

LECC

Law Enforcement
Conduct Commission

OPERATION ASINARA

REPORT PURSUANT TO
SECTION 132 OF THE *LAW ENFORCEMENT
CONDUCT COMMISSION ACT 2016*

OCTOBER 2019

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Law Enforcement
Conduct Commission

Office of the Chief Commissioner

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31 October 2019

The Hon John Ajaka MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

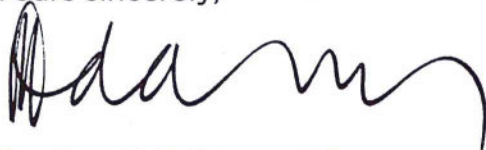
The Hon Jonathan O'Dea MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

In accordance with section 132(3) of the *Law Enforcement Conduct Commission Act 2016* (the Act), the Commission hereby furnishes to you a Report in relation to its investigation in Operation Asinara.

Pursuant to section 142(2) of the Act, I recommend that this Report be made public immediately.

Yours sincerely,



The Hon M F Adams QC
Chief Commissioner

Encl.

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1 Introduction

- 1.1 Operation Asinara was an investigation by the Police Integrity Commission ('PIC') into the conduct of a Sergeant at a country police station (Officer 1) following a complaint made to the New South Wales Police Force ('NSWPF') on 12 September 2014. It was alleged Officer 1 had given a 'tip off' to a suspect before the execution of a search warrant and also had possible historical involvement himself in drug supply.
- 1.2 The PIC commenced investigation of the complaint on 5 December 2014. The Law Enforcement Conduct Commission ('the Commission') subsequently took over the investigation when the PIC was abolished in July 2017.
- 1.3 Evidence obtained by the PIC during the course of the investigation did not support the original allegations however it did reveal that Officer 1 appeared to have been involved in the making of false statements in statutory declarations on two occasions.
- 1.4 These two occasions related to speeding offences in Queensland on two different dates by a motor vehicle registered in the name of Officer 1's son. After traffic infringement notices were issued, statutory declarations were purportedly signed by Officer 1's son claiming that Officer 1 was the driver at the relevant times. However, information obtained by the Commission indicated that this was unlikely to have been true, and further information suggested that Officer 1 was the person who had signed both statutory declarations purporting to be his son.
- 1.5 On 12 July 2017 the Commission forwarded an advisory brief of evidence to the NSW Director of Public Prosecutions ('DPP') seeking advice in relation to possible criminal charges arising out of these events. The DPP subsequently advised that there was sufficient evidence to prosecute Officer 1 for two offences of making a false document pursuant to s 253(b)(iii) of the *Crimes Act 1900*.
- 1.6 Proceedings against Officer 1 commenced in the Local Court on 8 March 2018, and after a defended hearing, both charges were dismissed on 13 February 2019. Notwithstanding the dismissal of the charges, the Commission is of the opinion that Officer 1 has engaged in serious police misconduct and should be considered for disciplinary action.

2 The Commission's Report

- 2.1 This Report is made pursuant to Part 11 of the *Law Enforcement Conduct Commission Act 2016* ('the LECC Act'). Section 132(1) provides that the Commission may prepare reports "*in relation to any matter that has been or is the subject of investigation under Part 6*".

Section 133 (Content of reports to Parliament) provides that:

(1) *The Commission is authorised to include in a report under section 132:*

(a) *statements as to any of the findings, opinions and recommendations of the Commission, and*

(b) *statements as to the Commission's reasons for any of the Commission's findings, opinions and recommendations.*

(2) *The report must include, in respect of each affected person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:*

(a) *obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,*

(b) *the taking of action against the person for a specified disciplinary infringement,*

(c) *the taking of action (including the making of an order under section 181D of the Police Act 1990) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the police officer,*

(d) *the taking of reviewable action within the meaning of section 173 of the Police Act 1990 against the person as a police officer,*

(e) *the taking of action against the person as a Crime Commission officer or an administrative employee on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the Crime Commission officer or administrative employee.*

See section 29(4) in relation to the Commission's opinion.

(3) An **affected person** is a person against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation (including examination) concerned.

(4) Subsection (2) does not limit the kind of statement that a report can contain concerning any affected person and does not prevent a report from containing a statement described in that subsection in respect of any other person.

