

SUBMISSION TO COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND POLICE INTEGRITY COMMISSION

In response to the invitation extended, I make the following brief submissions, from my perspective as Inspector of the Police Integrity Commission.

A. Scrutiny of NSW Police Counter-Terrorism and Other Powers

I am aware, as I understand the Committee to be, that the Ombudsman and the PIC are conducting a review of the operations of the Counter Terrorism Coordination Command, and of its powers, in relation to the assessment of the degree and nature of the risk attaching. Pending completion of any such study, any views offered at this stage would be premature and provisional. As a former Trial Judge, however, I did become aware of an investigation where it appears that the CTCC were seemingly not well informed of the requirements for controlled operations.

The Police already have a measure of coercive powers arising, for example, under the:

- Terrorism (Police Powers) Act 2002
- Crimes (Forensic Procedures) Act 2000
- Law Enforcement (Powers and Responsibilities) Act 2000

the latter of which picked up the powers previously conferred under a number of Acts, including the:

- Crimes Act 1900
- Firearms Act 1996
- Drug Misuse and Trafficking Act 1985
- Summary Offences Act 1988
- Police Powers (Drug Premises) Act 2001
- Police Powers (Drug Detection Dogs) Act 2001
- Police Powers (Internally Concealed Drugs) Act 2001

- Police Powers (Vehicles) Act 1998
- Search Warrants Act 1985
- Intoxicated Persons Act 1979

There is little in the way of consistency in relation to the exercise of these powers. For example those arising in emergencies or situations of public disorder, (under the Law Enforcement (Powers and Responsibilities) Act) can be exercised without the need for a warrant or judicial order, whereas others require the authority of a Judge (eg the issue of a covert search warrant or the making of a preventative detention order or a prohibited contact order under the Terrorism legislation). In some instances crime scene powers can be exercised with a warrant, and in other circumstances one is required. In some instances, the coercive powers, (including several of the special powers arising under the Terrorism legislation) can be exercised upon the authority of the Commissioner or Assistant Commissioner of Police or in their absence by an officer above the rank of Superintendent, in each case, subject to a report to the Attorney General and Police Minister.

In some instances power can be exercised in relation to adults with their consent or only by Judicial Order in relation to children (eg search for internally concealed drugs).

In addition to the general powers just mentioned the Police have extensive powers in relation to covert operations and electronic surveillance arising under the:

- Listening Devices Act 1984
- Telecommunications (Interception) Act (Cth) 1979
- Law Enforcement (Controlled Operations) Act 1997
- Law Enforcement and National Security (Assumed Identities) Act 1998

While in some instances, the Ombudsman or the Attorney General need to be informed of the exercise of these powers (eg under the Listening Devices legislation), or the Ombudsman has a statutory oversight role (eg under the Controlled Operations legislation), or the relevant agency has an audit responsibility (eg under the Assumed Identities Legislation), there is no uniformity in this regard.

Breaches of the relevant legislation, or the existence of some improper or unjustified exercise of the relevant powers will normally only come to light, in the absence of some general oversight requirement, if a complaint emerges, either internally or in the course of a trial. I do not suggest that this is necessarily a bad thing, but it needs to be taken into account if there is a move towards conferring additional or enhanced coercive powers on Police.

Apart from the powers exercisable by the NSW Police, as previously mentioned, coercive powers are also exercisable by the:

- NSW Crime Commission
under the NSW Crime Commission Act 1985

- Police Integrity Commission
under the Police Integrity Commission Act

In addition to the exercise of the coercive or investigative powers available under certain of the legislation previously mentioned, those agencies have powers inter alia to require persons to appear before them to give evidence, or otherwise to provide documents, or information, albeit subject to restrictions in relation to its use in any prosecution.

Each agency is able to work with the NSW Police on Joint Task Forces, in relation to criminal investigations, and in those circumstances their coercive powers can also be called in aid, although subject to the limitations mentioned in relation to the use of any evidence gathered.

