

**SPECIAL COMMISSION OF INQUIRY INTO OFFENDING BY FORMER
CORRECTIONS OFFICER WAYNE ASTILL AT DILLWYNIA WOMEN'S
CORRECTIONAL CENTRE**

Closing submissions of NSW Commissioner of Police

14 December 2023

Introduction

1. The NSW Commissioner of Police (**CoP**) was granted leave to appear in the Special Commission of Inquiry (**Inquiry**) on 20 October 2023.¹
2. These submissions are confined to a single issue raised in Counsel Assisting's Closing Submissions (**CAS**) - "*whether reports of misconduct which would constitute a criminal offence should be made directly to NSWPF and if so, whether it is sufficient or preferable that such a report be made to the CSIU*"² – and Proposed Recommendation 27 (**PR 27**), namely:

*"Consideration should be given to recommending that allegations of criminal conduct by CSNSW officers be required to be referred to NSWPF commands rather than to the CSIU in the first instance."*³
3. In support of PR 27, it is said in CAS that police officers who are members of the CSIU are "*effectively embedded*" within CSNSW and thus are "*not completely independent*" and CSIU Police Officers officers are "*conceivably more likely to be influenced by the views of CSNSW officers than other 'external' police*".⁴
4. In summary, the CoP submits that:
 - 4.1 the question whether reports of misconduct which would constitute a criminal offence should be referred to the Corrective Services Investigation Unit (**CSIU**) or to other NSWPF commands is a question which falls outside the Inquiry's Terms of Reference (**TOR**);
 - 4.2 there is no evidentiary basis for the proposition put in CAS that police officers within the CSIU (**CSIU Police Officers**) are:
 - (a) "*not completely independent*";

¹ T439.46

² CAS at [791], p 222

³ Proposed Recommendation 27, CAS at p 448

⁴ CAS at [797], p 223

- (b) “conceivably more likely to be influenced by the views of CSNSW officers than other external police”;

4.3 the Inquiry did not hear any evidence concerning:

- (a) any alleged failures of CSIU Police Officers to effectively, professionally, and thoroughly investigate complaints;
- (b) the benefits of referrals to Police Area Commands (formerly Local Area Commands) over referrals to the CSIU or whether such referrals would in fact create weaknesses in police investigations;

4.4 any finding to the effect that CSIU Police Officers have acted, or may act, other than impartially and in accordance with their duties as sworn police officers:

- (a) has the capacity to do real and serious reputational damage to identifiable police officers who work or have worked within the CSIU in circumstances where those officers have not been afforded procedural fairness;
- (b) would constitute a denial of natural justice.

4.5 a recommendation in the form of PR 27 would only serve to limit, rather than expand, the avenues by which reports of criminal conduct might be made which may discourage, rather than encourage, full, frank and prompt reporting to Police.

- 5. For these reasons, the CoP submits that any finding, implication or suggestion that CSIU Police Officers working within the are “*not completely independent*” or “*conceivably more likely to be influenced by the views of CNSW officers than other ‘external’ police*”⁵ would be unfair, prejudicial and without foundation.
- 6. It is respectfully submitted that PR 27 lacks utility and has the potential to be detrimental to the objectives of the Inquiry.

Terms of reference

- 7. At the outset, the CoP observes the manner in which the NSW Police Force investigate criminal offences is a matter which falls outside the TOR. As enumerated at [8] of the CAS, there is nothing within the TOR which calls upon the Inquiry to consider the manner or mode in which *members of the NSW Police Force* investigate crime.
- 8. As will be explained below, to the extent there is any foundation for PR 27, it could only be supported by the implicit acceptance of the proposition that there is a probability that CSIU Police Officers may abrogate their statutory and common law duties due to nebulous concepts of “*influence*”. The TOR focus upon the conduct of members of CSNSW, not the NSW Police Force. As will be developed below, the CSIU and CSIU Police Officers are not members of CSNSW.

⁵ Counsel Assisting’s Closing Submissions at [797], p 223

9. It is also apt to observe that in a letter from the CoP's solicitors to those assisting the Inquiry on 24 November 2023, the CoP sought an opportunity to be heard if the Inquiry was proposing to consider matters of the kind explored in Mr Corcoran's evidence.
10. No response to that letter was received.

