



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: 1016912

1 July 2015

Mr Andrew Tink AM
Review of Police Oversight
Locked Bag 5111
PARRAMATTA NSW 2124

Dear Mr Tink,

Review of the police oversight system

Thank you for inviting the Law Society of NSW to contribute to the review of the police oversight system ("Review").

The Criminal Law, Juvenile Justice, Indigenous Issues and Government Solicitors Committees of the Law Society ("Committees") note that the Review will consider one of the more significant ways in which the State exercises powers over individuals. The Review will consider a multiplicity of agencies and mechanisms for the review of police conduct in respect of matters where: (a) police exercise their powers in relation to the public and offenders; and (b) there is corrupt and criminal conduct by police officers.

The Committees consider that the Review could provide opportunities to strengthen public confidence in the criminal justice system and is therefore an important exercise. However, though the scope of this Review is potentially very diverse, the Committees note that the time frame to provide comments is short. While the Committees understand that the short opportunity to comment is a feature of the commission's timeframe, given the limited time available, the comments provided are relatively general in nature.

The Committees are of the view that oversight and investigation that is seen to be proper, impartial and independent is necessary to maintain public confidence in the criminal justice system. All of the Committees support a model involving the independent oversight of police conduct. Further comments specific to the Committees are set out in the attached submissions.

Thank you once again for the opportunity to comment. Any questions can be directed to Gaby Carney who is available on [redacted] or [redacted]

Yours sincerely,

John F. Eades
President

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966

T +61 2 9926 0333 F +61 2 9231 5809
www.lawsociety.com.au


Law Council
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CONSTITUENT BODY

Comments of the Criminal Law Committee and Juvenile Justice Committee

The Law Society's Criminal Law Committee and Juvenile Justice Committee (referred to in this section as the "Committees") represent the Law Society on criminal law and juvenile justice issues as they relate to the legal needs of people in NSW, and include experts drawn from the ranks of the Law Society's membership.

It is the Committees' view that there is an inherent conflict of interest whenever police are required to investigate their fellow officers. The Committees continue to be concerned that complaints about police, including the majority of critical incidents and serious misconduct involving the police, are investigated only by the police and, in most instances, no further action is taken. It is, of course, of great importance that such matters are investigated properly and impartially to ensure public confidence in the criminal justice system. Proper and impartial investigation must happen in fact and must also be seen to happen. It is therefore vital for public confidence that a body independent of the police conduct investigations.

In respect of critical incidents, in recent years the Committees have witnessed several controversial events which have come under the scrutiny of a number of independent bodies including the Ombudsman, the Coroner and the NSW Police Integrity Commission ("PIC"). This has occurred only after the matter has been referred to these organisations, sometimes weeks or months after the critical incident occurred.

It is the Committees' view that when the Ombudsman or Coroner investigates a matter they are almost wholly reliant on the initial reports and evidence provided by the internal police inquiry. The Committees are concerned that while these organisations often investigate and criticise police actions, their powers are limited with regard to the further steps they can take. Given their limited powers, these organisations have also had difficulty establishing precisely what has happened, and has in some cases resulted in diminished ability to hold someone accountable.

The Committees note the PIC's recommendations after its inquiry into the Adam Salter case. Amongst other recommendations, the PIC acknowledged that there would be benefit if a body, independent of the NSW Police Force, was made responsible for investigating critical incidents. The PIC also recommended that all critical incident investigation reports be published on the NSW Police Force website after the completion of any inquest and that the NSW Police Force *Guidelines for the Management and Investigation of Critical Incidents* be made publicly available¹.

The Committees agree with the view that NSW requires a single independent police review body which is sufficiently resourced and has its own officers to investigate and monitor police conduct complaints, including critical incident reviews and a broad discretion to cover incidents of possible corruption and serious misconduct. The Committees submit that the logical entity is the Ombudsman, who should be given greater investigative and monitoring powers. It is also the Committees' view that any proposed independent body should be able to publish all critical incident investigation reports. The Committees acknowledge that further consideration would be required to determine the details, including the independent body's functions and how the process would operate.

Broadly, the Committees' view is that a protocol should be established outlining the level of monitoring and investigation that should occur. For example, the Ombudsman should be

¹ Operation Calyx, Report to Parliament, June 2013 (pp 268-269) paragraphs [8.10] [8.11] and [8.24]

given access to all aspects of any internal police investigation following a critical incident or allegations of serious misconduct. The Committees submit that once a critical incident takes place, the Ombudsman should be alerted with independent officers being sent immediately to obtain statements from those involved in the critical incident. The Ombudsman should be allowed to make comments or suggestions as to the progress of the investigation and report on any irregularities.

