



NEW SOUTH WALES

*Inspector
of the
Police Integrity Commission*

Our Ref: 2012 03
Your Ref: LAC12/008

20 June 2012

The Hon Catherine Cusack MLC
Committee Chair
Committee on the Office of the Ombudsman and Police Integrity Commission
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Email: ombopic@parliament.nsw.gov.au

Dear Ms Cusack,

I refer to your letter of the 4 June 2012.

I am grateful for the extension of time in which to provide answers to the Further Questions on Notice.

I enclose my responses and accompanying documentation.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'David Levine'.

The Hon David Levine AO RFD QC
Inspector: PIC

PARLIAMENT OF NSW
COMMITTEE OF THE OFFICE OF THE OMBUDSMAN & POLICE INTEGRITY COMMISSION
FURTHER QUESTIONS ON NOTICE

Funding

- i. *In response to question on Notice 4, you indicated that a review of the budget may be necessary after you have settled into your position. Do you have a time frame in mind for this?*

Answer

I do not have a precise time frame in mind. The information available to me in the barest of outlines (which is all I presently require) and provided by the Chief Financial Officer of DPC is that the financial budget for 2011–12 is \$353,268.00. In the scheme of things I would regard this amount as being minimalist. There may be factors that will impact upon the budget:

First, the relocation of the offices of the Inspectorate to Bligh House by the end of July 2012. This will no doubt affect so much of the budget which is allocated to the payment of commercial rent. The second matter which could impact upon the budget is the necessity to employ either on a part or full time basis an additional member of staff. The nature and volume of the work of the Inspectorate since I commenced on the 1 February 2012 have not indicated that there is any necessity for either a full or part time additional member of staff. I have made an informal arrangement with the office of the Crown Solicitor that in the event that I require legal advice I may approach a member of the staff of that office who will decide whether or not that the Crown Solicitor can handle the matter. In the event that the Crown Solicitor cannot, I will then use what I understand to be a protocol via DPC for the engagement of independent legal advice. Hitherto the necessity to take such a step has not arisen. A third area that may affect budget will be the acquisition of a sophisticated telephone system and digital recording devices. The costs have yet to be explored.

I may well be in a better position to provide further information on budgetary matters early in 2013, that is after I have been in Office for 10 months.

Planning and Transition

- ii. *Are there any concerns raised by the previous Inspector that you have decided either to pursue or not to pursue?*

Answer

I have been working on the basis that the 2012 amendments to the Police Integrity Commission Act 1996 have addressed concerns raised by my predecessor.

There is one matter which I gather agitated my predecessor and that was in relation to the *Telecommunications (Interception and Access Act 1979) (Commonwealth)* I attach a letter he wrote to the then Commonwealth Attorney-General The Hon Robert McClelland dated 4 November 2011. I further attach communications from Ms Kathryn Ovingham of the Attorney-General's Department of the Commonwealth and my responses to Ms Ovingham. This is the only other matter of which I am conscious that was an issue raised by my predecessor and which I have addressed.

Task Force Emblems

iii.

- (a) Under what function, as set out in Section 89 of the Police Integrity Commission Act are you conducting your work on the referral to you of aspects of the Task Force Emblems?
- (b) If this work is not captured by the functions under s 89, upon what basis are you performing these tasks?
- (c) If this work is not captured by the function under s 89,
 - i. What protection or indemnities attach to you while you perform this work?
 - ii. What capacity do you have to report to Parliament as the results of your work?

iv. If you are conducting an Inquiry under s217 of the Police Act, how do you have jurisdiction for the purposes of this Inquiry over.

- (a) PIC officers
- (b) Officers or employees of the Crime Commission relating to events over a decade ago?

Answer

The issues raised in these questions occurred to me after receipt by me of a request by the Minister for Police under section 217 of the Police Act. I was referred to a request made by the then Minister for Police (Mr Costa) in 2002 under the same section to my predecessor, the Hon Mervyn Finlay QC. There is no evidence that the issues raised in the questions you have asked concerned the Hon Mervyn Finlay QC who proceeded to provide a Report to the then Minister for Police. Although the issues raised by the Questions have occurred to me, and indeed concern me, I have adopted the following approach.

I am prepared to approach the reference from the current Police Minister on the same basis as my predecessor the Hon Mervyn Finlay QC to ensure that the 'Taskforce Emblems' matter (which has at least a 12 year history) be brought to finality. I do not consider it to be in the public interest, with respect, that my efforts to achieve this outcome be thwarted by undue technical jurisdictional issues not least because of the time that has passed. If I am able to achieve some finality and it is then discovered that I did so without jurisdictional power, then so be it. The alternative, being stymied into doing little or nothing is not, to my mind, acceptable. I can indicate that each of the entities referred to in Questions iii. and iv. have themselves expressed a willingness to cooperate with me in providing information to enable the preparation of my Report to the Minister. This approach I can well understand might be considered to be unorthodox in some quarters but it is for a desirable end in my respectful view.