2.2 Part 4 of the LECC Act sets out the functions of the Commission. Pursuant to s 29 the Commission may, *inter alia*, make findings and form opinions on the basis of its investigations as to whether officer misconduct occurred and to make recommendations as to whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences or whether consideration should be given to the taking of action under Part 9 of the *Police Act 1990*. However, the Commission cannot include in a report under Part 11 of the LECC Act a finding or opinion that any conduct of a specified person is officer misconduct unless the conduct is serious misconduct.¹

2.3 Serious misconduct is defined in s 10 of the LECC Act as:

(1) For the purposes of this Act, **serious misconduct** means any one of the following:

(a) conduct of a police officer, administrative employee or Crime Commission officer that could result in prosecution of the officer or employee for a serious offence or serious disciplinary action against the officer or employee for a disciplinary infringement,

(b) a pattern of officer misconduct, officer maladministration or agency maladministration carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues that could adversely reflect on the integrity and good repute of the NSW Police Force or the Crime Commission,

(c) corrupt conduct of a police officer, administrative employee or Crime Commission officer.

(2) In this section:

serious disciplinary action against an officer or employee means terminating the employment, demoting or reducing the rank, classification or grade of the office or position held by the officer or employee or reducing the remuneration payable to the officer or employee.

serious offence means a serious indictable offence and

¹ Law Enforcement Conduct Commission Act 2016, s 29(6).

includes an offence committed elsewhere than in New South Wales that, if committed in New South Wales, would be a serious indictable offence.

- 2.4 Pursuant to s 61, the Commission may hold an examination for the purpose of an investigation into conduct that it has decided is (or could be) serious misconduct or serious maladministration.
- 2.5 In considering any factual conclusions to be reached in a report, the Commission will apply the civil standard of proof, namely whether the relevant factual matters have been proved to the reasonable satisfaction of the Commission.²
- 2.6 Section 143 requires the Commission, before including in a report under Part 11 any comment about a person that the Commission considers adverse, so far as practicable, to inform that person of the substance of the grounds of the adverse comment and give the person an opportunity to make submissions.
- 2.7 The Commission provided the legal representative of Officer 1 with a copy of the Commission's draft report and invited them to make submissions in response. By letter dated 18 July 2019, they advised that no submissions would be made, but that this was not to be taken as an acceptance by Officer 1 of the findings contained within this report. The Commission considers that it has complied with s 143 of the LECC Act.
- 2.8 The Commission has made a determination to protect the identity of all persons involved. Accordingly the involved persons will be referred to by codenames in this Report.

3 Background

- 3.1 On 12 September 2014 the NSWPF received a complaint alleging that Officer 1 had 'tipped off' a suspect before a search warrant was executed at the suspect's premises. The complaint also made reference to historical involvement in drug supply by Officer 1.
- 3.2 The PIC advised the NSWPF on 5 December 2014 that it would take over the investigation of this complaint.
- 3.3 The PIC interviewed a number of police and civilians. The PIC also examined NSWPF records, bank statements, and undertook covert surveillance. The material obtained during the course of the investigation did not support the original allegations made. However, the investigation did reveal that Officer 1 appeared to have been involved in the making of false statements in statutory declarations on two occasions.

² *Briginshaw v Briginshaw* [1938] 60 CLR 336; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

- 3.4 On 16 February 2013 and 29 October 2013, a motor vehicle with NSW registration plates was detected exceeding the speed limit in Queensland. This motor vehicle was registered in the name of Officer 1's son, Mr B, who was residing in Queensland at the time. The traffic infringement notices for these offences were sent to Mr B's recorded address, being his parents' home address in New South Wales.
- 3.5 In relation to both speeding offences, statutory declarations purportedly made by Mr B claimed that his father, Officer 1, was the driver at the relevant times. Despite this, information obtained by the PIC indicated that Officer 1 could not have been the driver at the relevant times on 16 February 2013 and 29 October 2013, as he was within New South Wales at the nominated times, being some 570 kilometres away from the location of the speeding offences, or a six hour drive from where the offences occurred. Further, information obtained suggested that Officer 1 was the person who had signed both statutory declarations, purporting to be his son Mr B in making the statements contained therein.
- 3.6 Mr B subsequently passed away on 3 November 2015 in an unrelated incident.
- 3.7 On 1 July 2017 the PIC was abolished and replaced by the Commission.
- 3.8 On 12 July 2017, the Commission forwarded an advisory brief of evidence to the DPP seeking advice as to any possible criminal charges arising out of the information obtained. On 15 January 2018, a response was received indicating that there was sufficient evidence to prosecute Officer 1 for two offences of making a false document pursuant to section 253(b)(iii) of the *Crimes Act 1900*.
- 3.9 A Court Attendance Notice listing the two charges against Officer 1 was served on him on 25 January 2018.

