

REPORT OF PROCEEDINGS BEFORE

**COMMITTEE ON THE OMBUDSMAN, THE POLICE
INTEGRITY COMMISSION AND THE CRIME
COMMISSION**

**INQUIRY INTO THE USE OF ANTI-PERSONNEL SPRAY AND
BATONS BY POLICE INTEGRITY COMMISSION OFFICERS**

At Sydney on Monday 12 November 2012

The Committee met at 9.00 a.m.

PRESENT

The Hon. C. Cusack (Chair)

Legislative Council
The Hon. S. Mitchell
The Hon. A. Searle

Legislative Assembly
Mr L. J. Evans (Deputy-Chair)
Mr R. J. Park

CHAIR: Before proceedings commence, I remind everyone to switch off their mobile phones as they can interfere with Hansard recording equipment. If your phone is on silent, please switch it off completely. I welcome participants to the Committee's Roundtable as part of its Inquiry into the use of anti-personnel spray and batons by officers of the Police Integrity Commission. The purpose of the Roundtable is to consider a proposal by the Police Integrity Commission [PIC] that legislation ought to be introduced to enable PIC officers to use antipersonnel spray and batons, to bring practices into line with those of NSW Police Force officers.

The Committee has resolved to authorise the media to broadcast sound and video excerpts of its public recordings. Copies of the guidelines governing broadcast of the proceedings are available from the table by the door. In accordance with the guidelines, a member of the Committee and witnesses may be filmed or recorded. People in the public gallery should not be the primary focus of any filming or photographs. In reporting the proceedings of this Committee, the media must take responsibility for what they publish or what interpretation is placed on anything that is said before the Committee. During the Roundtable I encourage you to engage with other participants as well as with the Committee members. However, I ask that you speak one at a time and before you start speaking to state your name for the Hansard reporters. All participants will be sworn or affirmed prior to giving evidence.

BRUCE MEREDITH JAMES, QC, Commissioner, Police Integrity Commission, and

GIOVANNA MISON, Manager, Compliance and Intelligence, NSW Police Firearms Registry, sworn and examined:

DAVID DANIEL LEVINE, AO, RFD, QC, Inspector of the Police Integrity Commission, Inspectorate of the Police Integrity Commission,

MICHELLE MARGARET O'BRIEN, Commission Solicitor, Police Integrity Commission,

ANDREW STUART NATTRESS, Assistant Commissioner and Director Operations, Police Integrity Commission, and

LINDA MICHELLE WAUGH, Deputy Ombudsman, Police and Compliance, NSW Ombudsman, affirmed and examined:

CHAIR: We will start with the Commissioner. Could you outline the current position in relation to the Firearms Registry and Police Integrity Commission officers?

Mr JAMES: The Commission has sent the Committee two letters, of 23 October and 7 November. What I am about to say may be well known to members of the Committee but I believe it may be of some assistance. When I refer to the legislation, in the interests of clarity I do not intend to refer to every last detail of it.

The Commission has a number of investigators in its staff. Some of the investigators are what is described in the Police Integrity Commission Act as "approved former police officers", that is, officers of the Commission who have served satisfactorily in the Australian Federal Police or the police force of another State or Territory for at least five years, who are not and have not been members of the NSW Police Force and who are designated by the Commissioner as approved former police officers. Members of the Committee will be aware that current and former New South Wales police officers cannot be employed by the Commission. The Act also refers to "seconded police officers" but PIC does not use seconded police officers.

Some of the Commission's investigators are approved former police officers. However, some of the Commission's investigators are not former police officers and consequently not approved former police officers. Those investigators are principally, but not entirely, in the Commission's Covert Surveillance units, the Physical Surveillance unit and the Technical Surveillance unit.

In the PIC Act there are, and there have been since the commencement of the Act, a number of provisions dealing with investigators who are approved former police officers. Section 123 of the Act provides that investigators who are approved former police officers have all the functions and powers of a constable of police under the Police Act. Section 124 (1) of the PIC Act provides that investigators who are approved former police officers are exempted from the requirement under the Firearms Act to have a licence or permit to possess or use semi-automatic pistols or ammunition for such pistols. Under section 124 (2) of the Act, investigators who are approved former police officers are exempted from the requirement under the Weapons Prohibition Act to have a permit to possess or use handcuffs and body armour vests.

