

OMBUDSMAN SUBMISSION

for the

Committee on the Office of the Ombudsman
and the Police Integrity Commission

concerning

Inquiry into Improper Associations in the New South Wales Police Force

June 2010

INTRODUCTION

The identification and effective management of conflicts of interests is a complex challenge for all public sector agencies. Employees with actual, potential or reasonably perceived conflicts between public duties and private interests are expected to identify, declare, and where appropriate, cooperate in the management of conflicts of interests.

The New South Wales Police Force ('NSWPF') has developed a number of policies concerning conflicts of interests. The NSWPF *Conflicts of Interests (Improper Associations) Policy and Guidelines* ('the Improper Associations policy') establishes the policy framework for handling improper associations.

The NSWPF defines an improper association as an association with people, groups or organisations involved in (or perceived to be involved in) activities incompatible with upholding the law.

The Improper Associations policy outlines the obligations on all NSWPF employees (sworn and unsworn) for avoiding, identifying, declaring and cooperating in the management of improper associations noting that such associations involve perceived or actual conflicts of interest between the employee's responsibility as an employee of the NSWPF and their private life activities.

There is little doubt that improper associations pose a risk to the NSWPF and have the potential to negatively impact on the core responsibility of detecting, investigating and prosecuting criminal activity. There is an omnipresent risk of actual, potential and/or perceived harm to the NSWPF arising from improper associations.

The Improper Associations policy demonstrates the NSWPF commitment at a corporate level to identify and manage the risk posed by improper associations. The policy contains reasonably clear guidelines for reporting and managing improper associations and the consequences for not complying with the policy.

The low level of compliance with the Improper Associations policy at the operational or command level identified by research conducted by the Police Integrity Commission ('the PIC research') is disturbing.¹ This office has encountered similar poor levels of compliance with the policy in our role in overseeing the NSWPF investigation of complaints in which allegations of improper associations have been raised.

Clearly, there is a need to increase levels of compliance with the Improper Associations policy from a risk management perspective. This submission will detail our experience in the handling of improper associations through the complaints system. In doing so, we will outline the types of matters in which allegations of improper associations arise and make some observations about the low level of compliance with the policy.

¹ People J, Kirsch N, & Barnett P, *Improper Associations in the NSW Police Force: A Review of Compliance with Policies and Guidelines*, NSW Police Integrity Commission, Research and Issues Papers No. 5, May 2010.

COMPLAINTS INVOLVING ALLEGATIONS OF IMPROPER ASSOCIATIONS

Under Part 8A of the *Police Act*, the Ombudsman is responsible for assessing and overseeing investigations of complaints that indicate or allege improper associations and other misconduct of police officers. The comments provided in this submission are largely derived from our complaint-handling experience.

All allegations of improper associations involving police officers must be notified to the Ombudsman as they raise issues of integrity. We oversee investigations of complaints containing allegations of improper associations. Our role is to ensure complaints have been properly dealt with in a timely and effective manner.

This office records numbers of allegations of improper associations raised in complaints. In 2007-2008, a total of 179 allegations were raised, and in 2008-2009, 139 allegations were raised. Preliminary figures for the period 1 July 2009 to 31 May 2010 indicate that a total of 154 allegations have been raised.²

Allegations of improper association can be raised in a number of ways. A complaint may contain an allegation that a police officer 'tipped-off' a drug supplier friend. Such a complaint raises serious allegations of both unauthorised disclosure of sensitive or confidential information and improper association. The context in which the alleged association arises usually determines the level of investigation required.