Independence of the Corrective Services Investigation Unit

11. PR 27 is based upon the proposition that CSIU Police Officers are "*not completely independent*" and are "*conceivably more likely to be influenced by the views of CSNSW Members than other 'external' police*".
12. At a threshold level, the submission relies upon the contention that CSIU Police Officers are "*effectively embedded*" within CSNSW.
13. The CoP submits that the categorisation of CSIU Police Officers as "*embedded*" is inappropriate and apt to mislead.
14. Before giving reasons for that submission, the genesis of the description of CSIU Police Officers as "*embedded*" ought to be noted. During the cross-examination of the current Commissioner Kevin Corcoran, on 23 November 2023, the following exchange took place⁶:

MR LLOYD: I want to ask you this, though: where a matter comes to the attention of the Professional Standards and Investigations, that is, the merged unit -

MR CORCORAN: Yeah.

MR LLOYD: - and that matter involves allegations of criminal activity -

MR CORCORAN: Yes.

MR LLOYD: - you understand currently the system is that that would be referred off to the CSIU for assessment?

MR CORCORAN: Yeah.

MR LLOYD: Those officers within the CSIU are embedded in the sense of being seconded over to Corrective Services from police?

MR CORCORAN: Yes.

15. The description by of CSIU Police Officers as "*embedded*" within CSNSW (with which the witness agreed) involves a false equivalence: a sworn Police officer "*seconded*" to CSNSW ought not be described as "*embedded*". The Inquiry ought to be slow to accept Mr Corcoran's acceptance of the description in answer to a leading question on a matter which was not fully explored. That

⁶ 23 November 2023, T3134.11 and following

description of CSIU Police Officers officers as being “*embedded*” was deployed in the examination of Ms Snell.⁷ Ms Snell was not asked to, and did not, accept that description.

16. The CoP adopts and agrees with the description of the CSIU at [44] to [47] of CAS and submits that Counsel Assisting are correct when they submit that “*the CSIU operates independently of CSNSW*”.⁸
17. CSIU Police Officers remain employed and paid by the NSW Police Force whilst seconded to CSNSW. CSIU Police Officers remain attached, and report, to State Crime Command, Robbery and Serious Crime Squad.
18. The independence of CSIU Police Officers is recognised by the statutory mechanism which permits the establishment of units such as the CSIU. To that end, section 95A of the **Police Act 1990** (NSW) provides as follows:
 - (1) *The Commissioner may enter into arrangements with a government agency (whether or not of New South Wales) for the use, by such an agency, of the services of members of the NSW Police Force (by way of secondment or otherwise).*
 - (2) ***While performing services for any such agency, a police officer retains rank, seniority and remuneration as a police officer and may continue to act as a police officer of that rank. However, this subsection does not prevent the payment of additional remuneration to police officers in accordance with arrangements under this section.***
19. Plainly, section 95A of the *Police Act* contemplates that CSIU Police Officers retain the statutory and common law obligations and powers conferred upon police officers, including under the *Police Act*. That is precisely what occurred here.
20. On that topic, it is apt to remember that it is the statutory and common law duty and obligation of police officers to detect and prevent crime.⁹
21. Given the express statutory and common law duties and obligations of a sworn police officer which continue to be owed whilst any officer is attached to CSIU, it is inapt and unhelpful to compare the arrangement with that of an ordinary secondment. Moreover, it is particularly inappropriate to describe CSIU Police Officers as being “*embedded*” in the absence of evidence demonstrating that they are so removed from their appointment as a member of the NSW Police Force to become part of the CSNSW machinery.
22. In evidence, it was said that the term “*embedded*” was not being used critically¹⁰, however it is difficult to see it being used any other way when regard is had to [797] of CAS.
23. Once one has a proper understanding of the duties of the CSIU Police Officers, and how those duties are not in any way different to any member of the NSW Police Force, it is difficult to

⁷ 24 November 2023, T3257.19

⁸ CAS, [45]

⁹ See section 6(1), section 3(a) & (b) of the *Police Act*; *State of New South Wales v Tyszyk* [2008] NSWCA 107 at [84]

¹⁰ 23 November 2023, T3134.37

understand how members of the NSW Police Force attached to commands other than CSIU are more “*independent*” and members of the CSIU are “*not completely independent*”.

Absence of evidence

24. Having regard to the concession at [796] of CAS, the CoP takes it that there is no dispute that there is a lack of evidentiary foundation to make good the proposition that CSIU Police Officers are “*not completely independent*” and “*conceivably more likely to be influenced by the views of CSNSW officers than other ‘external’ police*”.
25. CAS does not rely upon any evidence in support of the submission, save perhaps for the evidence of Mr Corcoran who accepted propositions put to him in a series of leading questions.
26. As a preliminary observation, and without meaning any direct criticism of Mr Corcoran, it is difficult to understand why Mr Corcoran’s acceptance of the leading question ought to be given any weight at all. CAS at [1457] to [1486] makes the observation that Mr Corcoran was unaware of the statutory mechanisms available ***in his role*** to deal with the management of poor performing Governors. Again, without any criticism of Mr Corcoran, in light of those submissions, it is difficult to understand how his evidence can be the foundation for PR 27 in circumstances where there is no evidence that he is aware of, or understands, the separate statutory and common law obligations on members of the NSW Police Force which run directly contrary to the implicit contention that CSIU Police Officers may lack independence.
27. The gravity of the allegation, or even implicit suggestion, that members of the NSW Police Force have, or might have, acted (or will act) contrary to their sworn duties by acting other than independently and free of influence cannot be understated. The CoP submits that, at a minimum, Counsel Assisting was obliged to, but did not, adduce evidence of the partiality and influence to which the submission and PR 27 alludes. Instead, the submission rests only upon supposition and surmise. No examples of mishandling of investigations, bias or unsatisfactory conduct are revealed by the evidence.
28. Should the absence of evidence be insufficient, there is ample ***evidence*** to suggest that where there were no failures to investigate complaints or allegations of misconduct by CSIU Police Officers. The evidence establishes that:
- 28.1 No member of the CSIU and/or NSW Police Force was involved in any failure to report Astill’s conduct.
- 28.2 When a report was made to the NSW Police Force, it was swiftly investigated ***by the CSIU***.
- 28.3 It was, in part, the diligent and independent work of the CSIU in investigating Astill that led to his conviction recorded at [3] of CAS.

Absence of procedural fairness

29. There is a clear line of authority that establishes that principles of procedural fairness apply to special commissions of inquiry.¹¹ That authority suggests that a duty to observe procedural fairness may be implied as a condition of the exercise of statutory powers and functions which are capable of adversely affecting the rights and interests of persons or organisations.¹²
30. Those CSIU Police Officers who worked within the CSIU during the time period which has been the subject of the Inquiry could be identified with relative ease by any person with knowledge of or interest in the subject matter of the Inquiry. As would the current serving CSIU Police Officers, who are caught up in the implicit submission in support of PR 27 that a lack of independence permeates the operation of the CSIU to this day. It is submitted, therefore, that any finding by the Inquiry that CSIU Police Officers were “*not completely independent*” or otherwise vulnerable to influence by CSNSW is an adverse finding which can, and does, affect many individual CSIU Police Officers.
31. Any such finding, with the imprimatur of having been made by the Inquiry, would be grave *vis-à-vis* a police officer. It would again be an implicit finding that there has been, or is a propensity for, CSIU Police Officers to abrogate their duties and obligations set out above. That plainly may have reputational and disciplinary implications beyond the Inquiry for the individual CSIU Police Officers. More broadly, any such finding would have the effect of undermining the authority and integrity of the CSIU as a unit.
32. In the absence of evidence, such consequences are unwarranted and should be avoided.
33. But were the Inquiry considering making such findings, it is submitted that the CSIU Police Officers against whom such a finding could be made ought have been called to give evidence, and allegations concerning their partiality and lack of independence ought have been squarely put to them. That the officers were not called is not surprising given the absence of any evidence of wrongdoing and the fact that such an inquiry falls outside the TOR. Nonetheless, if those submissions are not accepted, the difficulty is that that to make the findings which support PR 27 would be to deny CSIU Police Officers, and the CoP as the party ultimately responsible for the operation of the CSIU, procedural fairness and natural justice.