Accordingly, since 1997 when the Act came into force, investigators of the Commission who are approved former police officers, have been exempted from the requirement to have a licence or permit to possess or use semi-automatic pistols, ammunition for such pistols, handcuffs or body armour vests. On the other hand, investigators of the Commission who are not approved former police officers have not been exempted from the statutory requirements to have a licence or permit to possess or use pistols, ammunition for pistols, handcuffs or body armour vests. Such investigators have been able, of course, to apply for and obtain licences or permits authorising them to possess or use pistols, ammunition, handcuffs and body armour vests. Such investigators have received the same training in the use of those items as have investigators who are approved former police officers.

At the time that the PIC Act was passed, the only items of equipment used by NSW Police officers in conflict situations were pistols, handcuffs and body armour vests. That is, the items referred to in section 124 (1) and section 124 (2) of the Police Integrity Commission Act. Since the commencement of the Police Integrity Commission Act there have been developments in New South Wales police practices. New South Wales police

have been issued with other items of equipment for use in conflict situations, and in particular anti-personnel spray and batons. These items are prohibited weapons under the Weapons Prohibition Act and a permit is accordingly required to possess or use them. Accordingly, under the existing legislation those investigators of the PIC who are approved former police officers are not exempted by section 124 of the Police Integrity Commission Act or otherwise from the requirement to have a permit to possess or use spray and batons. Of course, those investigators of PIC who are not approved former police officers are not exempted from the requirement to have a licence or permit to possess or use capsicum spray and batons, just as they are not exempted from the requirement to have a licence or permit to possess or use pistols, ammunition, handcuffs or body armour vests.

A further matter which has recently come to the Commission's attention is that magazines for semiautomatic pistols are prohibited weapons within the Weapons Prohibition Act and it would seem that under the legislation and the regulations as they presently stand none of the Commission's investigators is exempt from the requirement to have a permit to possess or use magazines for semiautomatic pistols. What the Commission is seeking is legislative amendments such that all of its investigators are exempted from any requirement to have a permit to possess or use any item of equipment currently used by New South Wales police officers in conflict situations, that is, pistols, ammunition for pistols, handcuffs, body armour vests, spray, batons, and magazines for ammunition for pistols.

Why is the Commission seeking such legislative amendments? In the case of investigators who are approved former police officers, such legislation would restore their original equality with New South Wales police officers. For all investigators, such legislative amendments would avoid administrative difficulties involved in obtaining licences or permits. A matter which the Police Integrity Commission regards as particularly important is that under both the Firearms Act and the Weapons Prohibition Act applications for permits or licences are made to the Commissioner of Police. The applicant for a licence or permit is required to disclose personal details and to provide a photograph of the applicant. A principal function of the Police Integrity Commission is to investigate alleged misconduct by police officers. It is undesirable that the identity of PIC investigators, especially if they are investigators who are in covert surveillance units, be revealed to the police force.

Last year the Firearms Registry suggested that the problems could be overcome administratively, without legislation, by the issue of corporate licences to the Commission without the need for individual licences for individual officers. Such a system was actually introduced. However, it is doubtful—and I share those doubts—whether such a system complies with the existing legislation.

There are at least two possible ways in which the legislation could be amended. Section 124 of the Police Integrity Commission Act could be amended or section 6 (2) of each of the Firearms Act and the Weapons Prohibition Act could be amended. Section 6 (2) of each of the Firearms Act and the Weapons Prohibition Act are in very similar terms. Each subsection provides that a person is not guilty of an offence under the Act or the regulations only because of something done by the person while acting in the ordinary course of the person's duties. There is then a list of the persons to whom the subsection applies: (a) as a police officer or as a student police officer enrolled in the New South Wales police academy; or (b) as a prison officer employed by the Department of Corrective Services; or (c) as a police officer or as a prison officer of the Commonwealth, another State or Territory; or (d) as a member of the armed forces of the Commonwealth. I will not read the whole of that paragraph. Section 6 (2) of each Act does not say in terms that such a person is exempt from the requirement to have a licence, but that is the practical effect of the provision.