An examination of complaints containing allegations of improper association that have been finalised in 2009-2010 involve the following:

- alleged associations (including friendships, intimate relationships and other types of social contact) with members of Outlawed Motor Cycle Gangs ('OMCGs') or other criminal organisations or syndicates
- alleged associations (including friendships, intimate relationships and other types of social contact) with persons known or suspected to be involved in the use and/or supply of prohibited drugs
- alleged associations (including friendships, intimate relationships and other types of social contact) with former police officers who have been removed from the NSWPF for criminal activity and/or misconduct
- alleged associations with family members (including spouses, partners, siblings, children and close relatives) involved in criminal activity
- alleged disclosure or 'leaking' of confidential information (from COPS and other NSWPF holdings) to suspects or targets of police investigations and operations
- alleged failure to comply with the policies and procedures regulating relationships between police officers and informants raising concerns about the exact nature of the association
- alleged failure to comply with policies and procedures regulating secondary employment raising concerns about undeclared associations with persons engaged in

² The figures do not represent the number of complaints as more than one allegation of improper association may be raised in a complaint. For example, a complaint may contain an allegation that three police officers have an improper association with a particular person, group or organisation. This is recorded as three separate allegations of improper association as it involves three officers.

high-risk industries such as the security, liquor, tow-truck, gaming/racing, and sex industries

- alleged drug use raising concerns about the people the officer is associating with when purchasing and/or using prohibited drugs
- alleged failure to declare a conflict of interest when dealing with an associate (such as a relative, friend, or acquaintance) while conducting police duties
- alleged cover-up and/or protection of persons involved criminal activity including attempts to influence criminal investigations, and
- alleged 'drug rip' where officers seized a large amount of drugs without arresting and charging the persons found in possession of the drug.³

The complaints alleging improper associations and other misconduct were made by:

- members of the public
- police officers
- anonymous persons (usually to Crime Stoppers)
- persons apprehended by police for involvement in criminal activity
- informants, and
- other law enforcement agencies such as the Australian Federal Police, the New South Wales Crime Commission and the Australian Crime Commission (usually when they discover the involvement of NSWPF officers with targets of their criminal investigations).

Approximately 40% (59 of 154) of the allegations of improper association resulted in some management action including:

- removal from the NSWPF (some officers resigned or were medically discharged before removal proceedings had been finalised)
- deferral of salary increment
- disciplinary transfer
- issue of a warning notice
- formal and informal counselling
- advice and guidance (usually about the Improper Associations policy)
- increased supervision including regular audits of COPS accesses and risk assessments, and
- revocation of secondary employment approval.

Some complaints resulted in changes to policy and procedures. For example, as the result of one complaint the *Confidential Source Management Policy* and associated procedures were amended to require disclosure of previous or current relationships at the time of registration between the source handler (the police officer) and the source (informant).

³ This allegation formed part of the PIC investigation *Operation Lantana* reported to Parliament in October 2009. Interestingly, at the time the allegation of the 'drug rip' was made, an earlier complaint of improper association with OMCG members involving one of the officers involved in the 'drug rip' had already commenced.

Another complaint resulted in the amendment to the *Secondary Employment Policy* to make it clear that participation in a syndicate that owned and raced greyhounds requires secondary employment approval.

RISKS ASSOCIATED WITH IMPROPER ASSOCIATIONS & THE COMPLAINTS SYSTEM

The Improper Association policy is implicit recognition by the NSWPF of the importance of reducing and eliminating the risk of harm that may result from improper associations. The actual, potential and perceived harm that can flow from improper associations has been comprehensively outlined in research conducted by the PIC.⁴ We have encountered the possibility for many of these harms in our complaint oversight role.

Many of the complaints containing allegations of improper association also contain other allegations of serious misconduct and/or corruption. These complaints must be investigated thoroughly so as to eliminate the possibility of harm to the NSWPF.

The complaints system provides an effective mechanism for ensuring that alleged breaches of the policy and other serious allegations are investigated in a formalised, transparent and accountable manner. However, it is important to recognise the complaints system is *reactive* insofar as it relies on allegations being made before any possible risk can be identified.

In addition, there are sometimes limitations on the scope of an investigation that may be conducted as a result of an improper association allegation. For example, if an allegation of improper association arises from information obtained from telephone intercept warrants or call charge records, then current legal restrictions on the use and disclosure of this material may hamper or prevent any investigation of the allegation. These restrictions can lead to the unsatisfactory situation where an officer's unexplained contact or association with a person involved in criminal activity cannot be recorded as an allegation of improper association or investigated if on its face it does not also amount to an allegation of criminal conduct.

