



NEW SOUTH WALES

***Inspector
of the
Police Integrity Commission***

14 June 2013

Our Ref: G6 2013 02

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

Via email: catherine.cusack@parliament.nsw.gov.au

Dear Ms Cusack,

Re: Inquiry into Performance Measures in Oversight Agencies

I refer to your letter of 22 May 2013 and my letter in response of 24 May 2013.

Currently, this Inspectorate has the following reporting requirements:

1. to provide an Annual Report to the Presiding Officer of each House of Parliament pursuant to section 102 of the Police Integrity Commission Act 1996 ("the PIC Act").
2. to provide an annual report on its obligations under the Public Interest Disclosures Act 1994 ("PID Act") for submission to the Minister responsible for it pursuant to section 31(1) of the PID Act. A copy of the report is also to be provided to the NSW Ombudsman.
3. to provide a report every 6 months to the NSW Ombudsman pursuant to section 6CA of the PID Act.

Inspector of the Police Integrity Commission
GPO Box 5215, Sydney NSW 2001

T: (02) 9232-3350 | F: (02) 8243-9471 | E: pic_executive@oipic.gov.au

4. To provide an annual report on its obligations under the Government Information (Public Access) Act 2009 ("GIP Act") pursuant to section 125 of the GIP Act.

This Inspectorate will also have requirements to keep records pursuant to the recently passed Independent Commission Against Corruption and Other Legislation Amendment Bill 2013, which inter alia, makes amendments to the PIC Act.

As far as this Inspectorate is concerned, I do not find the above reporting requirements onerous or burdensome. However, the above is not an exhaustive list of reporting requirements as there may arise from time to time the necessity for this Inspectorate to report on a matter or matters which could lead to an ad hoc increase in reporting.

By way of example, in May 2012, pursuant to section 217 of the Police Act 1900, the Minister of Police asked me as the Inspector of the PIC to review and report on a police investigation known as "Strike Force Emblems". It became apparent, once all the material relating to the review was received at this Inspectorate, that the task could not be undertaken by a part-time Inspector, with only the assistance of his part-time executive assistant. Ultimately, that particular matter was referred to the NSW Ombudsman, who has indicated that 10 staff members are working on the ministerial referral and the review is likely to take about 2 years. If this Inspectorate had been expected to continue the review and ultimately provide a Report to the Minister of Police, the task would have been very onerous and burdensome. It would also have meant, that I would not have been in a position to undertake the functions required of me as the Inspector pursuant to the PIC Act.

I forwarded a Memorandum to a number of authorities, including the Premier, setting out the reasons why this Inspectorate should never had been asked to undertake such a review pursuant to section 217 of the Police Act 1990. I attach a copy for your information. Subsequent to the publication of my Memorandum, I have been informed by the Premier that in future, this Inspectorate will not have matters referred to it pursuant to section 217 of the Police Act 1990. (Copy attached).

In conclusion, whilst I do not find the current reporting requirements onerous or burdensome, there are situations, such as that described above, which could create difficulties for an agency or body, such as this Inspectorate, to perform its statutory functions as required. This must be kept in mind when an agency is requested to report on a matter or matters.

Please let me know if I can be of any further assistance.

Yours sincerely,



The Hon David Levine AO RFD QC
Inspector: PIC



INSPECTOR: POLICE INTEGRITY COMMISSION
MEMORANDUM
S.217 POLICE ACT 1990.

1. By letter dated 11 May 2012 the Hon Michael Gallacher MLC, Minister for Police & Emergency Services, pursuant to **Section 217** of the **Police Act 1990**, requested that I, as Inspector of the Police Integrity Commission, undertake a Review.
2. The terms of the Minister's letter were as follows:

Please find attached a copy of an investigation report and attachments, covering Strike Force Emblems which was established in 2003 by then Commissioner Moroney following a complaint from the NSW Police Association. This is a matter, which I am advised has not been finalized.