A way in which the problems could be overcome would be to amend section 6 (2) of each of the Firearms Act and the Weapons Prohibition Act so as to add a further paragraph saying that the provision applies where something is done as an officer of the Police Integrity Commission. I understand that the Firearms Registry is supportive of that proposal and it would appear to be the simpler course to amend each of the Firearms Act and the Weapons Prohibition Act, rather than amending section 124 of the Police Integrity Commission Act.

There was a proposal last year, as I understand, that the Firearms Act and the Weapons Prohibition Act would be amended in the way that I have outlined by a provision in a miscellaneous provisions Act. I understand that that proposal did not go ahead because it was thought that the provisions might be more substantive than provisions of a kind which are usually included in a miscellaneous provisions Act. The proposal then is that either the Police Integrity Commission Act or, preferably, the Weapons Prohibition Act and the Firearms Act be amended in the way that I have suggested. Because of delays which may occur in the

passing of any legislation, it is sought as an interim measure that the regulations to each of the two Acts, the Firearms Act and the Weapons Prohibition Act, be amended and my understanding is that as an interim measure the object could be achieved by amending the regulations. That is what I proposed to say.

CHAIR: Mr Levine, do you support the submission?

Mr LEVINE: Yes, I support the submission in every respect. I have nothing to add to what the Commissioner has said except however it is done the Inspectorate would consider the amendment as part of its jurisdiction embraced by its power under section 89 to audit generally the conduct of the PIC.

The Hon. ADAM SEARLE: What does the Firearms Registry think about the proposals? Do you support them as well?

Ms MISON: Yes we do.

CHAIR: And the Ombudsman's office?

Ms WAUGH: Yes, we would support them, I guess on the provision that the training and the accountability mechanisms are both there. I think the Commissioner has given evidence in this correspondence about the training from an independent law enforcement authority and there is obviously adequate accountability in terms of dealing with any complaints.

CHAIR: Does any witness have any information about the argument against this change, because it is not apparent to the Committee what the problem is here? It seems like red tape, that the legislation, as I understand it, the original PIC legislation has been overtaken by changes to other Acts, which has created a red tape situation and it is just not at all clear to the Committee why this has been so difficult to resolve. Ms Mison, how many applications have you processed at the Firearms Registry under the current arrangements?

Ms MISON: We currently only have one. As the Commissioner indicated we have issued one to the Commissioner for the use and possession of firearms and one permit currently issued for all of the weapons as indicated in the Weapons Prohibition Act. I currently have nine applications for firearms and 27 permits to be issued under the Weapons Prohibition Act for extraneous items not covered by the exemption. That will take a reasonable amount of time to process.

CHAIR: I note you travelled from Murwillumbah yesterday to appear.

Ms MISON: Yes.

CHAIR: Thank you. In terms of the onerous nature of this for the Firearms Registry, could you describe the process for us?

Ms MISON: Currently what happens with applications made by Police Integrity Commission officers through Mr Ian Hamilton and their security risk department and they are forwarded to me. As indicated by the Commissioner in normal circumstances photographs need to be attached to any prohibited weapon permit. We do not currently have that as an arrangement because the bulk of the people who are applying are assumed identities and covert officers. The documentation appears before me and I am the only person who processes the applications. It takes me three different steps and processes to get it to an issued status. I have to go through each one, put it into our system, print up the documentation and check it to make sure the conditions are correct. We currently do not charge a fee in relation to that but the normal fee is \$75 for each particular permit issued. We provide that as a fee exemption. I arrange for the permits to be sent back to the Police Integrity Commission.

Under normal circumstances once the permits are actually put on to the licensing system they are available for every New South Wales police officer to view but they are not put on under normal names. We use code names for those people such as SO7 or TO7. I do not know the identity of those individual people myself. Statutory declarations are supplied by the Police Integrity Commission indicating that they have made checks on those people and they have no current apprehended violence orders or offences that would normally preclude them from having a licence or permit because we cannot do the checks ourselves as we would normally do—it is left to Police Integrity Commission to do that.