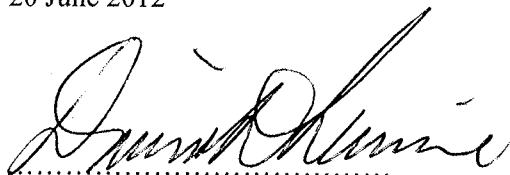
That is as far as I am prepared to proceed in answer to the Questions at this stage.

v. Have you considered seeking Crown Solicitor advice on the above issues (items iii, iv and v)?

Answer

Yes and I shall do so. When I shall do so, I do not quite know however I think I can safely say that by the time I have completed writing the Report I will be better placed properly to instruct the Crown Solicitor as to the matters on which I wish to receive his advice.

20 June 2012



The Hon David Levine AO RFD QC

Inspector: PIC



NEW SOUTH WALES

*Inspector
of the
Police Integrity Commission*

Our Ref: CR 04-AD

4 November 2011

The Hon Robert McClelland MP
Attorney-General
Parliament House
BARTON ACT 2600

Dear Attorney-General,

Re: *Telecommunications (Interception and Access) Act (1979)*

- 1) I have set out below, for your interest, paragraphs 139-146 from my 2011 Annual Report tabled in the NSW Parliament on 11 October 2011.
- 2) That material will no doubt speak for itself, and I need not comment further upon it.
- 3) In view of my conclusions stated in paragraphs 145-146, it occurred to me that you may wish to consider amending the legislation to overcome the problems identified by me in that material.

<p>ADVICE FROM THE COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS</p>
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- 139) As noted in my 2010 Annual Report (page 17), I wrote to the Commonwealth DPP in respect of the apparent breaches by the Commission of the *Telecommunications (Interception and Access) Act (1979)* (Cth), identified in my Report dated 28 January 2010 (published on the Inspector's website). My Report dealt with complaints by the Police Association (NSW) of improper use by the Commission of lawfully intercepted

telephone conversations. In that correspondence I sought the advice of the DPP as to whether, in light of my opinions as to a breach of that legislation, proceedings should be commenced by the DPP against the Commission or any officer thereof. The advice subsequently conveyed to me by letter from the CDPP was to the effect that in his opinion there was no reasonable prospect of securing a conviction against the Police Integrity Commission or any of its officers under section 105 of that legislation in respect of the publication by the Commission of the material the subject of the complaint.

140) As also noted in my 2010 Annual Report (page 17) I had of my own initiative “commenced an investigation into the circumstances in which the Commission published in that [Mallard] Report, the telephone conversations of certain persons together with the identity and personal details of those persons, apparently on the basis that such persons were parties to a telephone conversation with a person being investigated by the Commission, and also details sufficient to identify another person referred to in those conversations together with potentially adverse material relating to that person.” **Subsequently, I completed my investigation and produced a Report detailing my findings and recommendations. That Report appears in the Schedule to this Annual Report and is also available on the Inspector’s website – www.inspectorpic.nsw.gov.au.**

141) For convenience, I include below the following summary of the background to and the conclusions reached in that Report, including paragraphs 1-7 of my Report.

- 1) *The Police Integrity Commission’s Operation Mallard Report was presented to the NSW Parliament in December 2007, and thereupon made a public document, on the recommendation of the Commission.*
- 2) *Contained in that Report is a considerable amount of material comprising personal details concerning two persons identified therein as Quenten Roberts and Michelle Roberts, neither of whom was at any time under investigation by the Commission, nor was either called as a witness by the Commission during the conduct of the Mallard hearings. There*

is also material concerning a person identified in the Report only, and unceremoniously, as "Purcell's ex-wife" who falls into the same category, although such material is confined to one subject matter of narrow compass.