In the case of the PIC, the exercise of its powers is subject to monitoring both by its Inspector and in certain respects by the Ombudsman. The limited extent to which the NSW Crime Commission is subject to potential monitoring has been examined and is known to the Parliamentary Committee, and I shall make no further comment in relation to it.

In this context, it does not seem to me that there is any necessity for further enhancement of the powers of the NSW Police. They are already extensive, they have not been shown to be inadequate, and in the case of terrorist activity they are particularly comprehensive, although, in my view, entirely justifiable, so long as they remain amenable to appropriate audit and oversight of the kind which currently exists, including the provision of annual reports and monitoring by the Ombudsman. Of course, in many situations these powers will be enhanced by those available to Federal Agencies working in tandem with NSW Police, arising under Federal laws.

To confer upon the NSW Police powers such as those exercisable by the NSW Crime Commission, the PIC, or the Australian Crime Commission, to interrogate suspects or to require their production of information or documents, would appear to me to be excessive in relation to routine investigations. It would:

- Risk being adopted as an easy alternative to the more valuable gathering of objective evidence through regular inquiry including the collection and analysis of forensic exhibits.
- Require greater skills in the decision making required for its deployment which to some extent, call for quasi judicial evaluation.
- Present a possibility for its malicious use, diluting the recognised privilege against self-incrimination.
- Require additional resources in relation to the appointment, for example, of examiners, to supervise hearings.
- In general, be an over response to routine criminal investigations, in circumstances where the NSW Crime Commission or the PIC, or the ICAC, is available to investigate, or to support the NSW Police, in relation respectively to organised crime and Police and public corruption.

My one concern, which I consider worthy of raising, however, is that there is now a formidable body of legislation governing or empowering the exercise of police investigative powers. The extent of this legislation and the differences which exist concerning the deployment of the various powers is potentially capable of causing Police uncertainty and difficulty in managing their functions. There would, in my

view, be some merit in giving consideration to a further rationalisation and consolidation of these provisions, in the course of which greater attention could possibly be given to some coordination or unification of the:

- Approval mechanism required for the exercise of the relevant powers,
- Availability of and appropriate form of independent oversight in relation to their exercise.

It is my understanding that some concern is already entertained in Police circles, by reason of the complexity and different regimes which do exist in relation to the available powers, however that is a matter which the Committee may wish to explore further itself.

B. Ten Year Review Of The Police Oversight System

a) The Roles and Functions of the PIC and Office of the Ombudsman

From my experience over the past eight months, it appears that the existing systems for the oversight of the Police complaint system works reasonably well, given the large number of complaints that are made each year, from which the two agencies involved, the PIC and the Office of the Ombudsman, have to select the relatively small number that call for particular attention.

It is clear that there has to be a class or kind criteria for the potential division of responsibility for investigation. So far as I can see the existing criteria remain appropriate, and the reporting system appears to be such that each oversight agency can readily identify and target matters of interest.

In the implementation of the system the PIC has accepted, as its charter requires, the primary role of the corruption fighting agency. It has the staff and powers which are needed for that purpose, and the adoption of this primary role is, in my view, important in preventing it from being diverted into the management of lesser complaints, particularly service complaints, which are more appropriate for a management approach and outcome, or for internal investigations.

It has the capacity, however, drawing on the matters that become apparent from these investigations, and from the general complaints history, to select for monitoring, those matters that are referred for investigation by the NSW Police which raise concerns of some seriousness or systemic problems.

Its allied role, drawing in particular, from intelligence derived from its direct investigations and monitoring work, is that of research into particular projects of strategic or management significance, particularly where they may contribute to an improvement in the Service's attitude to professionalism, and its anti corruption strategies.

As presently placed, it seems to me that these separate strategies are well balanced, and that any move towards reorganisation of the complaint investigation or oversight structure, particularly one that would exist under a single umbrella would risk upsetting that balance.