In the normal situation those names would be run against our system every day to make sure that they do not commit any offences that would preclude them but in this case we rely on the Police Integrity Commission to do that. So the Police Integrity Commission has to run those checks and balances against every person every single day to make sure they have not committed any offences. If they do find someone has committed an offence the Police Integrity Commission then notify me and we take the appropriate course of action. Currently what happens is they supply me with an email indicating that they have conducted those checks regularly.

All of the documentation that I have is stored in my safe: It is not open, it is not scanned, it is not saved anywhere and nobody has access to documentation except me. If changes are made and any of these people are no longer employed by the Police Integrity Commission they have to notify me and we have to cancel the permit and continue on with that. It is a lengthy ongoing process that has to be maintained in relation to this. That does not happen for every police officer. We do not know if police are employed or not employed or changes are made. There are exemptions in the Act for public servants within the Police Force—including myself—and other members of the registry for handling firearms and weapons in the normal conduct of our employment. So far as red tape, there is a substantial amount in relation to doing what we do at the present time.

CHAIR: Have you ever refused a permit?

Ms MISON: No.

CHAIR: In relation to prison officers would this bring the Police Integrity Commission into line with the same exemptions as prison officers?

Ms MISON: Yes, prison officers have an exemption in relation to firearms and weapons.

CHAIR: At this point in time the Police Integrity Commission officers do not have the same standing as a prison officer?

Ms MISON: No. As you may or may not be aware the prisons have been privatised and are run by the GEO Group Australia. It is not my department so I do not have much to do with them other than I know them. They are normal security guard people who are now being employed to look after the prisons. Those people under the provisions of the Prison Act are classified as employees to enable them to have the exemption that the normal prisons officers would have and they are, for all intents and purposes, just normal security people. They will be afforded the exemptions while the Police Integrity Commission officers will not be afforded those exemptions.

CHAIR: How long have you been seeking to resolve this problem?

Ms MISON: Several years. It has been ongoing since 2010. There was at least one lot of changes. Within that time period we have had continual negotiations with Police Integrity Commission in relation to attempting to make things more amenable to both of our areas and reduce the time and effort. Hence, we went down the path of issuing the one permit for firearms and one permit for weapons under section 28G of the Firearms Act. That enabled the Commissioner to do as he saw fit. As the Commissioner has pointed out, he does not believe that is the appropriate way we should be going: Therefore, we have gone back to make an effort to comply by issuing these permits to each and every person not exempted.

CHAIR: The Premier's Department are responsible for administering the Acts relevant to this.

Mr JAMES: Yes.

CHAIR: Have you had any feedback from Premier's? The problem the Committee has is that it is on their advice we are having this Inquiry but no officers from the Premier's Department have accepted our invitation to come to the Inquiry. That leaves the Committee in the dark as to what the problem has been and why this has dragged on for so many years.

Ms O'BRIEN: I can advise the Committee that I have spoken with one of the legal officers at the Premier's Department who informed me it was the Department's view that when the proposal made by the Firearms Registry was put up for the statute law reform session in August the Premier's Department took the view it was not an appropriate amendment for statutory law reform. Following that event the Premier's

Department then referred the matter back to the Committee to look at. I spoke to a lawyer at the Premier's Department and discussed the fact that the proposal made by the Firearms Registry would be an appropriate one for the Committee to consider. He agreed with me that it would be. There has certainly been no suggestion to me from the Premier's Department that there is any policy reason why the proposal should not go ahead or any opposition to it from the Premier's Department—it was the fact that it was not regarded as a machinery type amendment for the purposes of statute law reform back in August.

CHAIR: Why was it necessary to have a parliamentary inquiry?

Ms O'BRIEN: I cannot answer that. I can only assume it dates back to 2010 when we put in the smaller proposal to the a review of the Police Integrity Commission Act. When the Government produced the report on the review of the Police Integrity Commission Act that particular submission made by the Police Integrity Commission was dealt with as outcome 13 of the Government's report on the review of the Police Integrity Commission Act. At that time the Government referred that particular recommendation to this Committee to be considered. Really there has been no development since that time because it has been sitting awaiting consideration by the Committee. We have taken the opportunity to introduce into the process the things that have intervened since that time including the added complication that has come to our attention about the magazines and the very attractive proposal that has been made by the Firearms Registry to deal with it.