- 3) In fact, the only reason Mr and Ms Roberts were identified in the Commission's public Report, together with the personal details pertaining to them, was that each participated in telephone conversations with, and at the behest of, the then Superintendent Purcell of NSW Police, who was under investigation by the Commission at that time, which telephone calls were lawfully intercepted by the Commission pursuant to telephone intercept warrants obtained by the Commission.*
- 4) However, unlike the Roberts, the woman referred to as "Purcell's ex-wife" was not, as will appear below, a party to any such lawfully intercepted telephone conversation, her involvement resting on the even more tenuous basis that she was so-described when mentioned in relation to a lawfully intercepted telephone call between Purcell and another police officer. Nevertheless, personal details concerning her were published by the Commission in its Mallard Report.*
- 5) These personal details were among those also published about these three persons during the Commission's public hearings, which took place on 30-31 May, and, in particular, on 1 June 2007, when the telephone calls between Purcell and each of the Roberts were played in full so as to be audible to those in the hearing room, and the text thereof displayed on a public monitor (subject in each case to deletions made by the Commission relating to other persons mentioned therein), and when portion of the content of the telephone conversation referred to above, in respect of "Purcell's ex-wife", was put to Purcell by Counsel Assisting during Purcell's examination.*

- 6) *Transcripts and the audio-tapes relating to the telephone calls involving the Roberts, were then provided by the Commission to the representatives of the Media present in the hearing room. None of this material was at any time sought to be retrieved by the Commission from these recipients, and no restriction was placed by the Commission on the use to which this material might be put by them.*
- 7) *In my opinion, the overall effect of the publication of the material in question, both in the public hearing and in the subsequent Report, because of the nature of that material, and the construction that might not unreasonably be placed upon it, was capable of damaging the interests and reputations of the three persons publicly identified in this manner.*

- 142) I concluded that the Commission had published concerning those three persons, without their knowledge or consent, highly personal information which was capable of causing each of them embarrassment, which was potentially prejudicial to their interests, and damaging to their integrity and reputations, and that there was *not the slightest justification* for the Commission's conduct in so doing.
- 143) Subsequently, I again sought the advice of the CDPP as to whether, in light of my opinions as to a breach of the TIA Act, proceedings should be commenced by the DPP against the Commission or any officer thereof. The advice subsequently conveyed to me by letter from the CDPP was to the same effect as the previous advice, namely, that in his opinion there was no reasonable prospect of securing a conviction against the Police Integrity Commission or any of its officers under that legislation.
- 144) The gravamen of that and the previous advice seems to be that the CDPP takes the view that the question of the relevance to an investigation of lawfully intercepted material gathered by the Police Integrity Commission is a matter solely for the Commission to determine, and that the issue of whether in the circumstances the Commission ought to have excised the offending material did not bear on whether an offence had been committed.

145) This situation in my opinion gives rise to a most unsatisfactory state of affairs. As the extracts published by the Commission from the lawfully intercepted conversations identified in my two Reports demonstrate, in my opinion, the Commission in each case published personal details of and or derogatory references to a number of persons arising out of the intercepted telephone conversations. That material was entirely irrelevant to the Commission's investigation. The Commission nevertheless published that irrelevant material to the potential detriment of the interests and reputations of those involved.

146) Yet it appears that such persons are left without remedy or protection under that legislation or any other law.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Peter Moss'.

The Hon P J Moss, QC
Inspector of the Police Integrity Commission

PIC_Inspector - Ovington, TSLB to Inspector PIC - Request for comments - use of lawfully intercepted information in public hearings [SEC=UNCLASSIFIED]

From: "Ovington, Kathryn" <Kathryn.Ovington@ag.gov.au>
To: "pic_inspector@dpc.nsw.gov.au" <pic_inspector@dpc.nsw.gov.au>
Date: 29/03/2012 4:28 PM
Subject: Ovington, TSLB to Inspector PIC - Request for comments - use of lawfully intercepted information in public hearings [SEC=UNCLASSIFIED]
CC: "Whitaker, Susan" <susan.whitaker@ag.gov.au>, "Kelly, Wendy" <Wendy.Kelly@ag.gov.au>

UNCLASSIFIED

Dear Inspector

I work in the Telecommunications and Surveillance Law Branch of the Attorney-General's Department and we are currently developing amendments to the *Telecommunications (Interception and Access) Act 1979* (TIA Act).

With changes to the technological and structural nature of the telecommunications industry, law enforcement and security agencies are facing increasing challenges to their capability to undertake telecommunications interception. In response the Department is reviewing the operation of the TIA Act. This project is being conducted within Government and we have approval for limited in-confidence consultation with Government agencies and Departments as well as selected industry participants. Within New South Wales, the Department has had similar discussions through pre-existing forums with New South Wales Police, the Police Integrity Commission, the Independent Commission Against Corruption and the Crime Commission.

Your predecessor, the Hon PJ Moss QC, wrote to the former Attorney-General, the Hon Robert McClelland MP, on 4 November 2011 to express concern about the disclosure of certain lawfully intercepted conversations in hearings by the Police Integrity Commission. In the former Inspector's view, the material was irrelevant to the Commission's investigation and publication was to the potential detriment of the interests and reputations of those involved.