The Ombudsman's office should also provide a level of counselling and psychological service to families affected by a critical incident. Investigations and court hearings following critical incidents can be very difficult for affected families. In the Committees' experience it can be traumatic for families when evidence is given in court by police officers, particularly when it is not clear as to the role played by these officers during the critical incident. An investigation and hearing conducted by an independent body may alleviate these difficulties.

The Committees are also of the view that the powers and performance of the Ombudsman's office in relation to this function should be reviewed regularly. The Committees suggest that this occurs every 12 to 18 months.

For the reasons set out above, it is the Committees' view that a genuinely independent body that is transparent and adequately resourced is clearly required in NSW. The Committees submit that the Ombudsman, with greater investigating and monitoring powers, would be the appropriate body. The Committees further submit that the power of the State Coroner should not be affected in any way by the outcome of the Review and the Parliamentary Committee on the Ombudsman should continue to function.

Comments of the Indigenous Issues Committee

The Indigenous Issues Committee of the Law Society of NSW ("IIC") represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The IIC is concerned about the interrelationship between police and Indigenous peoples in the exercise of police functions and State powers. The IIC's primary concern revolves around the availability of an adequately resourced, accessible and transparent mechanism that will meaningfully and appropriately address the complaints of Indigenous people, and in a timely way. Such a mechanism must have regard to the particular needs of Indigenous people and to the history of mistrust between Indigenous people and the police.

1. Consultation process

The IIC's view is that this is an important issue that requires proper consideration. The relationship between Indigenous people and the NSW Police Force is one that is complicated by historical and contemporary experience.

As noted in the Royal Commission into Aboriginal Deaths in Custody recommendations handed down in 1991:

1.4.14 The relations between Aboriginal and non-Aboriginal people were historically influenced by racism, often of the overt, outspoken and sanctimonious kind; but more often, particularly in later times, of the quiet assumption that scarcely recognises itself. What Aboriginal people have largely experienced is policies nakedly racially-based and in their everyday lives the constant irritation of racist attitudes. Aboriginal people were never treated as equals and certainly relations between the two groups were conducted on the basis of inequality and control.²

and later:

1.4.16 Police officers naturally shared all the characteristics of the society from which they were recruited, including the idea of racial superiority in relation to Aboriginal people and the idea of white superiority in general; and being members of a highly disciplined centralist organisation their ideas may have been more fixed than most; but above and beyond that was the fact that police executed on the ground the policies of government and this brought them into continuous and hostile conflict with Aboriginal people. The policeman was the right hand man of the authorities, the enforcer of the policies of control and supervision, often the taker of the children, the rounder up of those accused of violating the rights of the settlers. Much police work was done on the fringes of non-Aboriginal settlement where the traditions of violence and rough practices were strongest.³

The Committee notes also that Professor Chris Cunneen's report commissioned by the National Inquiry into Racist Violence in 1990 concludes that, "On the evidence available, it can be concluded that over policing, including the excessive use of force, occurs in the Redfern Aboriginal community."⁴

More recently, following the riots in Redfern sparked by the death of Thomas Hickey, the fraught relationship between police and Indigenous peoples in the Redfern and Waterloo

² Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National report* (1991) Vol 1, 10 [1.4.14].

³ *Ibid.*

⁴ Chris Cunneen, *Aboriginal-Police Relations in Redfern: with special reference to the 'Police Raid' of 8 February 1990, a report commissioned by the National Inquiry into Racist Violence*, Human Rights and Equal Opportunity Commission, May 1990, available online: <https://www.humanrights.gov.au/publications/aboriginal-police-relations-redfern-special-reference-police-raid-8-february-1990> (accessed 25 June 2015)

area was also considered by the 2004 Inquiry of the NSW Legislative Council's Standing Committee on Social Issues. The Committee noted that it remained "concerned about the relationship between police and Aboriginal people in Redfern and Waterloo."⁵ Further, the Standing Committee noted:

Some disturbing evidence has been presented to the Inquiry. While the evidence indicates that in recent months there has been an improvement in Aboriginal/police relations in the area, it is clear that this troubled relationship is deep seated and that a consistent and long term approach to its improvement is needed. Against the backdrop of the historical conflict between the two groups, the [Standing] Committee is aware of the pressing need to break the cycle of tension and disharmony.⁶

