



# POLICE ASSOCIATION OF NEW SOUTH WALES

A.B.N. 86 047 021 267

P.O. BOX A1097, SYDNEY SOUTH, N.S.W. 1232

PHONE: (02) 9265 6777 FAX: (02) 9265 6789 EAGLENET 57071

21 May 2009

Helen Minnican  
Committee Manager  
Committee on the Independent Commission Against Corruption  
Parliament of New South Wales  
Macquarie Street  
SYDNEY NSW 2000



I write in respect of the Inquiry into proposed amendments to the Independent Commission Against Corruption Act 1988 and the attendance of Mr Gregory Chilvers and Mr Phillip Tunchon, on behalf of the Police Association of NSW before the Committee on Monday 11 May 2009.

The uncorrected proof of transcript for the evidence given on that day does not require any corrections.

In respect of two matters arising from the transcript which were highlighted (p26 and p31-32), please find attached the following:

- A: Two page document containing reference to the numbers of officers who appealed to the IRC NSW following *s181D* removal. (Ref. p26 of transcript)
- B: Copies of Reports of the Inspector of the Police Integrity Commission. In referring to the first of these Reports (B1); this is a summary of what the Inspector found in the more substantial documents which are also attached. In particular I refer to paragraphs 5 – 10 inclusive of the Report marked B.1. (Ref. p31-32 of transcript).

If you have any further inquiries, please don't hesitate to contact.

Yours truly,

Phil Tunchon  
Assistant Secretary

1. The Association has for some time participated in a Ministerial Working Party known as the Complaints Advisory Group (participants include representatives from the Professional Standards Command, the Police Integrity Commission, the Office of the Ombudsman, the Minister's office, and the Association). In the course of the Association's involvement with the working party, we came to prepare a submission supporting the position that the Review mechanisms in Part 9 of the *Police Act* 1990 ought not be amended. The submission comments upon a number of the decisions of the Industrial Relations Commission over time and so it is perhaps a convenient starting point for this submission. A copy of that submission (prepared April 2008) is attached and marked "A".
2. According to the 2007/2008 Annual Report of the NSW Police Force, there were 28 removals/dismissals<sup>1</sup> in the relevant year, taking the total number of removals (referred to in paragraph [2] of the attached submission) to 203. There have also been a number of decisions of the Industrial Relations Commission since the preparation of the attached submission that result in the submission at paragraph [2] of attachment "A" to be revisited.
3. Taking those matters into account, of the 203 removals since 1996 there have now been 24 removals that have gone to final judgment on the merits. Of those 24 removals<sup>2</sup>, a total of 9<sup>3</sup> officers returned to duty (noting a further five<sup>4</sup> were

---

<sup>1</sup> See NSW Police Force Annual report 2007/2008, page 130 Table entitled "Police Separations 2007-08", note figure obtained by combining the column totals for "dismissal" and "s 181D Removal"

<sup>2</sup> There have now been a total of 41 judgments in s 181E review applications (s 181E is the provision under which application is made to the Industrial Relations Commission for "Review" of an Order under s 181D of the *Police Act* 1990). As noted in our earlier submission, there are significantly more judgments than there are removals that have gone to ultimate judgment because there are procedural judgments and appeal judgments that result in a number of judgments on the way to the ultimate judgment on the removal.

<sup>3</sup> *Van Huisstede v Commissioner of Police* (1999) 98 IR 57, *Burrows & Giardini v Commissioner of Police* [2001] NSWIRComm 333; *Miller v Commissioner of Police* [2002] NSWIRComm 296; *Cassel v Commissioner of Police* [2003] NSWIRComm 73; *Dobbie v Commissioner of Police* [2006] NSWIRComm 12; *Formston v Commissioner of Police* [2006] NSWIRComm 88; *Commissioner of Police v Dobbie* [2006] NSWIRComm 285; *Evans v Commissioner of Police* [2006] NSWIRComm 404; *Commissioner of Police v Evans* [2006] NSWIRComm 170; *Commissioner of Police v Sewell* [2008] NSWIRComm 147 and *Reid-Frost and Commissioner of Police* [2009] NSWIRComm 43 (noting *Reid-Frost* is currently under appeal). As will be apparent from footnote 5 in our earlier submission, at that time the decisions of *Brennan v Commissioner of Police* [2007] NSWIRComm 229 and *Collins v Commissioner of Police* [2008] NSWIRComm 30 were counted in the group resolved in the officers favour. Since that time the Full Bench has overturned each of those decisions resulting in each officer ultimately being removed (and hence the increase in the number of matters successfully resolved in favour of the Commissioner).