Mr LEE EVANS: Commissioner, on a day-to-day basis who or in what circumstances do you think these pieces of equipment will be used?

Mr JAMES: Probably not on a day-to-day basis. Perhaps I will pass the question on to the Director of Investigations.

Mr NATTRESS: The question of the issue of these accoutrements, as they are called, is addressed by means of risk assessments which are part and parcel of each operation that the Commission undertakes. When an operation is designed the risk assessment is completed. A number of senior officers, including myself, participate in that process. The risks as they relate to the safety of officers or anyone assisting the Commission in the investigation are taken into account and if it is thought that this equipment is necessary then it is issued on that basis. There is no-one in the Commission carrying or accessing this equipment on a daily basis.

Mr LEE EVANS: My only concern is, due to the level of investigations you carry out, who would be the people, as far as an operation goes, obviously they are criminals, but what level of criminal would you be using a baton and a capsicum spray on?

Mr NATTRESS: As I said the issue of these accoutrements is based on a risk assessment. Hypothetically if we were meeting an informant covertly, someone that we did not really know, who had flags on the various intelligence systems that we have access to of a propensity to violence or to carry weapons themselves, then that would be an occasion when we would most probably issue our investigator, or whoever it is that is meeting the person, with the appropriate weapons.

Mr RYAN PARK: I share the frustration of the Chair that this has not been sorted out for you earlier. I cannot understand a situation where a group like yours has to have this sort of process to reduce Government red tape. I think it is crazy. You should have had it earlier. There are not too many people who do not support it. Reading through it I am personally a bit frustrated at the process to get to this point. I think I generally share that view with many people, that the Police Integrity Commission employ the best and brightest in terms of investigators—and they should be—and yet they have to jump through hoops to get equipment that, for all intents and purposes, security guards are issued. That is a glitch in the system.

The Hon. SARAH MITCHELL: I echo the comments of the Chair and Mr Park. In reading the documentation it seemed it was a black and white issue and hearing from you all today shows that it really is. The administrative burden that the Commissioner wrote of in the letter of 23 October seems onerous for something that should have a simple solution.

Ms Waugh, you talked about the Ombudsman's perspective to ensure that there was enough training and accountability but you are comfortable with what the Commissioner suggested: Is there anything you want to add in that respect?

Ms WAUGH: No. Basically the impression I get is the level of training that is received by Police Integrity Commission officers equates to what a police officer would get. I think that would be an adequate standard. In terms of the accountability; the complaint issue you might be concerned with is excessive use of force or an inappropriate use of force and there is a mechanism for a person to make a complaint and have that dealt with. They are the two main things. I also have to say, in terms of the risk assessment and all of the things that go with it, it does not have to be a risk you are facing every day. You might be only meeting with an informant or doing a covert operation once every six months but if that carries risk the officers need to have adequate protection and the ability to deal with the situation. To me what they are asking for are items you would hope would de-escalate a situation and not put a life in danger unless it was absolutely necessary.

The Hon. SARAH MITCHELL: I would guess in that respect it is similar to normal police officers in that they may have things like the capsicum spray but not use them for long periods of time depending upon the situation, so to me it seems a very similar case.

CHAIR: Everybody in this room has a responsibility for ethical management of taxpayer dollars. It seems to me this matter has dragged on for two years at least and at great expense to the Firearms Registry we are now sitting here using the resources of the Parliament. Can I just foreshadow that our Committee will be looking at publishing the cost of this Inquiry to the best that we can estimate it. I ask that the firearms registry and the Police Integrity Commission give us an estimate of costs as well because I think it is important to be transparent about how expensive it is to put off simple decisions that have red tape and keep people running around in circles. I realise that the dollar cost does not capture the whole demoralisation cost of having to deal with stupid anachronisms in the law, so if you would not mind providing that information or anything else that you think would be of assistance to try and capture the process, which has not been a good one in my view. Maybe that would be a worthwhile matter for the Committee to comment on. Does any other witness have any further comment to make?

