y in Huskisson, who could have assisted in relation to the allegation that Marsden engaged in threesomes with David Y and John Y.
- 10.39. Police declined to interview John Y’s de facto wife.
- 10.40. Police failed to interview TB (the solicitor with whom Edward allegedly attended Costello’s).
- 10.41. Police refused to interview an employee of Marsden from whom John Y had taken over.
- 10.42. Police failed to interview Shane X’s mother and “three persons” with whom Shane X had a “close association” who could have provided information relevant to his credibility.
- 10.43. Police did not seek to interview the person named Neville who allegedly introduced Shane X to Marsden, nor did they seek to interview Shane X’s best friend, Ilan, in relation to alleged offences by Marsden against Shane X.
- 10.44. In relation to the alleged offence upon Sean X at the Albury Hotel, police failed to interview the owner of the hotel.

IMPROPER RELATIONSHIP BETWEEN WOODHOUSE AND TRAVIS

- 11. Woodhouse had an improper relationship with Russell Travis which was outside of normal police protocols.
- 12. The Strike Force Cori investigation subjected Marsden to “double jeopardy” by reinvestigating allegations that were the same or similar to those investigated by Detective Chief Inspector R K Inkster (as he then was).

IMPROPER RELEASE OF INFORMATION/IMPROPER ARRANGEMENTS TO RELEASE INFORMATION

- 13. Police improperly supplied information to Amalgamated Television Services and the media. In particular:
 - 13.1. Woodhouse (improperly) supplied David Y’s name to Greg Quail.
 - 13.2. Police (improperly) referred Shane X to Channel Seven.
 - 13.3. The “arrangement” between police and Channel Seven for responding to a subpoena issued by the defendant was “questionable”.