By way of background, I advise that while in Opposition, I stated that I would make public the recommendations of Strike Force Emblems.

Since becoming Minister for Police I have reviewed those recommendations and I am of the view that they cannot be released in their current form. Firstly, I am not confident that these recommendations have been concluded. Secondly I am conscious of the need to ensure that no one person is denied natural justice.

In your role as Inspector of the Police Integrity Commission I request that you undertake a review of this matter with an emphasis upon reviewing the recommendations to ensure they have firstly, been properly dealt with, secondly their release would be in the public interest, thirdly whether their release would not prejudice any legal action or investigation by the Public Integrity Commission or your office and fourthly, their release will not unreasonably reflect upon any individuals without them being afforded natural justice.

In accordance with S.217 of the Police Act NSW, 1990, I respectfully request this investigation be reviewed by your office and report provided to myself with your findings.

3. As at 11 May 2012, the Inspectorate was **not** within the Police Minister's portfolio. It was within that of the Premier.
4. By letter dated 25 May 2012 the Hon Barry O'Farrell MP, Premier, wrote to me in the following terms:

Dear Inspector

I refer to the NSW Police Strike Force Emblems Report dated 25 August 2005.

I am advised the Minister for Police and Emergency Services referred the Emblems Report to you earlier this month. I am further advised that in accordance with S.217 of the Police Act NSW 1990, the Minister has asked you to determine whether you are of the opinion that the recommendations of the report can be made available to the public.

As the Minister responsible for the administration of the Police Integrity Commission Act 1996 I would also respectfully request you consider whether the Emblems Report could be publicly released in its entirety.
(emphasis added)

The NSW Government is committed to openness and transparency but we understand the necessity of balancing public interest against procedural fairness and the importance of not prejudicing any potential legal action or investigation.

5. Section 217 of the Police Act 1990 states:

'217 Ministerial inquiries

- (1) *The Minister may appoint any person (an authorised person) to inquire into, and to report to the Minister on, any matter on which the Minister*

wishes to be advised in relation to the management and administration of the NSW Police Force. (emphasis added).

(2) *For the purpose of conducting such an inquiry, an authorised person may, at any time, do any of the following:*

- (a) enter any police premises,*
- (b) call for, and inspect, all or any police records, documents, files or other matter, whether of the same or of a different kind, on police premises,*
- (c) question and seek information from any member of the NSW Police Force.*

(3) *A member of the NSW Police Force who fails:*

- (a) to comply with any requirement made of the member by an authorised person under this section, or*
- (b) to give all assistance and co-operation to an authorised person, is guilty of an offence.*

Maximum penalty: 20 penalty units or imprisonment for 6 months, or both.'

6. Prior to the current version of section 217 and pursuant to the **Police Service (Management) Amendment Act 1993**, it was the Police Board which had the power to consider matters relating to the administration and management of the Police Service. This was by virtue of s.19 of the **Police Service Act 1990**. (The Police Service Act 1990 was renamed the Police Act 1990 pursuant to amendments in July 2002.) In particular the Police Board could, after consultation with the Minister, “undertake reviews it considered appropriate of the procedures of the Police Service designed to safeguard the integrity of the Police Service” (s.19(c)) and to make “reports or recommendations to the Minister on any matter referred to it by the Minister or on any matter arising from the exercise of its functions or, after consultation with the Minister, on any matter it considers appropriate” (s.19(d)(i) and (ii)). The Police Board had the power to delegate to any person any of the functions of the Police Board

but only after consultation with the Minister (s.21). Section 22 set out the powers of entry and inspection which are in almost identical terms to those of the current s.217(2). Section 22(5) defined “**Authorised person**” as “*a member of the Police Board, or other person, authorised by the Chairperson of the Police Board for the purposes of this section*”.