Ms MISON: Can I just clarify the issue of the magazines which people may not have a general understanding about?

CHAIR: Yes, please.

Ms MISON: The provisions in the Weapons Prohibition Act caters for what we classify as overcapacity magazines so a normal handgun, which Police Integrity Commission officers would use, a normal Glock nine millimetre, which is a police issue firearm—the same as what police officers have—comes with a standard magazine of 15 rounds. The normal category H licence holder who is out there target shooting can have a 10-round magazine, hence anything that is more than 10 rounds fits within the parameters of the Weapons Prohibition Act, so even a normal police officer carrying his weapon and if he was not exempt under the Act he would have to get a permit under the Weapons Prohibition Act to cover the magazine because it fits in the overcapacity magazine round.

Security guards are exempt under the Act for having overcapacity magazines, so they can in fact carry, for all intents and purposes, a 30-round magazine in their normal firearm that they would use. Normal police officers do not carry 30 rounds of magazine capacity. So it just enables Police Integrity Commission officers again to be as normal police officers by enabling them to have the normal standard issue magazine that comes within those firearms.

CHAIR: Is this issue the tip of the iceberg in terms of red tape that the firearms registry is trying to deal with?

Ms MISON: Yes. We have an awful lot of red tape.

Mr LEE EVANS: Bring them into line with the security industry.

CHAIR: Not if you have ended up in a situation where a police officer needs a permit.

Ms MISON: Police officers do not, in effect, need a permit because they are exempted under the Act but if, for all intents and purposes, they were not exempt under the Act like they currently are, then because they are using 15 rounds they would then need to have a permit as well, but they are fully exempt; they do not need to have permits issued to them.

The Hon. ADAM SEARLE: So there is no operational difficulty?

Ms MISON: No. The Glocks come with a normal standard—correct me if I am wrong—15-round magazine. Now they can have more rounds if they need to or want to. They can carry more magazines if they need to, to give them added fire power. If you cannot shoot them with 15 rounds, then you really should not be out there in the field. Like I said, security guards have an exemption that enables them to have those overcapacity magazines.

CHAIR: Without going into the firearms registry issues, do you have a process to resolve these issues of red tape, particularly those which arise because of changes in legislation which overtake other changes that have been previously made?

Ms MISON: We attempt to, yes. We have a process in place to look at streamlining mechanisms between us, especially where it affects other government agencies and that type of stuff. We do have a process in place where we negotiate with them on ways and means that we can otherwise use the Act to cater for the capabilities that they need to have.

CHAIR: But what assistance do you have in resolving the legislative difficulties? It sounds like your processes are all about trying to get around the anachronisms?

Ms MISON: We have a current legislative review of the regulations that are currently in place that has been put forward to Parliament and as far as I am aware that is being put onto the side burner at the present time. I do not know what stage that is currently sitting at but as far as I am aware that is all on hold.

CHAIR: Who is conducting that review?

Ms MISON: Honestly I cannot tell you at the present time, I am sorry—Les Tree and that department, whatever it is.

The Hon. ADAM SEARLE: The Ministry of Police.

Ms MISON: Yes, the Minister of Police.

CHAIR: The Ministry of Police.

Mr RYAN PARK: It is the old ministry. I am not sure what it is called in the new Government's arrangement but for all intents and purposes it was known as the Ministry of Police.

Ms MISON: Police and Emergency Services and whatever ministry. Yes, Les Tree.

The Hon. ADAM SEARLE: He had the job before we came to government in 1995.

CHAIR: I think we have all the evidence we need in relation to the matter before us. If anything does arise out of our deliberation, would you mind if we forwarded to you questions on notice?

Mr JAMES: No objection.

CHAIR: Failing that, our hope is to certainly have this matter finalised as quickly as possible. I thank all of the witnesses for your participation and cooperation. I thank my fellow members of the Committee. I think this Roundtable has been a fairly effective way of resolving the matter quickly as well.

(The witnesses withdrew)

(The Committee adjourned at 9.51 a.m.)