The IIC understands that the difficult relationship between Indigenous people and the police is not confined to the Redfern and Waterloo areas.⁷

While the IIC understands the time constraints the Review process faces, given the potential scope and complexity of these issues, the IIC is of the view that proper consultation with Indigenous communities is needed (beyond consultation with organisations such as the ALS and Legal Aid NSW). The individuals in these communities may be vulnerable and marginalised, and are unlikely to have used the complaints process, and their experiences would be valuable information for a review that is interested in systemic improvement. The IIC notes also that there may be issues that arise that are specific to rural, regional and remote areas that should be considered by the Review through further consultation.

2. Difficulties in current oversight model

The IIC notes that a significant barrier for the making of complaints is the fact that regardless of the agency that receives the complaint, the process (including the process through the Ombudsman) makes the police station or Local Area Command that is the subject of the complaint responsible for investigating the complaint. While the IIC acknowledges that the subject of the complaint should have the opportunity to know the complaint against them, and the opportunity to respond, the IIC's view is that the investigation and resolution process itself should be seen to be independent and impartial.

The IIC understands that given the fraught history and relationship that Indigenous people have with police, the current process is unlikely to be one where Indigenous people feel able to raise concerns. Even if they do, they may not have confidence that their complaints will be fairly investigated and resolved. In the experience of IIC members, complainants have been interviewed by police about their complaints in a way that may be inappropriate, and at times accusatory. The status quo is concerning as public confidence in the integrity of the system (in respect of both actual and apprehended bias) is likely to impact on public respect for the rule of law.

The IIC suggests that although there are a number of agencies involved in the oversight of police, the structure of the current process leads to a gap in oversight and investigation of inappropriate police conduct that relates to "everyday" policing. This gap relates to the level of misconduct that is less than serious misconduct or in relation to critical incidents, but if unchecked may enable more serious misconduct, as well as contribute to the tension

⁵ NSW Legislative Council Standing Committee on Social Issues, *Final Report on the Inquiry into issues relating to Redfern and Waterloo*, Report 34, December 2004, at 16, [2.41], available online: [http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/77220a893aea0e16ca256f6c00098a80/\\$FILE/03%20Final%20Report%20Chapter%202.pdf](http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/77220a893aea0e16ca256f6c00098a80/$FILE/03%20Final%20Report%20Chapter%202.pdf) (accessed 25 June 2015).

⁶ *Ibid.*

⁷ *Ibid.* at 16, [2.42].

between Indigenous people and police. In the IIC's experience, people are less likely to make complaints in relation to inappropriate police conduct at this level.

3. IIC's submissions

The IIC does not comment specifically on what form an appropriate investigation of allegations of unacceptable police conduct might resemble. However, the IIC notes that an adequately resourced and independent oversight body is required.

Such a body might be the forum for receiving and triaging complaints. The IIC notes that if the body is to be seen as genuinely independent, consideration should be given to making the investigative function independent of the NSW Police. The IIC suggests also for consideration whether this independent body would investigate complaints of misconduct of all levels of seriousness, or whether it might, for example, only investigate complaints that relate to conduct that is not unlawful, an offence or corrupt, but falls within the sort of conduct described in ss 122(d) and 122(e) of the *Police Act 1990*.⁸

In the IIC's view, there may be benefits in having one agency carrying out these functions (even if just in relation to the types of misconduct that falls within the conduct described in ss 122(d) and 122(e)). If the role of an oversight body is to both address individual complaints as well as to make systemic improvements, the convergence of oversight functions in one body is a useful way to generate and collate the data necessary to inform evaluations and further reform.

The IIC reiterates that it is critical that this oversight body be institutionally, practically, culturally and politically independent. Further, if there is to be a new body set up, it should have a specific unit to assist it to deal with complaints involving Indigenous people in a culturally appropriate manner. The IIC's view is that the Coroner and WorkCover should remain relevant bodies in relation to the investigation of critical incidents.

⁸ Subsections 122(d) and 122(e) of the *Police Act* relate to conduct that:

- is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or
- arises, wholly or in part, from improper motives, or
- arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or
- arises, wholly or in part, from a mistake of law or fact, or
- is conduct of a kind for which reasons should have (but have not) been given, or
- conduct of a police officer that is engaged in in accordance with a law or established practice, being a law or practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect.