



POLICE ASSOCIATION OF NEW SOUTH WALES

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Review of the *Police Integrity Commission Act 1996* pursuant to Section 146 of the Act

Submission of the Police Association of NSW

Forward

Police have extraordinary powers, among which is the power to deprive a person of their liberty and, in certain circumstances, their life. Given these powers, police in NSW are necessarily subject to the most rigorous oversight and accountability. This is as it should be, in order to ensure that the citizens of NSW have the utmost confidence that their police will carry out their duties to the law without prejudice and with integrity.

NSW Police has identified its values to be:

Excellence - having the highest professional standards and integrity

Trust - promoting community faith and confidence in their police

Honour - acting with pride and admiration for the policing profession

Impartiality - fair and objective decision making without prejudice

Commitment - dedication and devotion in the performance of your duties

Accountability - acknowledging ownership and being answerable for your actions

Leadership - acting as a role model for the community and your colleagues

The initial letters of this heading spell the word "ethical". These are high standards that the Police Force has set for its members and they are consistent with the community expectations of police and the demands that accompany the powers that the office of constable bestows on them.

In order to ensure that the members of the NSW Police Force are acting in accordance with their stated values and are fulfilling their duties in an ethical manner, an independent

oversight regime has been established. The current regime includes the Office of the Ombudsman and the Police Integrity Commission.

The Association recognizes the need for independent oversight of Police as an effective tool to ensure that public confidence in police remains high, and to assist the Force in identifying and removing officers who are not acting with integrity in the execution of their duties.

The stated policy of the Association is that the oversight body should be a specialist body, appropriately staffed and resourced and a one stop shop for police oversight. In that regard, we support a single oversight body. We do not see a role in this regime for the generalist Ombudsman and believe that the Police Integrity Commission is the appropriate oversight agency for the NSW Police Force.

This position, however, is subject to some very important conditions:

- The oversight body must act with, at the very least, the same standards that they expect of the police themselves , and
- The oversight body must also be accountable for its actions.

It is our very real concern that the Police Integrity Commission has in recent times failed to live up to the level of accountability that we expect of them. It is our hope that this can be rectified and we intend to propose some recommendations that may assist to bring about improvements in the PIC's performance.

Background

The Police Integrity Commission was established in 1997 as the result of a recommendation of the Wood Royal Commission into Policing. The initial recommendation was for the establishment of a permanent "Police **Corruption** Commission". This was later changed to the "Police **Integrity** Commission" (PIC) to emphasise the positive contribution that the Commission was intended to make to NSW policing. The PIC was established with effectively the extensive and extraordinary powers of a standing Royal Commission.

Section 3 of the *Police Integrity Commission Act 1996* sets out the objects of the Act:

Principal objects of Act

The principal objects of this Act are:

- (a) to establish an independent, accountable body whose principal function is to detect, investigate and prevent police corruption and other serious police misconduct, and (our emphasis)*
- (b) to provide special mechanisms for the detection, investigation and prevention of serious police misconduct and other police misconduct, and*
- (c) to protect the public interest by preventing and dealing with police misconduct, and*
- (d) to provide for the auditing and monitoring of particular aspects of the operations and procedures of the NSW Police Force.*

The Association supports these objects as relevant for an oversight body such as the PIC. The need for the PIC to be independent is essential for it to carry out its functions without fear that its actions will be subject to outside interference or political control.

Nonetheless, this absolute independence requires the PIC to have particular regard to its need to be accountable in the ways in which it carries out its functions. This is especially important if it is to maintain the confidence of the public and the honest police without whose support the PIC will find it difficult to operate.

Rules of Evidence

There is no rule of law requiring the PIC to observe the rules of evidence applicable in a court of law, nevertheless as the principles of natural justice apply to the PIC, only evidence with some probative value should be acted upon, and opinions only formed on sufficient evidence. All allegations that arise in the course of an investigation or any inferences that go to the integrity of an officer, should be put to that officer so as to allow them to have the opportunity to respond.

It is our submission that the impact of the opinions formed by the PIC on the lives of police officers is so significant as to require very careful consideration of the evidence by the PIC prior to publishing any such opinions. In those cases (see below) where the findings or recommendations of the PIC are subsequently subject to rigorous assessment in other fora and found to be seriously wanting, then the reputation of the PIC suffers. In the meantime, officers who have been affected by the unfounded opinions of the PIC may have their lives and careers permanently damaged, without any recourse to compensation or correction.

It is therefore very important that those who oversee the PIC investigations and who compile the reports are very familiar with the interpretation of evidence and the conduct

of investigations. The strict rules of evidence may not apply, but neither should they be ignored. In considering issues relating to corrupt behavior, the principles of *Briginshaw* may be helpful.¹ In that case, Dixon J, referring to the burden of proof required in said:

Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences (our emphasis) flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency. (our emphasis)

The *Briginshaw* approach is based on the principle that a court in a civil action should not lightly find that a party has engaged in criminal conduct. As accusations of wrongdoing usually involve serious consequences for the defendant, justice demands that the accuser, whether in civil or criminal matters, carries the burden of proof to the requisite standard. In this respect, it is our submission that, given the consequences for the officer who is subject to adverse findings, the PIC should give effect to *Briginshaw* and reassess the burden of proof utilised in coming to its conclusions to ensure that it is the appropriate one.

The Current Climate

The NSW Police Force has undergone an incredible reformation since the Wood Royal Commission and now has a reputation both in Australia and internationally for excellence and integrity. It is generally accepted that there is no ongoing evidence of any endemic or systemic corruption. As in all occupations, individual or pockets of opportunistic corrupt members occasionally arise, but for the most part these are discovered and removed by the NSW Police Force, oversighted by the PIC. It is significant that most investigations of serious misconduct or corruption among police are investigated by the

¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336

NSW Police, with the PIC as the oversight body – this, in itself, indicates the level of trust that the PIC has in the Force to address these issues.

The PIC does carry out its own investigations and sometimes takes over police investigations of corruption. On these occasions, the PIC is under the spotlight of those officers it oversees. To maintain the support of police and to engender confidence that the PIC is working to further the integrity of policing in NSW, the PIC needs to operate in a manner that is beyond reproach.

Police expect the PIC to function in the way that police are expected to operate. They expect to see investigations carried out without bias, in a manner that is fair and accountable and that targets corrupt officers, not honest ones. Police expect the PIC to operate at least to the high standards that they expect of police. They expect the PIC to be a role model for integrity and fairness.

The requirement to act beyond reproach is especially important given the extraordinary powers that the PIC has been given and the unique legal environment within which they operate. A PIC investigation and its subsequent report can have a devastating impact on the lives of officers subject of the inquiry and also on those who find themselves on the periphery of the inquiry. Police expect to see the PIC act in accordance with the principles of natural justice. They expect the PIC to make every effort to avoid “collateral damage” and to consider the impact that their actions will have on the innocent and honest police whose support they should value.

The Act specifically excludes serving or former NSW police officers from serving as investigators with the PIC. At the time the Act was passed, this was understandable – the NSW police were under a significant cloud, the Royal Commission was still exposing corruption and there was little public confidence in the ability of the police to investigate themselves. This is no longer the case. Indeed, the very fact that the majority of investigations overseen by the PIC are, in fact, carried out by NSW police provides ample evidence of the PIC’s faith in the NSW Police Force. It would seem appropriate to revisit the ban on NSW police serving with the PIC. There may be circumstances where the perceived conflicts of interest were such that interstate officers may have to be seconded to assist, but this would be only in the most unusual of circumstances. The writer cannot imagine what those circumstances may look like.

A number of notable high-profile inquiries in recent years have fallen well below the expectations of police in regard to the actions of the PIC. The effect of these events has meant that the reputation of the PIC among police as a fair, unbiased body that operates with the highest levels of integrity has suffered. The credibility of the Commission’s reports is now, justifiably or not, generally suspect among senior police. Unless this

reputation is restored there is a very real danger of the PIC losing the support of police, in particular, senior police. We will make mention of a number of these inquiries.

Rani

In December 2007, the PIC published its report to Parliament regarding Operation Rani. This operation concerned a NSW Police Force investigation into the disappearance of Janine Vaughan at Bathurst in 2001. The report made adverse findings against Detective Inspector Paul Jacob and Detective Senior Constable Ritchie Sim. In the case of Jacob, the PIC made a finding, at 10.21 that "in the opinion of the Commission the actions taken by Jacob, both individually and as a whole, are such that he should not remain a member of the NSW Police Force." This is clearly a finding of misconduct and possible criminal behavior. This goes beyond a recommendation that a matter be referred for consideration of the laying of charges or action under a disciplinary regime. It is a finding of fact of a kind that seriously damaged Jacob's reputation and impacted on his rights to fairness and just process.

Subsequently, independent advice from experienced senior counsel received by the Commissioner of Police and further investigations found the PICs findings to be so flawed and unreliable that the Commissioner chose to take no action at all against Jacob and Sim. Mr Jacob remains one of the state's most highly regarded investigators. Nevertheless, the Rani report and its adverse findings remain published on the PICs website and continue to unfairly impact on Mr Jacob's reputation.

The PIC is not part of the criminal justice system or the police disciplinary system. It can, and should refer matters for further investigation and consideration of action, but it should not be making findings of fact in matters where the onus of proof should be closer to the criminal onus than the civil. Section 16 of the Police Integrity Commission Act spells this out clearly:

16 Provisions regarding assessments, opinions and recommendations

(2) However, the Commission may not:

- (a) make a finding or form an opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence), or*
- (b) make a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence).*

Procedural Fairness

Whistler (Officers Briggs, Deissel, Jackson and Philpott)

In December 2005 the PIC published a report recommending s 173 non-reviewable disciplinary actions for a number of officers regarding alleged behavior that had not been put to them during the course of the hearings. These allegations relied on comments of a magistrate in another hearing in another forum. The officers were not given the opportunity to address the allegations prior to their publication in the final report.

One officer (Briggs) subsequently complained to the Inspector, who upheld the complaint in 2007, noting that a number of other officers had also been denied natural justice and that even though the PIC was not bound by the strict rules of evidence, nevertheless it had to afford procedural fairness especially in those circumstances where they were likely to find against a person subject to an investigation. The PIC conceded that procedural fairness had been denied a number of officers in Whistler. The Inspector provided a draft report to the PIC to allow it to prepare the Alford report.

Alford (December 2009)

Senior counsel advice was that PIC could not “unpublish” Whistler and remove the offending material. It did send letters of apology to Briggs, Deissel, Jackson and Philpott, as well as copies to Wagga Local Area Command and the Professional Standards Command.

In order to address the issues PIC began Operation Alford, which gave it the power to publish a report that purported to address the shortcomings of Whistler and identify the passages in Whistler that it found to be invalid.

PIC, however, also sought to revisit a number of issues that it had already covered in Whistler and effectively restart the original investigation. Upon challenge, this was found to be essentially *ultra vires* and the final Alford report merely identified passages that should not have appeared in Whistler due to the lack of procedural fairness. Alford identifies the complainants as ‘affected persons but does not recommend any further action.’ Both Whistler and Alford are on the PIC website. Whistler’s findings remain published, notwithstanding the Alford declarations.

State of NSW v Hathaway [2010] NSWCA 184 has laid this matter to rest finally, removing any suggestion of wrongdoing by Briggs, Philpott, Jennings, Jackson and Deissel.

The Inspector's report (June 2010)

Philpott, Jennings and Deissal made further complaints to the Inspector regarding Whistler. The Inspector upheld the complaints, essentially saying that Alford did not address all the issues, and with the two reports currently published on the PIC website, the confusion is such as to have a lasting and damaging impact on the reputations and careers of the complainants.

The Inspector notes that Whistler is **"incoherent and internally inconsistent, lacking crucial cross-referencing, and consequentially substantially unreliable"**. He states that "the only acceptable and ethical course open to the Commission...is for the Whistler Report to be **removed** forthwith from the Commission's website in its entirety, with an explanatory note being substituted explaining clearly and fully the reasons for its removal..."

This report was published on 9th June 2010. There has been no response to date from the PIC. On 16th July the Inspector wrote to the Commissioner of Police explaining his findings and strongly recommending that all s173 notices in respect to Jennings, Kelly, Briggs, Philpott and Deissel be withdrawn and all penalties incurred and detriment suffered as a result of those orders be removed, withdrawn, cancelled or revoked.

Police Association of NSW Complaint - Mallard

The complaint relates to the release to the media of unedited recordings of telephone conversations made by Adam Purcell, during which he makes extensive disparaging remarks about other senior officers not subjects of the investigation. At one stage he makes serious adverse comments about one officer (Wood) that were clearly unsubstantiated and made while he (Purcell) was intoxicated.

None of the officers mentioned in these recordings was an affected person or relevant to the inquiry.

The material was widely reported without any opportunity for the officers mentioned to respond or defend themselves. The officers subsequently suffered extreme embarrassment both at their workplace and in the public arena.

No opportunity was afforded any of the officers so mentioned to be questioned in the hearings of Mallard, nor were they given the opportunity to respond in any meaningful way to the remarks of Purcell. Obviously, the media gave them no opportunity to respond. The Association cannot understand why the PIC Commissioner did not use his powers under section 52 (1) of the Act to suppress the names of these officers.

The Inspector upheld the complaints (January 2010) and recommended that the PIC apologise to the officers involved and review their policy as to the use of intercepted material. A draft copy of the Inspector's report was given to the PIC.

The PIC Response

In general, the PIC "rejects the criticisms contained in the draft report". No apologies have been issued.

PIC has amended its procedures so that "a record is now kept of how many copies [of intercept material] are released and to whom", and it has amended its hearing policy to emphasise the requirement that consideration be given to the relevant privacy considerations when intercepted information is being considered for use in public hearings.

No one has seen the above policy outside the PIC. We do not believe that this response was satisfactory.

The impact of these inquiries.

Apart from the personal grief suffered by police officers either subjected to allegations emerging from these inquiries, or mentioned during hearings, the impact extends to their careers, their families and their working relationships. Many of these inquiries take years to be finalized. Even after reports are published, it may take many more years for matters to be determined in other fora. The stigma of having been even mentioned in a PIC hearing or report may linger for many years, even after the officer has ultimately been cleared of any wrongdoing by a jurisdiction to which the matter has been referred.

We know that the Director of Public Prosecutions (DPP) maintains an "Adverse Mention List". This list contains the names of any officer who is adversely mentioned by the PIC in any report or hearing. The DPP has an obligation to notify defence lawyers if an officer giving evidence against an accused is on this list. This information may be used by defence counsel to attack the credit of officers giving evidence in criminal trials. This could be devastating to prosecution cases. Given that an officer on this list probably has not had the opportunity to have his or her matter determined before any competent criminal or disciplinary forum, the obligation of the PIC to act both in a timely manner and with proper attention to due process and fair play is significant. It is our understanding that the DPP will now remove an officer from the list if the Inspector determines that the finding of the PIC is flawed. Given the limited resources of the Inspector and the time taken to investigate and resolve complaints against the PIC, an officer may remain on the list for years. There is a significant public interest question at issue here. The reality is that there is the potential for criminal prosecutions to fail due to the fact that an officer's credit is impugned on flawed PIC findings. The obligation on the PIC to be cautious and credible in its findings is obvious.

The response of the PIC

The attitude of the PIC in recent times to the deliberations and findings of the independent oversight body (the Inspector) has been unacceptable for both police and the public. Findings and recommendations of the Inspector have largely been rejected or ignored by the PIC. Police are beginning to lose faith in the ability of the PIC to treat them fairly. The trust that the PIC will work to remove corrupt police at the same time standing with honest police and supporting them in the fight against corruption is beginning to waver. There is a real risk that police will now see the PIC as only looking to obtain "scalps".

Sir Robert Peel, the creator of the modern concept of a police force, developed nine principles of modern policing. The last principle is : "The test of police efficiency is the absence of crime and disorder, not the visible evidence of police action in dealing with it." This is a principle that might also apply to oversight bodies, in particular the PIC. The real test of the effectiveness of the PIC is the absence of police corruption, not the number of inquiries or hearings that are held. Findings that name and shame officers without credible evidence only serve to weaken the moral authority of the PIC and destroy police cooperation.

Inspector of the Police Integrity Commission and the Joint Parliamentary Committee

The functions of the Inspector of the PIC are set out in s89 of the PIC Act:

Principal functions of Inspector

- (1) The principal functions of the Inspector are:
 - (a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and*
 - (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and*
 - (c) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.**
- (2) The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Ombudsman, the ICAC, the New South Wales Crime Commission, the Joint Committee or any other agency.*
- (3) The Inspector is not subject to the Commission in any respect.*

The role of the Inspector (together with the Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission (the JPC)) is critical in maintaining trust among police and the public that the way the PIC operates is fair, transparent and accountable. Both these bodies become redundant if :

1. They are not rigorous in their examination of the PIC's activities, or
2. Their recommendations are not acted upon, or are ignored by the PIC.

If these bodies are truly overseeing the PIC, then they cannot simply accept the reports of the PIC, but must place them under the microscope, particularly when there are credible complaints against the PIC. Nothing less would be expected of the Police or the PIC itself.

The Office of the Inspector, a part time function with limited resources, has produced a number of reports that have raised serious issues regarding a number of the PIC's operations. These reports have shown a fearless approach to ensuring that the PIC maintains procedural fairness and accountable procedures. The Inspector has made a

number of recommendations in these reports that the PIC has chosen simply to ignore, without any reasoning or justification for that course of action.

The JPC has made no recommendations for the PIC regarding the findings of the Inspector, nor has it been critical of the operations of the PIC, despite the very well-founded criticisms in the Inspector's reports. The JPC appears to take the responses of the PIC to the Inspector's reports (given in evidence before them) as sufficient explanation of the criticisms found in the reports. A reading of the transcripts of these hearings does not reveal the kind of rigorous questioning that one would expect of a Committee overseeing such a significant Commission. Given the workload of many parliamentarians and the fact that they are not necessarily expert in law, it may be time for the Committee to seek the advice of senior counsel well experienced in the law relating to commissions of inquiry, to assist in their examination of the PIC's activities.

The fact that the recommendations of the highest authority in NSW and the purported voice of the people, the NSW Parliament (through the JPC) can be ignored by the PIC is of some concern. Even if the PIC does not agree with the Inspector or the JPC, it must do more than merely reject these recommendations – some sensible justification must be made out so that the requirements of accountability can be made out. If this is not forthcoming, then the PIC should be required, through amendment to the Act, to take further action to satisfy those requirements.

Other Comments

The Reporting Functions of the PIC

These are outlined at section 97 of the Act:

97 Content of reports to Parliament

- (1) *The Commission is authorised to include in a report under section 96:*
 - (a) *statements as to any of its assessments, opinions and recommendations, and*
 - (b) *statements as to the Commission's reasons for any of its assessments, opinions and recommendations.*

- (2) *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.*
- (3) *An "affected" person is a person against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation concerned.*
- (4) *Subsection (2) does not limit the kind of statement that a report can contain concerning any such "affected" person and does not prevent a report from containing a statement described in that subsection in respect of any other person.*

The Act does not require the PIC to revisit any report, nor to make any subsequent report, correcting any errors that are found to have occurred in the original report by the Inspector or any other competent authority. This is a glaring omission. The PIC's reports remain published, even if they are found at some later time to be fatally flawed. This is consistent with the law and High Court precedent in regard to the findings of such Commissions. Nonetheless, there are demands of fairness and natural justice that overturned findings or flawed reports are in some way acknowledged and accepted by the body which has made the (flawed) report. Even if, at law, the reports cannot be "unpublished", there is no reason why a fatally flawed report cannot be removed from the PIC's website, or at the very least, have links from the report to the findings that have overturned or criticized the PIC report.

On a more basic level, apologies can be made to those affected by the flawed reports. This is not a sign of weakness, but an indication that the PIC is both conscious of the impact of its findings and committed to fair play and accountability. The PIC expects police to acknowledge mistakes – police expect the same from the PIC.

Acting on these latter two issues would go a long way to restoring police confidence in the PIC.

The Reporting Functions of the Inspector

The Act is unclear on the power of the Inspector to issue reports concerning complaints against the PIC. The Act refers only to annual reports and special reports to parliament. Given the requirements of both timeliness and fairness, the Act should be amended to clarify this issue.

RECOMMENDATIONS:

1. The Commissioner of the Police Integrity Commission be appointed from the ranks of serving or retired judges of the Supreme Court of a state of Australia.
2. The position of Inspector of the Police Integrity Commission be made a full time role and that the office of the Inspector be appropriately resourced and funded.
3. The *Police Integrity Commission Act 1996* be amended to allow the Inspector to publish reports on the Inspector's website at any time.
4. The *Police Integrity Commission Act 1996* be amended, if necessary, to allow the Police Integrity Commission to remove reports from its website and any other place of publication or to publish reports identifying and correcting errors in previously published reports.
5. The Police Integrity Commission seek advice from an independent senior counsel prior to publication of any report or finding.
6. The Police Integrity Commission website provide hyperlinks from its reports to reports of the Inspector or findings of a court or judicial officer that subsequently overturn any finding of the Police Integrity Commission.
7. S10 of the *Police Integrity Commission Act 1996* be amended to remove the prohibition on the use of serving or former NSW Police Officers as investigators or staff of the Police Integrity Commission.
8. A code of conduct and values for the Police Integrity Commission that mirrors the code of the NSW Police Force and enshrines the principles of natural justice be established and referred to in the *Police Integrity Commission Act 1996* and the regulations to that Act.

9. The *Police Integrity Commission Act 1996* be amended so that the Joint Parliamentary Committee on the Ombudsman and the Police Integrity Commission has the power to direct the Police Integrity Commission to take any lawful action it (the Committee) considers appropriate where the Committee determines that a report by the Inspector or the findings of a court warrants the action.

10. A senior counsel assisting the Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Committee be appointed.

11. The jurisdiction of the Office of the Ombudsman over police be revoked and the Police Integrity Commission become the single oversight body for the NSW Police Force.