Recommendation 27 should not be made

34. Separately to the matters raised above, there are a number of reasons why PR 27 should not be made. As the basis for the recommendation was not the subject of evidence before the Inquiry, the CoP appreciates that there is a difficulty in submitting upon the position in great detail. But the CoP does so as it throws up the very problem with the denial of natural justice and procedural fairness wrought by the findings that would permit PR 27.

¹¹ *Mahon v Air New Zealand Ltd* [1984] AC 808; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Annetts v McCann* (1990) 170 CLR 596; *Re Royal Commission on Thomas Case* [1980] 1 NZLR 602; *Ferguson v Cole* (2002) 121 FCR 402 (Branson J)

¹² *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 578,592. See also *Annetts v McCann* (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [97] (Gummow, Hayne, Crennan and Bell JJ).

35. PR 27 can only have any utility if there is evidence to support the suggested counterfactual: that allegations reported to other NSW Police Force commands at first instance would be better or more thoroughly investigated, than allegations made to the CSIU. As is frankly acknowledged at [796] of CAS, no such evidence was called for or before the Inquiry.
36. The Inquiry also did not hear any evidence regarding the benefits of a unit of the NSW Police Force with specialised knowledge and experience *vis* investigating allegations of criminal conduct within CSNSW.
37. The CoP submits that the aims of the Inquiry are achieved where every avenue to report allegations of criminal conduct remain available to CSNSW staff at all times. The CoP supports any recommendation which encourages the reporting of allegations of criminal conduct to the NSW Police Force. However, the CoP opposes any recommendation which limits those avenues by removing, as PR 27 does, one mode of reporting.
38. Presently, allegations of criminal conduct can be made to Police Area Commands (formerly Local Area Commands), the CSIU or directly to specialist units of the NSW Police Force. Reports can be made in person, via the Police Assistance Line, to Crime Stoppers or by email to a dedicated CSIU email address. The CoP submits that there is no good reason to even consider limiting these avenues of reporting by mandating that one of those avenues cannot be adopted.
39. There is a very good policy reason to have as many options to report criminal conduct as possible.
40. To adopt a hypothetical, CSNSW staff might well wish to avoid reporting to Police Area Commands where the CSNSW officer being reported has a familial or other relationship with a member of the NSW Police Force. That hypothetical has a greater propensity to arise in rural settling. By reason of the work of this Inquiry, CSNSW staff will be well aware of the existence of the CSIU. The same state of knowledge cannot be said to be implicit in CSNSW staff who are most unlikely to have knowledge of how the specialist commands of the NSW Police Force are divided, let alone how one makes a report to those commands. While there's no evidence, it would not be a leap to accept the proposition that CSNSW staff are more likely to be familiar with local police stations rather than specialist commands of the NSW Police Force. To delimit the options available to CSNSW staff might well have the unintended and disastrous consequence of discouraging the reporting of criminal conduct, because the only mode in which that can be done is one which the person seeking to disclose conduct is not comfortable adopting. To be very clear, the CoP does not submit that there would be any conflict of interest or that Local Area Commands would abrogate their duty. However, the difficulty with mandating the mode by which CSNSW staff are to make reports is that it might discourage such reports because *of the perception of CSNSW staff* that a conflict might arise.
41. Moreover, a vice in PR 27 is disclosed in its very wording. The recommendation recognises that the report to external commands need only be made *in the first instance*, thus accepting that the CSIU would of course be an appropriate command of the NSW Police Force to investigate offending by CSNSW staff. By mandating reporting to a command other than CSIU, the commencement of the work by the specialised CSIU command may be delayed, and the chance to implement investigative techniques that may have been open by reason of a swift report may be lost.

42. The submissions at [40] and [41] provide very limited examples of why the Inquiry ought not make PR 27, and throw up the very difficulty in it being made: the evidence simply provides no foundation for understanding the utility (or lack thereof) of it having been made.

Conclusion

43. The CoP submits that the CSIU is an integral specialist unit, the importance of which has been demonstrated by the very work of this Inquiry.
44. In the absence of any evidence of failures on the part of the CSIU or CSIU Police Officers, the Inquiry ought to reject PR 27 and would not make any findings of the kind suggested in [797] of CAS. The fact that PR 27 is worded in a manner that suggests "consideration ought to be given" does not resolve the fundamental difficulties with it being made.

Signed:



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