7. The relevant sections of the **Police Service Act 1990** were:

Functions of the Board

s.19 The Police Board has the following functions:

- (a) the functions conferred on it by this Act in connection with the employment of members of the Police Service Senior Executive Service and other members of the Police Service;*
- (b) the supervision and promotion of career development and training for all members of the Police Service;*
- (c) after consultation with the Minister, the undertaking of reviews it considers appropriate of the procedures of the Police Service designed to safeguard the integrity of the Police Service;*
- (d) the making of reports or recommendations to the Minister:*
 - i. on any matter referred to it by the Minister; or*
 - ii. on any matter arising from the exercise of its functions or, after consultation with the Minister, on any matter it considers appropriate.*
- (e) such other functions as are conferred or imposed on it by or under this or any other Act.*

Delegation by the Board

- s.21 (1) The Police Board may delegate to any person any of the functions of the Police Board, other than this power of delegation.*
- (2) The Police Board must consult the Minister about any proposed delegation by the Board under this section.*

Powers of entry and inspection

- s.22 (1) *An authorised person may, for the purposes of exercising the Police Board's functions, enter any police premises at any time.*
- (2) *The authorised person may, for that purpose, call for and inspect all or any police records, documents, files or other matter, whether of the same or a different kind or nature, on those premises, and question and seek information from any member of the Police Service.*
- (3) *A member of the Police Service who fails to comply with any requirement made of the member under this section or to give all assistance and co-operation to the authorised person is guilty of an offence.*
- Maximum penalty: 20 penalty units or 6 months imprisonment, or both.*
- (4) *An authorised person is to be issued with a certificate of authority under this section signed by the Chairperson of the Board.*
- (5) *In this section "authorised person" means a member of the Police Board, or other person, authorised by the Chairperson of the Police Board for the purposes of this section. (emphasis added)*

8. The current version of section 217 became law by virtue of the **Police Service Further Amendment Act 1996** which, *inter alia*, abolished the Police Board. The Police Board's power to conduct inquiries into the administration and management of the Police Service was transferred to the ministerial appointee who would by virtue of his or her appointment become an "authorised person". There is no longer a definition of "authorised person" as referred to under s.217 but it is clear from the wording of the section that any person can be appointed by the Minister so as to become an authorised person for the purpose of section 217. The Ministerial appointee replaces the role of the Police Board whose primary function was to undertake reviews of the procedures of the Police Service designed to safeguard the integrity of the Police Service.

9. The Police Integrity Commission

In the same year as the amendments to the Police Act referred to above came into effect, namely 1996, the Police Integrity Commission (“PIC”) was established. The Principal functions of the PIC are set out in s. 13 of the **Police Integrity Commission Act 1996** (“the PIC Act”) and are as follows:

- to prevent officer misconduct (s.13(1)(a))
- to detect or investigate, or manage or oversee other agencies in the detection or investigation of, officer misconduct (s.13(1)(b))
- 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 the PIC Act, and to deal with records of the Police Royal Commission as provided by the PIC Act (s.13(1)(c)).

10. Principal Functions of the Inspector of the PIC

The principal functions of the Inspector of the PIC (“the Inspector”) are set out at s. 89 of the PIC Act which reads as follows:

- s.89(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
 - (b1) to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and

unreasonable invasions of privacy) by the Commission or officers of the Commission, and

- (c) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.
- s.89(1A) Without affecting the power of the Inspector to make a report under Part 8, the Inspector may, at any time:
 - (a) make a recommendation or report concerning any matter relating to the functions of the Inspector under this section that the Inspector considers may effectively be dealt with by recommendation or report under this section, and
 - (b) provide the report or recommendation (or any relevant part of it) to the Commission, an officer of the Commission, a person who made a complaint or any other affected person.
 - s.89(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.
 - s.89(3) The Inspector is not subject to the Commission in any respect.

11. It will be seen that the powers and functions of the Inspectorate are essentially directed at the performance of the Police Integrity Commission and its officers, not the police or any other agency.