The analysis of complaints data used in the PIC research mostly revealed improper associations between police officers and friends and acquaintances. The analysis of the information held or obtained by the PIC from the NSWPF, which included written declarations of improper associations made by police officers, mostly revealed improper associations between police officers and family members.

The different associations uncovered depending on the data examined strongly supports the value of the complaints system in detecting the arguably more difficult, and potentially riskier improper associations between police officers and friends or acquaintances. Or put another way, it appears that police officers are more likely to make declarations of improper associations involving family members, whereas the complaints system is more likely to uncover improper associations that officers are unlikely or unwilling to declare. It is these later, undeclared, and thus unmanaged associations that pose a significant risk as they are difficult to detect in the absence of a declaration.

⁴ People J, Kirsch N, & Barnett P, *Improper Associations in the NSW Police Force: A Review of Compliance with Policies and Guidelines*, NSW Police Integrity Commission, Research and Issues Papers No. 5, May 2010 at pages 2-4.

While the complaints system may have deterrent effect insofar as it reinforces that failure to comply with the policy amounts to misconduct resulting in management action, it is not an ideal tool to encourage officers to identify and declare improper associations. This is because the complaints system is concerned with the investigation and management of alleged misconduct rather than the *proactive* identification and management of risk. Given its *reactive* nature, the complaints system cannot and should not be the sole mechanism for dealing with and managing improper associations.

Other risk management strategies — in addition to the complaints system — can and should be utilised to identify and manage the risks associated with improper associations. For example, the *Secondary Employment Policy* requires applicants to identify any potential or actual improper associations that may result from the proposed secondary employment and asks applicants to identify how these may be avoided or managed.

In our view, the complaints system is a useful and proven mechanism for identifying and managing some of the risks posed by improper associations despite some inherent limitations. Accordingly, any suggestion that the complaints process be discouraged when dealing with and managing improper associations should be viewed with caution especially given the current, disturbingly low level of compliance with the Improper Associations policy identified by the PIC research and the fact that complaints involving allegations of improper association usually involve other allegations of serious misconduct and/or corruption.

We acknowledge that increased compliance with the policy may result in less allegations of improper association requiring full investigation in circumstances where the alleged improper association has been previously declared.

However, caution is required when viewing allegations of improper associations without any examination of the context in which the allegation arose. For example, if a complaint alleges that a police officer has an improper association with a family member or close friend, and it is ascertained that the officer has made a declaration in relation to that person, this may not be the end of the necessary inquiries. The nature of the association may also need to be examined to ensure that the officer has not inadvertently or intentionally provided information or assistance to the associate in breach of his or her various duties and responsibilities as a police officer.

COMPLIANCE WITH THE IMPROPER ASSOCIATIONS POLICY

The Improper Associations policy contains reasonably clear guidelines about the responsibilities of all NSWPF employees in relation to avoiding, identifying, reporting and cooperating in the management of improper associations.

The policy makes it clear that the mere existence of a conflict of interest such as an improper association does not amount to misconduct. Under the policy a 'misconduct concern' arises when an employee fails to:

- identify an improper association when it was reasonable for them to have done so
- report an improper association and/or
- cooperate in the effective resolution of a conflict of interest arising from an improper association.

A failure to comply with the policy may amount to a breach of the NSWPF *Code of Conduct and Ethics* resulting in management action.

The policy states that NSWPF employees have a responsibility to avoid improper associations and that the most effective manner of managing an improper association is for the employee to cease the association. The policy states that '*commanders, managers or supervisors should encourage employees to relinquish an improper association wherever possible.*'

The PIC research found extremely poor levels of compliance with the policy requirement for written declarations of improper associations. This is the experience of this office when oversighting the handling of complaints involving allegations of improper associations. Rarely have officers made the requisite written declaration where an improper association has been found to exist. On occasion, we receive complaints involving allegations that an officer has failed to cooperate in the management of an improper association after a declaration has been made.

