



NEW SOUTH WALES

Inspector of the New South Wales Crime Commission

SPECIAL REPORT TO THE MINISTER

made under

section 67 of the *Crime Commission Act 2012*

28 October 2014



Inspector of the New South Wales Crime Commission

The Hon Stuart Laurence Ayres MP
Minister for Police and Emergency Services
Minister for Sport and Recreation
Minister Assisting the Premier on Western Sydney
52 Martin Place
SYDNEY NSW 2000

Dear Minister

In accordance with section 67 of the Crime Commission Act 2012 I hereby furnish to you a Special Report concerning the oversight of the New South Wales Crime Commission by the Police Integrity Commission.

Yours faithfully

A handwritten signature in black ink, appearing to read "G Barr".

The Hon Graham Barr QC
Inspector, New South Wales Crime Commission
28 October 2014

Oversight of the NSW Crime Commission by the Police Integrity Commission

This Special Report, made under s67 of the *Crime Commission Act, 2012*, deals with difficulties and risks arising out of the possession by the Police Integrity Commission of power to investigate the activities of the New South Wales Crime Commission and its officers and to receive and deal with complaints about it and its officers.

The Inspector of the Crime Commission

The Office of the Inspector of the Crime Commission (the Inspector) was established by Part 4 of the *Crime Commission Act 2012* (the CC Act) following the Report of the Special Commission of Inquiry into the New South Wales Crime Commission made by Mr David Patten on 30 Nov 2011 (the Patten Report). The Inspector's principal functions are set out thus in subs 62(1) of the CC Act:

- 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*
- c) *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*
- d) *to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities*

The position before the Standen arrest

The Police Integrity Commission (the PIC) was established by the *Police Integrity Commission Act 1996* (the PIC Act) as recommended by the Royal Commission into the New South Wales Police Service, which was undertaken from 1995 to 1997. As originally enacted, the PIC Act gave the PIC no authority over the Crime Commission or its officers. Relevantly, it was concerned principally with the detection, investigation and prevention of misconduct of police officers and police administrative officers.

Section 13 provided in part:

(1) The principal functions of the Commission are as follows:

- a) *To prevent officer misconduct*
- b) *To detect or investigate, or manage or oversee other agencies in the detection or investigation of, officer misconduct...*

By s4 'officer misconduct' meant police misconduct or corrupt conduct of an administrative officer and 'administrative officer' meant any member of the New South Wales Police Force other than a police officer.

By s23 the PIC was empowered to conduct an investigation on its own initiative or on a police complaint or an administrative officer complaint. By subs 23(2) the PIC was empowered to conduct an investigation even though no police officer or administrative officer or other person had been implicated and even though no police misconduct or corrupt conduct of any administrative officer were suspected.

By S75D each of the holders of certain named offices, including the Crime Commissioner, was placed under a duty to report to the PIC any matter that the officer suspected on reasonable grounds concerned or may have concerned officer misconduct, which meant misconduct of a police officer or corrupt conduct of an administrative officer.

Changes after the Standen arrest

In June 2008 a senior officer of the Crime Commission, Mark William Standen, was arrested and charged with serious offences. The NSW Parliament responded swiftly. The PIC Act was amended with effect from 1 July 2008 so that officer misconduct included misconduct of a Crime Commission officer. Section 5B was inserted to define that term thus:-

Misconduct of Crime Commission officers

- (1) Definition for the purposes of this Act, misconduct of a Crime Commission officer means any misconduct (by way of action or inaction or alleged action or inaction) of a Crime Commission officer:*
 - (a) whether or not it also involves participants who are not Crime Commission officers, and*
 - (b) whether or not it occurs while the Crime Commission officer is officially on duty, and*
 - (c) whether or not it occurred before the commencement of this subsection, and*
 - (d) whether or not it occurred outside the State or outside Australia.*
- (2) Examples of misconduct of a Crime Commission officer can involve (but is not limited to) any of the following:*
 - (a) the commission of a criminal offence by a Crime Commission officer,*
 - (b) any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law,*
 - (c) corrupt conduct within the meaning of the Independent Commission Against Corruption Act 1988 involving a Crime Commission officer.*
- (3) Former Crime Commission officers conduct may be dealt with, or continue to be dealt with, under this Act even though any Crime Commission officer involved has ceased to be a Crime Commission officer. Accordingly, references in this Act to a Crime Commission officer extend, where appropriate, to include a former Commission Officer.*

At the same time other sections mentioned above were amended to bring the Crime Commission and its officers under the purview of the PIC Act. Section 23 was amended to apply to Crime Commission officers. By s75C any person could complain to the PIC about misconduct of a Crime Commission officer. In this way the PIC acquired the power to investigate the Crime Commission and its officers either in response to any frank complaint or on its own initiative where there was no complaint and no suspicion of relevant misconduct.