12. Referral by the Minister of Police

The referral by the Minister pursuant to section 217 in effect required a review of the procedures of the Police. This was concurrent with the Inspector's oversight role of the PIC, a body which was established to prevent, detect and investigate serious police misconduct. The Emblems matter revolved around alleged officer misconduct on a very large scale, dating back to the last century. The situation was thus that this

Inspectorate was asked to review Police conduct and procedures over a wide area and discrete recommendations whilst also overseeing the PIC, which is an integrity body established to investigate virtually the same such kind of matters as arose from Strike Force Emblems, namely serious police misconduct.

One of the functions of the Inspector is to consider complaints lodged against PIC or its officers. Such complaints are usually from current or former Police officers. It is clear that by its very nature, the role of "authorised person" (in s.217 above) and the role of the Inspector should not be undertaken by the same person.

It is undesirable that the Inspector be asked to report to a Minister of Police on matters with respect generally to the management and administration of the NSW Police (noting the functions in s.89(1) above) and given that the Inspector's role is to oversee the PIC. It is paramount that the PIC Inspector is seen as independent, impartial and objective in performing his functions. To review and report back with respect to the Emblems matter did not sit with the role of PIC Inspector and in effect, had the potential of undermining public confidence in the Inspectorate.

Further, to consider whether recommendations of an internal report prepared over 10 years ago had been "properly dealt with" would have required an in-depth knowledge of the administration and management of the Police over the past 10 years, including determining whether and how the recommendations of the Emblems matter had been implemented or could have been.

Given the width of the terms of reference, this Inspectorate was not adequately staffed to deal with such a large matter. At the time the Emblems matter was referred, I was (and still am) engaged on a part-time basis (3 days a week). In addition, I had the assistance of an executive assistant, who was also employed 3 days a week. In October 2012, a third staff member, a Senior Legal Project Officer, was employed to assist me in the Inspectorate. She is also employed on a part-time basis (3 days a week). The Emblems matter has now been referred to the NSW Ombudsman and I understand that 10 staff will be employed to work on


the matter and it is anticipated that the investigation will take about 2 years.

The reference from the Minister (within whose portfolio lies the Inspectorate) must be a reference pursuant to s. 89(2) of the PIC Act to perform the functions referred to at s.89(1). The independence of the Inspector will otherwise be at risk of subversion and the office compromised.

Section 217 in its current form is too broad. The section should be amended (together with any other necessary amendments elsewhere) so that the situation cannot arise whereby a Minister of Police can appoint an Inspector of PIC to review the procedures of the Police. The Police Act should be amended so as to define "authorised person" for the purpose of s.217. The definition should expressly exclude the PIC Inspector, given the Inspector's quite specific legislative functions to which I have already referred.

13. I am grateful for the assistance of Ms Susan Raice, my Senior Legal Project Officer, in the preparation of this Memorandum.

February 2013



The Hon David Levine AO RFD QC
Inspector: Police Integrity Commission



Premier of New South Wales

RECEIVED

25 APR 2013

INSPECTOR, PIC

DPC11/02904
2013-29833

The Hon. David Levine, AO RFD QC
Inspector of the Police Integrity Commission
GPO Box 5215
SYDNEY NSW 2001

17 APR 2013

Dear Mr Levine

Thank you for your letter of 4 February 2013 concerning the referral of the Strike Force 'Emblems' Report under section 217 of the *Police Act 1990*.


The matters raised by you in your attached memorandum have been carefully considered.

I am advised that the Ministry for Police and Emergency Services discussed the referral of the 'Emblems' Report with you prior to it being made and additional resources were also offered. Notwithstanding this, I advise that no further referrals under section 217 of the *Police Act 1990* will be made to the Inspector of the Police Integrity Commission. This will ensure that public confidence in the Inspectorate is maintained.

I note that the Strike Force 'Emblems' matter is now being considered by the Ombudsman.

Thank you for bringing these matters to my attention.

Yours sincerely


Barry O'Farrell MP
Premier

cc: Minister for Police and Emergency Services