4 Prosecution

- 4.1 Proceedings commenced in the Local Court on 8 March 2018. The DPP conducted the prosecution and Officer 1 was legally represented throughout. He maintained pleas of not guilty to both charges in a defended hearing on 5 and 6 September 2018, 12 October 2018, 14 December 2018 and 13 February 2019 before the Local Court Magistrate.
- 4.2 In support of the prosecution case, the following witnesses were called to give evidence: the two NSWPF officers who were identified as witnesses on the statutory declarations, a forensic document examiner, and the Queensland Police officer who interviewed Mr B in relation to the speeding offences.
- 4.3 In summary, the prosecution relied on the following to prove beyond a reasonable doubt that Mr B had made false documents to influence the exercise of public duty:

- the lie that Officer 1 told to the Queensland police officer, namely that he was the driver of the vehicle at the relevant times;
- the agreed facts and admissions regarding the whereabouts of both Officer 1 and his son at the time of the speeding offences and of the making of both statutory declarations;
- the lies that Officer 1 told to his colleagues when seeking attestation of the statutory declarations;
- the documents themselves, being the statutory declarations; and
- the signatures attached to each of the statutory declarations.

4.4 Officer 1 did not give evidence.

4.5 The Magistrate was satisfied that the evidence supported a *prima facie* case, but did not find that all elements of the offence had been proven beyond a reasonable doubt. His Honour stated that “*despite the presence of a strong and rational suspicion that the defendant was the person who signed the statutory declarations I am unable to reject the possibility that they were not signed at the time that the attestations occurred, given the fact that the expert evidence could not rule out the possibility that [Mr B] did sign them*”. As such, both charges were dismissed. Officer 1’s subsequent application for costs was refused.

4.6 Despite this, the Magistrate made the following observations regarding Officer 1:

“I am also aware that he is a man prepared to go to the very edge to assist his son. He did ask his colleagues to ignore their legal obligations and potentially do serious criminal offences by asking them to attest to statutory declarations without witnessing [Mr B’s] signature. He was prepared to take on responsibility for speeding offences which were not his in circumstance where the potential for exposure and the pitfalls were obvious. In that period he also wrote a passionate reference for his son regarding the PCA charge. He was clearly prepared to do substantial things, legal and illegal to assist his son.”

5 Consideration of serious misconduct

5.1 When considering whether Officer 1 engaged in serious misconduct, it is important to keep in mind the definition of serious misconduct set out above, and that the Commission makes findings to its own reasonable satisfaction independent of any findings of the Court. It is against that background, that the Commission makes the following findings.

1. Officer 1 was not the driver of the motor vehicle on either date

- 5.2 Officer 1 was not the driver of the motor vehicle at the dates and times of both speeding offences. In relation to the first speeding offence on 16 February 2013, Mr B's telephone records and bank statements indicate that he was in Queensland at the time. Further, public information showed that he was listed to work in Brisbane on that day. These factors, when considered together, strongly suggest that Mr B was in Queensland on 16 February 2013. It should be noted that agreed facts to the same effect were made in the Local Court proceedings.
- 5.3 In addition, telephone records and bank statements of Officer 1 indicate that he was located in New South Wales on the same date.
- 5.4 Similarly in relation to the second speeding offence on 29 October 2013, Mr B's telephone records and bank statements indicate his presence in Queensland on that date. It should be noted that agreed facts to the same effect were made in the Local Court proceedings. Meanwhile, Officer 1 was rostered on duty on 29 October 2013 at his local police station.
- 5.5 In August 2015, a Queensland police officer contacted Mr B about the speeding offences, and Officer 1 subsequently contacted this officer. On 14 August 2015, a lawfully intercepted telephone conversation revealed Officer 1 advising the Queensland police officer that *"Yeah I was the one that was driving the, the car at one of those times I'm sure."*
- 5.6 On 16 August 2016, lawful interception of Officer 1's mobile telephone revealed a conversation with his son, where Officer 1 said *"or unless, unless I've signed one for you or something like that, and they, the signatures aren't the same, but that's alright, you just say it mate, that was two years ago, and since...I've changed my signature"*.