As so empowered, the PIC investigated the activities of the Crime Commission. Some instances were widely publicised and commented on. One operation became notorious.

During the currency of the investigation these two important agencies of government, whose function it was and is to cooperate and share information (CC Act s13, PIC Act s18) were parties to a Supreme Court action. There were resulting embarrassment and expense.

After the establishment of the Office of Inspector of the Crime Commission

When the Office of the Inspector of the Crime Commission was later established the PIC Act was amended by the insertion of subs 23(2A), by which the PIC was forbidden to conduct an investigation into the Crime Commission without the consent of the Inspector if no particular officer were implicated and no misconduct suspected. In addition s75D was enlarged to require the Inspector to report possible officer misconduct to the PIC.

Remarkably, however, the CC Act was not amended to require any office holder, even the Crime Commissioner, to report to the Inspector any suspicion of misconduct by officers of the Crime Commission.

The result has been that reports by office holders under s75D of the PIC Act have directed almost all complaints about Crime Commission officers to the PIC. Few such complaints are directed to the Inspector. Only five were received in the year ended 30 June 2014.

Having given the Inspector and the PIC concurrent powers to investigate complaints, the statutes are silent about which office should exercise them on any particular occasion. This engaged the attention of the Parliamentary Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission (the Parliamentary Committee), which recommended that the PIC Commissioner and the Inspector of the Crime Commission develop protocols to ensure a clear understanding of this oversight and responsibility for the management of complaints (Report 07/55 recommendation 1). The Inspector and the Commissioner have met and agreed on a way of consultation and resolution: see the Committees report 08/55, August 2014 at paragraphs 1.88-1.94.

This duality of responsibility is peculiar. Each of the Independent Commission Against Corruption, the Police Integrity Commission and the Crime Commission has its own Inspector. The functions and power of each Inspector are identical: see *Independent Commission Against Corruption Act* ss57B, 57C and 57D; PIC Act ss89, 90 and 91; the CC Act ss62, 63, 64. Given that the only relevant oversight of the ICAC is that of its Inspector and of the PIC that of its Inspector, it seems odd that the relevant oversight of the Crime Commission is not so confined. The reason, history shows, is not that the Inspector is constitutionally less appropriate as sole overseer but that dual responsibility has come about by incremental legislative amendment in the face of events.

The need for change

So far there have been only a few instances of consultation between the Inspector and the Commissioner of the PIC about complaints received that are possibly manageable by either. The results have been satisfactory to both sides and there is no reason to suppose that that will not continue to be so, given the cordial relations that exist between them.

However, these arrangements do not have the force of law. Neither, possibly, would more formal memoranda. The Commissioner and the Inspector hold office for limited periods of

time and incoming office holders might disagree about existing arrangements, which may for that reason prove unsatisfactory in the long term.

There has been no request by the PIC under subs23(2A) of the PIC Act for the Inspector's consent to its conducting any investigation into the Crime Commission where no particular Crime Commission officer has been implicated and no misconduct is suspected.

It appears that whatever the perceived need for supervision of the Crime Commission was in the days following the Standen arrest, there is no longer any need for the PIC to oversee the Crime Commission. It would appear that without the peculiar history of this matter the Parliament would never have made either of these agencies subject to secret investigation of the other unless the investigation fell within the proper legislative objects and functions of that other.

As it is, in matters the subject of this report the Crime Commission is a servant of two masters. Such a management structure is hardly ever resorted to because of the inherent risk of conflict and inconsistency. That risk exists.

A better approach, it is submitted, would be to repeal the relevant provisions of the PIC Act. As a result the Inspector would be solely responsible to investigate complaints about the Crime Commission and its officers and to deal with conduct amounting to maladministration as provided for by s62(1) of the CC Act. The risk of disagreement over the exercise of concurrent power would be removed. The risk of concurrent, possibly inconsistent, investigation of similar matter would be removed. The risk of conflict would be removed.

It is recommended that the CC Act and the PIC Act be amended so as to remove the Crime Commission from the oversight of the PIC and to constitute the Inspector as the only body charged with carrying out principal functions of the kind provided for by s62 of the CC Act.



The Hon Graham Barr QC
Inspector, New South Wales Crime Commission
28 October 2014