In this regard, I consider it important that the Ombudsman be able to perform the significant role of providing a general oversight of the Police management of complaints, with the power, as necessary, to conduct a relatively small number of investigations itself, and to carry out research into various projects of relevance, including for example, its annual Special Reports to Parliament during 2002 entitled;

- 1. Improving the management of complaints – Identifying and managing officers with complaint histories of significance.*
- 2. Improving the management of complaints – Assessing police performance in complaint management.*
- 3. Improving management of complaints – Police complaints and repeat offenders.*

There is, in my view, value in monitoring the independent roles of each Agency to ensure that they can each focus upon the primary purpose for which they were created. To bring those purposes under one umbrella would, in my view, cause tensions and conflicting priorities that could only be counterproductive.

The absence of any need for this can be seen in the circumstance that each agency maintains a useful working relationship with the other, and also, in the contemporary environment, with the NSW Police. In that regard, the nature of the oversight role of the Ombudsman is such that it is likely to be able to deal with the Police in a somewhat more comfortable and cooperative environment than the PIC whose interest is more attuned to a law enforcement and a potentially adversarial role, at least in relation to those officers within the NSW Police who are suspected of engagement in corrupt and/or seriously unlawful behaviour.

That is not to suggest that relations between the NSW and the PIC are fraught, or other than cooperative.

On my own assessment, there is no problem of this kind. However there will be occasions where adverse interests and pressures, of a serious kind, will arise which justify the PIC adopting a relationship with the Police which is a step back from that of the Office of the Ombudsman.

The latter agency can give greater attention to mediating difficulties, and adopting other strategies, which might lead to a less formal and quicker outcome, with consequent benefits for complainants and for the overall management of the Service. Moreover, it is able, through the reporting and records systems to collect and compile meaningful statistics on a wide range of matters of relevance for the effective management and integrity of the Service, and for the treatment of those members of the public who became the subject of its attention. These general management monitoring, and oversight activities, are not the kind of functions that should take up the resources and time of a focussed anti corruption agency such as the PIC.

b) The Sufficiency of the Available Powers

So far as I can see, the powers available to each agency are sufficient for their separate purposes. The one qualification relates to the absence of power, in the PIC, to investigate complaints concerning the NSW Crime Commission, which plays a very significant role in the policing of organised crime and serious drug offences which, prior to its existence, would have fallen to the NSW Police to investigate.

I would see benefit in the PIC role being expanded in this respect. If not the PIC then any other form of oversight would need to be consistent with the preservation of the necessary confidentiality for its operations, and it would depend on the oversight agency having the experience, understanding, and resources that would be required for sensible effective monitoring.

I appreciate that this is a delicate issue, but it is none the less important in the current climate, which is likely to see the NSWCC involved, at least to some degree, in anti terrorist operations, which, similarly to those arising in connection with organised crime, justify a hard line investigation, including the deployment of sophisticated covert techniques and controlled operations.

c) The Management Structure, Funds, and Resources

So far as I can see the management structure of the PIC is correct, with sufficient controls and audit capacity in place. The exceedingly low levels of complaint in relation to the performance of its work supports the conclusion. The majority of the complaints received by me are those which involve the contention that the PIC rather than the NSW Police should have taken up the matter for investigation.

Almost universally these complaints lack substance and involve an assumption that the PIC can and should respond to every complaint that is made concerning Police. With those complaints running in the order of 4000 per year that is an impossible expectation, and the PIC must refer the vast preponderance of them to the Police or Ombudsman.

The criteria for selection, which were identified in the address which I previously provided to the Committee are in my view entirely appropriate, and have not been abused or neglected.

The internal oversight of investigations through the Operations Advisory Group is effective and appropriate, as is the structure for and work of those involved in projects and in Hearing Room Procedures.

I am also satisfied as to the arrangements which exist for the security of operations, and of the IT system.

I believe the PIC funds and resources to be adequate, although no doubt additional funding and staff could be applied to advantage. There certainly should be no reduction.