The use of lawfully intercepted information (LII) in public hearings is and will remain a contentious area. The Department would like to ensure that existing powers are unaffected as much as possible going forward while balancing privacy interests and ensuring public confidence in the regime. Accordingly, the Department is considering an option to maintain the status quo enabling the use of LII in public hearings (that are not prosecutions) but to require the head of that agency to approve the use of LII in a public hearing prior to a hearing occurring. In making a decision to approve the use of LII in a public hearing, the head of the agency may be required to have regard to:

- the value of the LII to the investigation
- the potential damage that public disclosure could have on any person, including their reputation
- whether the public disclosure of the LII will assist in the investigation, and
- the gravity of the offence under investigation

The agency head's power to make such a decision may be supported by an ability to impose restrictions on the publication of any evidence.

We consider that including such requirements on the face of the TIA Act would create a national approach.

In addition, we propose that this approach would add integrity by assuring the public that decisions to use LII in public proceedings are considered at the highest level within agencies.

We seek your comments on this proposal, on an in-confidence basis, in light of the comments made by your predecessor on this issue.

Kind regards

Kathryn Ovington
Senior Legal Officer
Telecommunications and Surveillance Law Branch
Tel: 02 6141 3059 / mob: 0439 575 352

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PIC_Executive - Email TSLB to Inspector PIC [SEC=UNCLASSIFIED]

From: "Ovington, Kathryn" <Kathryn.Ovington@ag.gov.au>
To: PIC_Executive PIC_Executive <PIC_Executive@dpc.nsw.gov.au>
Date: 4/04/2012 4:08 PM
Subject: Email TSLB to Inspector PIC [SEC=UNCLASSIFIED]
CC: "Whitaker, Susan" <susan.whitaker@ag.gov.au>, "Kelly, Wendy" <Wendy.Kelly@ag.gov.au>

UNCLASSIFIED

Thank you Inspector.

Kind regards

Kathryn Ovington
Senior Legal Officer
Telecommunications and Surveillance Law Branch
Tel: 02 6141 3059 / mob: 0439 575 352

From: PIC_Executive PIC_Executive [mailto:PIC_Executive@dpc.nsw.gov.au]
Sent: Wednesday, 4 April 2012 3:35 PM
To: Ovington, Kathryn
Subject: [SEC=UNCLASSIFIED]

Dear Ms Ovington

Thank you for your email of 29 March 2012. I shall attend to the matters raised as soon as I can.

Yours sincerely

The Hon David Levine AO RFD QC
Inspector PIC

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PIC_Inspector - T(I & A) Act 1979 - Comment [SEC=UNCLASSIFIED]

From: PIC_Inspector
To: Kathryn.Ovington@ag.gov.au
Date: 20/04/2012 12:08 PM
Subject: T(I & A) Act 1979 - Comment [SEC=UNCLASSIFIED]

Dear Ms Ovington,

I refer to your email re the subject seeking my comments on the disclosure of lawfully intercepted conversations.

There is an initial matter that is puzzling me; it is either simple, complex or its solution is staring me in the face.

S.63 (1) refers to "....*subsection 7(1)* ". There are similar references to "*subsection 7(1)*" in , for example, S63A(1)(c) and S63B(1) and (2).

My query is: "*subsection 7(1)*" of what Section?

OR, are the references to "*subsection 7(1)*" to be understood as references to *Section 7 (1)* of the Act?

Or is it something else altogether?

Please do feel free to help me in any way you consider appropriate.

Yours sincerely,

The Hon David Levine AO RFD QC
Inspector - Police Integrity Commission
NSW Department of Premier & Cabinet
GPO Box 5215 Sydney NSW
T: 9232 3350 F: 8243 9471
E: pic_inspector@dpc.nsw.gov.au

PIC_Inspector - Email PIC Inspector to TSLB - T(I & A) Act 1979 - Comment [SEC=UNCLASSIFIED]

From: "Ovington, Kathryn" <Kathryn.Ovington@ag.gov.au>
To: PIC_Inspector PIC_Inspector
<PIC_Inspector@dpc.nsw.gov.au>
Date: 20/04/2012 3:26 PM
Subject: Email PIC Inspector to TSLB - T(I & A) Act 1979 - Comment [SEC=UNCLASSIFIED]
CC: "Whitaker, Susan" <susan.whitaker@ag.gov.au>

UNCLASSIFIED

Dear Inspector

I can see that these references can be confusing. It is a usage that we have probably adopted from our parliamentary drafting colleagues. They refer to section x, subsection x(1), paragraph x(1)(b), subparagraph x(1)(b)(i) and so on.