There are a number of possible reasons for the poor level of compliance with the policy including:

- lack of awareness and/or understanding of the policy
- mistaken belief that a declaration will be treated as a complaint, and
- lack of guidance about what information is to be contained in a written declaration.

Many of the possible reasons for the poor level of compliance with the policy might be addressed by raising awareness of the policy by providing regular, balanced and consistent information to employees and ensuring that commanders, managers and supervisors are aware of the need to encourage compliance with the policy in addition to their obligations to manage declared improper associations. We note that the NSWPF does currently provide regular messages about the policy in the *Police Weekly*,⁵ the Police Handbook, and by way of SMIT (Six Minute Intensive Training).⁶

Additional guidance regarding the content of written declarations by way of templates readily accessible to all employees and clear information about the storage and use of the declarations may also increase compliance rates.

However, it is our view that certain elements of the policy may need to be re-visited if the objective of greater compliance is desired.

The use of the term 'improper' association has the potential to dissuade an employee from making a declaration given the negative connotation associated with the word 'improper'. It is understandable that many employees are unwilling or unable to characterise certain associations — essentially relationships — with spouses, partners, children, siblings and close friends as 'improper'. In addition, the term appears to pre-judge the association which may deter an employee from disclosing it in the first place. A re-examination of the terminology would be a useful first step in encouraging greater compliance with the policy noting that some other states have opted for the more neutral 'declarable' association.

⁵ The last one appeared in the NSW Police Gazette 09/40 issued by the Commissioner published in NSWPF, 'PSC Case Study – Revised Conflicts of Interest Policy & Guidelines', *Police Weekly*, Vol. 21 No. 41, 2 November 2009, pp. 27-28.

⁶ NSWPF Education and Training Command, 'PCT007 – Improper Association (Policy Awareness)', 16 April 2010.

But perhaps the single most important factor affecting compliance with the policy is the requirements of the policy itself. The policy contains a number of mixed and possibly confusing messages that may not augur well for engendering compliance.

It is possible that the lack of compliance with the policy is caused by embarrassment and/or fear of complying with some of the policy requirements. For example, the policy states that employees are required to take all reasonable steps to identify and avoid improper associations and to report and cooperate in the management of improper associations that cannot be avoided. The characterisation of an association as 'unavoidable' may evoke negative feelings affecting an employee's willingness to place the association under close scrutiny by declaring it.

In addition, the policy states that *'improper associations need to be managed to protect both the employee and the NSW Police Force'* but then goes on to state that *'in most circumstances the interests of NSW Police are best served through the affected member relinquishing the association'*. There does not appear to be any real focus on the interests of the employee given that the starting point for managing an improper association appears to be the cessation of the association, which begs the question as to why an employee would declare the association in the first place. In our view, the relinquishment requirement does not sit comfortably with the notion of cooperative management of the association and may be acting as a disincentive to disclosure.

While we appreciate the need for the policy to contain clear and unambiguous requirements in order to achieve the policy objective of reducing or eliminating the risk associated with improper associations, it is our view that the factors discussed above may be contributing to the poor levels of compliance with the policy.

Greater compliance with the policy should be an objective of the NSWPF. Achieving this objective may require re-examination of the policy given that it currently contains a number of obligations that appear to pose barriers to an employee's willingness to declare an 'improper association'.

Having said that, we recognise that there will always be some associations that employees will not declare simply because they do not want to draw any attention or scrutiny to the activities they engage in with particular people, groups or organisations. In such circumstances, it is reasonable to treat the failure to disclose an improper association as a breach of the employee's obligations warranting management action.

Clearly, there is a fine, yet difficult balance to be achieved in any policy concerning improper associations. The challenge is to strike an appropriate balance between the identification and management of risk associated with improper associations on the one hand, and to encourage the reporting and cooperative management of improper associations on the other.