I am not in a position to offer any meaningful comment in relation to this aspect so far as the Office of the Ombudsman is concerned.

d) The Accountability Mechanisms

In relation to the PIC, the accountability system is satisfactory. As Inspector, I have sufficient powers to oversight all aspects of the PIC's operations, subject to some limitations in relation to the interception of telecommunications, although they are the subject of monitoring by the Office of the Ombudsman.

There has never been any occasion when there has been other than full cooperation extended by the PIC in relation to disclosure, or provision of information or documents. By way of weekly meetings and access to the TI System the Inspector can effectively monitor the operations for efficiency and compliance with the law.

The only powers that have been found to have been lacking concerned the ability to investigate former officers, a lacuna which is being addressed by amendment of the Act, and the lack of power, on the part of the Inspector (shared with the position of the ICAC Inspector) to do more than make a recommendation to correct or overcome some perceived deficiency.

This has not proved to be a problem in the past, although that has depended on the integrity of the holder of the Office of PIC Commissioner, and on the measure of confidence held in the holder of the Office of the Inspector.

So far as the NSW Police are concerned, the accountability provided via the PIC and the Office of the Ombudsman is elsewhere addressed in this submission, and, in my opinion, is both sufficient and workable.

e) & f) The Efficiency and Effectiveness of the System

In general the system works well, although the number of complaints which have to be assessed and managed inevitably leads to some difficulties, as well as to dissatisfaction from those whose complaint are not upheld.

The NSW Police have had some difficulties, as I understand it, in giving effect to the Dresden recommendations, particularly in Rural Commands because of the resources required where a complaint is referred to an Independent Local Area Command. I believe that this is likely to be addressed following trials of a modified process pursuant to the draft CARA (Complaint Allocation Risk Appraisal) guidelines, which appear to me to be satisfactory if properly implemented.

The potential will always remain for potential dissatisfaction however if a complaint is investigated by an officer from the same Station or Command, no matter what the rank of the investigator.

It may be appropriate for there to be some further development of the system to encourage an enhancement of the Professional Standards Command so that it can investigate a larger proportion of the complaints received than it has in the past, preserving for Local Area Commanders and the Complaint Management Teams the lesser matters, and encouraging on their part a significantly management orientated approach.

An enlargement of the role of the PSC would lead to more expert and consistent handling of the complaints that are of intermediate seriousness, provide more opportunity for covert inquiries and integrity testing where an at risk officer is involved, and enhance the intelligence gathering capacity of the PSC.

I would see it as appropriate however for there to be greater attention given to the processing of minor matters, particularly conduct or service complaints, on a less formal management basis, which is designed cooperatively, and for the benefit of the officer concerned, to improve performance. This approach was regarded by me as important in my Report following the Royal Commission, but I have some concerns

as to whether it has been fully implemented, or whether some LACS have seen it more prudent or palatable, to transfer the investigation to another LAC.

There is a natural tendency to follow the formal route of investigation, lest there be criticism of a cover up or of protection being extended to the officer concerned. In an environment where there is a large volume of complaints, their formal processing and investigation is likely to be productive of delay, and that will inevitably add stress to the officer concerned, which is likely to end up with the officer exiting the Service HOD.

Any shift in direction would require a careful balance to ensure the maintenance of discipline and public satisfaction, and, on the other hand, the preservation of the careers of officers, who have either been unfairly accused of misconduct, or whose misdemeanours or indiscretions were relatively minor, or involved honest mistakes.

It is a process which I believe should involve a good deal of flexibility, and continued monitoring by the PIC and by the Ombudsman who could supply independent assessment and advice to the NSW Police. It is one in which I do see room for the useful deployment of mediation, counselling and ongoing support in place of a strict disciplinarian approach.

Finally, and while I realise this is potentially controversial, I would like to see the review or appeal process in relation to S 181D Decisions transferred to the District Court or the Administrative Decisions Tribunal. I am not at all sure that traditional industrial principles work well in the area of policing where integrity and trust are paramount. District Court Judges would in my view, be better placed, by reason of their experience in the criminal jurisdiction and participation in other Review Tribunals, such as the Medical Tribunal, to deal with these matters.