2. Mr B was not present when the statutory declarations were witnessed

- 5.7 Secondly, in relation to the first speeding offence, the statutory declaration was witnessed by Officer 2 at Officer 1's local police station on 23 March 2013. Mr B's mobile telephone records and bank statements suggest that he was in Queensland on this date, and public information also showed that he was listed to work in Brisbane on this date. It should be noted that agreed facts to the same effect were made in the Local Court proceedings.
- 5.8 Officer 2 participated in a formal record of interview on 11 May 2016 with officers of the PIC, and was shown the statutory declaration. He stated that he recognised Officer 1's name and signature on the statutory declaration. He further stated that he had a vague recollection of the event, and recalled that Officer 1 told him that he got a ticket in Mr B's car which he was driving at the time, and that this statutory declaration was to say that he was the driver. This version of events is consistent with records which show that Officer 1 was rostered on duty at his local police station on the same date.
- 5.9 When giving evidence on 5 September 2018, Officer 2 stated that he believed the handwriting on the statutory declaration belonged to Officer 1,

but he could not recognise the signature of the declarant.³ He also stated that he did not see the declarant sign the statutory declaration.⁴ His recollection was that the statutory declaration had already been completed when it was presented to him by Officer 1, and that he did not see Mr B on this day.⁵

- 5.10 In relation to the second speeding offence, the statutory declaration was witnessed by Officer 3 at Officer 1's local police station on 1 December 2013. Mr B's mobile telephone records and bank account statements indicate that he was in Queensland on this date. Additionally, public information shows that he was listed to work in Queensland on the same day. Officer 1's mobile telephone records indicate that on this date he was within New South Wales. It should be noted that agreed facts to the same effect were made in the Local Court proceedings.
- 5.11 Officer 3 participated in a formal record of interview on 11 May 2016 and provided a statement dated 7 September 2016. He stated that his recollection was that Officer 1 went to him with the document and asked that he witness Officer 1's signature as the declarant. His understanding was that Officer 1 was the declarant because Officer 1 owned the vehicle to which the speeding offence related and that Officer 1 was the driver at the time of the speeding offence.
- 5.12 When giving evidence on 5 September 2018, Officer 3 stated that he recognised the handwriting on the statutory declaration as belonging to Officer 1, but he could not recognise the declarant's signature.⁶ He said he did not see Officer 1 sign the document⁷ and that he did not see Mr B on the day⁸. He could not recall whether the statutory declaration had already been completed when it was presented to him.⁹

Serious misconduct

- 5.13 The Commission is reasonably satisfied that Officer 1 was not the driver for either of the speeding offences on 16 February 2013 or 29 October 2013, and that his son Mr B was not present when the statutory declarations for those speeding offences were presented for witnessing on 23 March 2013 and 1 December 2013. There is a strong inference that both statutory declarations were completed when presented for witnessing. This is based on Officer 2's evidence and Officer 3's formal record of interview. The alternative is that Officer 1 presented blank statutory declarations for witnessing, which would also implicate him in serious misconduct. In any event, the Commission is reasonably satisfied that both statutory declarations were completed when presented to the officers for witnessing.

³ Local Court transcripts at T35-36.

⁴ Local Court transcripts at T36.

⁵ Local Court transcripts at T37.

⁶ Local Court transcripts at T43-44.

⁷ Local Court transcripts at T44.

⁸ Local Court transcripts at T45.

⁹ Local Court transcripts at T45-46.

- 5.14 The appropriate conclusion, then, is that Officer 1 presented two statutory declarations, on different dates, containing statements he knew to be false for witnessing. Further, the Commission is reasonably satisfied that these statutory declarations were completed by Officer 1, and therefore he made, or at the very least prepared, knowingly false statements in the two statutory declarations for signing or witnessing.
- 5.15 The Commission finds that Officer 1 engaged in serious misconduct, being conduct that could result in the prosecution for a serious offence, namely being an accessory to making a false document, using a false document pursuant to s 254 of the *Crimes Act 1900* or possession of a false document pursuant to s 255 of the *Crimes Act 1900*. These findings are made notwithstanding the dismissal of the criminal charges (which were, as has been noted, different charges) in the Local Court.

6 Findings

- 6.1 Officer 1 is an affected person because he is a person against whom substantial allegations have been made in the course of the Commission's investigation: s 133(4).
- 6.2 For the reasons stated in this report, the Commission finds that Officer 1 engaged in serious misconduct. The Commission recommends that consideration be given to the taking of disciplinary action pursuant to s 173 or s 181D of the *Police Act 1990*. This report has been provided to the Commissioner of Police, who has been informed of the true identities of Officer 1 and the other individuals named in this report.

Operation Asinara
Report pursuant to s 132
Law Enforcement Conduct Commission Act 2016
October 2019

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