Yes, as you say the references to subsection 7(1) are to be understood as references to section 7(1) of the Act.

Incidentally, I am out of the office next week. If you are sending any comments next week, would it be possible for you to email my Director Susan Whitaker at susan.whitaker@ag.gov.au. I will put her contact details in my out of office message in any event.

Kind regards, Kathryn

Kathryn Ovington
Senior Legal Officer
Telecommunications and Surveillance Law Branch
Tel: 02 6141 3059 / mob: 0439 575 352

From: PIC_Inspector PIC_Inspector [mailto:PIC_Inspector@dpc.nsw.gov.au]
Sent: Friday, 20 April 2012 12:08 PM
To: Ovington, Kathryn
Subject: T(I & A) Act 1979 - Comment [SEC=UNCLASSIFIED]

Dear Ms Ovington,

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S.63 (1) refers to ".....*subsection 7(1)* ". There are similar references to "subsection 7(1)" in , for example,

PIC_Inspector - T(I&A) Act 1979 - Comment

From: PIC_Inspector
To: kathryn.ovington@ag.gov.au [SEC=UNCLASSIFIED]
Date: 21/05/2012 4:03 PM
Subject: T(I&A) Act 1979 - Comment

Thank you for your email of the 20 April 2012.

My present position is this; I have read the communication from my predecessor to the then Commonwealth Attorney-General, The Hon Robert McClelland MP dated the 4 November 2011. I have also had regard to what my predecessor wrote in his 2010 Annual Report as set out in his communication of the 4 November 2011.

It is not to be taken that by having had regard to them, I am necessarily in agreement with them or would have taken the same steps as my predecessor.

I agree with the observations generally in your communication dated 29 March 2012. The area certainly is contentious and there are of course competing areas of public interest to be served, protected and reconciled if necessary.

Presently, I am *not* of the view that a LII should lose its immunity because it is 'irrelevant' the more so if found to be irrelevant by someone such as an Inspector rather than the particular body conducting the inquiry in which evidence of the LII emerges.

This leads me to state expressly that I agree, at this point of time, that the status quo should be maintained in relation to the use of LII in public hearings but that the head of the relevant agency should have power relating to approval of the use of LII in public hearings even if, on the strictest legal basis, there may well be an argument that it is 'irrelevant', provided the matters to which you refer are properly balanced.

Certainly the agency's head should have power to impose restrictions on disclosure and to publish public disclaimers and the like.

It goes without saying that a national approach is highly desirable.

I regret I cannot expand further on the matter, except to say that I would not necessarily taken the same course as my predecessor with the utmost respect to him and further that the overall approach outlined in your communication of 29 March 2012 is one with which I am in essential agreement.

Yours sincerely

The Hon David Levine AO RFD QC
Inspector - Police Integrity Commission
GPO Box 5215 Sydney NSW
T: 9232 3350 F: 8243 9471
E: pic_inspector@dpc.nsw.gov.au

PIC_Inspector - RE: Email Inspector PIC to Ovington, TSLB - T (I&A) Act 1979 - Comment - use of LII in public hearings [SEC=UNCLASSIFIED]

From: "Ovington, Kathryn" <Kathryn.Ovington@ag.gov.au>
To: PIC_Inspector PIC_Inspector
<PIC_Inspector@dpc.nsw.gov.au>
Date: 23/05/2012 9:03 AM
Subject: RE: Email Inspector PIC to Ovington, TSLB - T(I&A) Act 1979 - Comment - use of LII in public hearings [SEC=UNCLASSIFIED]
CC: "Whitaker, Susan" <susan.whitaker@ag.gov.au>, "Kelly, Wendy" <Wendy.Kelly@ag.gov.au>, "Woodley, Stuart" <Stuart.Woodley@ag.gov.au>

UNCLASSIFIED

Thank you Inspector for your comments on this issue.

Your input, and consideration of your predecessor's comments, are both greatly appreciated.

Kind regards, Kathryn

Kathryn Ovington
Senior Legal Officer
Telecommunications and Surveillance Law Branch
Tel: 02 6141 3059 / mob: 0439 575 352

From: PIC_Inspector PIC_Inspector [mailto:PIC_Inspector@dpc.nsw.gov.au]
Sent: Monday, 21 May 2012 4:03 PM
To: kathryn.ovington@ag.gov.au [SEC=UNCLASSIFIED]
Subject: Email Inspector PIC to Ovington, TSLB - T(I&A) Act 1979 - Comment - use of LII in public hearings

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Yours sincerely

The Hon David Levine AO RFD QC
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