<sup>4</sup> *Wells v Commissioner of Police* (2000) 100 IR 106; *Little v Commissioner of Police (No.2)* (2002) 112 IR 121; *Cavanagh v Commissioner of Police* [2003] NSWIRComm 474; *Harrison v Commissioner of Police* [2006] NSWIRComm 319; *Allchin v Commissioner of Police* [2007] NSWIRComm 76; *Allchin v*

reinstated solely to permit medical discharge applications to proceed) and the Commissioner has been successful in defending his removal of 10<sup>5</sup> officers. Insofar as those nine officers who were reinstated were concerned, in the majority<sup>6</sup> the Commission identified that the conclusions reached by the Commissioner were, following review, demonstrated in whole or in part to be factually wrong. In the latest decision, *Reid-Frost and Commissioner of Police* [2009] NSWIRComm 43 (noting *Reid-Frost* is currently under appeal), the Commission was scathing of deficiencies in the decision making process adopted by the Commissioner (determining in fact that he simply could not physically have complied with his statutory obligation to “consider” the response of an officer to the mandatory Notice issued under s 181D(3)(a) of the *Police Act*).

4. Such matters are exactly the reason why, as was accepted by Justice Wood, it is appropriate for any review mechanism to permit an analysis of whether “the decision was reached upon an incorrect factual basis”<sup>7</sup>. In one, the treatment visited upon the officers concerned was found to be so harsh, having regard to the treatment visited on other officers<sup>8</sup>, as to warrant reinstatement.

---

*Commissioner of Police (No.2)* [2007] NSWIRComm 280. We note Mr Allchin’s attempts to have the orders reopened were not successful: see *Craig Allchin and NSW Police* [2008] NSWIRComm 205

<sup>5</sup> *Bartlett v Commissioner of Police* (1998) 87 IR 436 (dealing with removal for a conflict of interest in the form of an inappropriate association); *Starr v Commissioner of Police* [2001] NSWIRComm 226 (dealing with an officer who was found to have created fictitious reports of being shot at and been untruthful in internal investigations); *Dangerfield v Commissioner of Police* [2003] NSWIRComm 96 (inappropriate use of force in carrying out duties); *Hosemans v Commissioner of Police* (2003) 136 IR 376 (various allegations relating to inappropriate off duty behaviour whilst under the influence of alcohol and being untruthful in giving evidence before the Local Court); *Hosemans v Commissioner of Police (No.3)* (2005) 136 IR 161 (second decision in the *Hosemans* litigation dealing with merit of removal – again Commissioner successful in concluding that Removal not harsh, unjust or unreasonable); *Hosemans v Commissioner of Police (No.4)* (2006) 150 IR 263 (Full Bench consideration of whether the merit decision in No.3 was correct – held to be an ordinary application of law to facts and no error demonstrated); *Johnston v Commissioner of Police* [2007] NSWIRComm 73 (inappropriate and dishonest use of COPS system); *Johnston v Commissioner of Police* [2007] NSWIRComm 93 (decision of Full Bench after appeal by individual from loss at first instance – held to be an ordinary application of law to facts and no error demonstrated); *Flanagan v Commissioner of Police* [2008] NSWIRComm 11 (off duty assault and inappropriate COPS accesses – timing and nature of COPS accesses suggested dishonest attempts to cover his off duty assault – **NOTE: THIS JUDGMENT WENT ON APPEAL AND WAS QUASHED – MATTER WAS REMITTED FOR REHEARING AND JUDGMENT IS CURRENTLY RESERVED**); *Commissioner of Police v Brennan* [2008] NSWIRComm 52 (on duty use of force – reemployed at first instance, Full Bench held error in conclusion that removal was ‘harsh’), *Commissioner of Police and Wayne Edward Collins* [2008] NSWIRComm 162 (balancing exercise miscarried at first instance – conviction incompatible with continued service – removal affirmed); *Toshack v Commissioner of Police* [2009] NSWIRComm 31 (applicant lied to prosecutor to cover his mistake and then lied to victim to further cover his mistake – lack of integrity incompatible with continued service – balancing exercise miscarried in first instance).

<sup>6</sup> See *Van Huisstede, Miller, Cassel, Formston* and to a lesser extent *Evans, Reid-Frost and Commissioner of Police* [2009] NSWIRComm 43 (noting *Reid-Frost* is currently under appeal).

<sup>7</sup> See paragraph 4.124 of the Final Report

<sup>8</sup> See *Burrows & Giardini v Commissioner of Police* [2001] NSWIRComm 333