



**GUIDELINES AGREED BETWEEN
THE POLICE INTEGRITY COMMISSION
AND
THE OMBUDSMAN
AFTER CONSULTATION WITH THE COMMISSIONER OF
POLICE
UNDER THE POLICE ACT 1990**

These guidelines
are to take effect from 1 October 2016

A handwritten signature in black ink, appearing to read 'M. M. O'Brien'.

**M. M. O'Brien
Assistant Commissioner
Police Integrity Commission**

A handwritten signature in blue ink, appearing to read 'John McMillan'.

**Professor John McMillan
Acting Ombudsman**

INTRODUCTION

Part 8A of the *Police Act 1990* (the Act) concerns the handling of complaints about the “conduct” of police. The Act provides that where “notifiable complaints” are received by the Police Commissioner a copy must be sent to the Ombudsman (section 130).

This document includes guidelines pursuant to:

- Section 121 of the Act to specify the complaints that the NSW Police Force (NSWPF) must notify to the Ombudsman.
- Section 122(2) of the Act specifying those complaints that need not be dealt with under the provisions of Part 8A.

Other agreements under the Act

The following agreements under the Act also relate to oversight of the police complaints system but are not included in these guidelines:

- memoranda of understanding agreed between the Commissioner of Police, the Police Integrity Commissioner and the Ombudsman under section 128(2) concerning requirements for recording complaints on the NSWPF complaint information system c@ts.i.
- arrangements agreed between the Assistant Commissioner, Professional Standards Command, and the Deputy Ombudsman, Police and Compliance, under section 146(4) of the Act for the Ombudsman to monitor complaint investigations conducted by the NSWPF.

The operation of the section 121 guidelines

The Act provides that any person may make a complaint about a police officer and defines broadly the ‘conduct’ that may be made the subject of a complaint. Police conduct is “any action or inaction (or alleged action or inaction) of a police officer” (section 121 of the Act). It includes conduct on or off duty, and can include actions or inactions outside the State or outside Australia.

Part 8A applies to all complaints that allege or indicate police conduct which is:

- an offence (section 122(1)(a)),
- corrupt (section 122(1)(b)),

- unlawful but not criminal or corrupt (section 122(1)(c)),
- conduct that, although not unlawful (section 122(1)(d)):
 - is unreasonable, unjust, oppressive or improperly discriminatory in its effect,
 - arises from improper motives,
 - arises from a decision that has taken irrelevant matters into consideration,
 - arises from a mistake in law or fact,
 - is conduct of a kind for which reasons should have (but have not) been given.
- in accordance with a law or established practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect (section 122(1)(e)).

The purpose of the section 121 guidelines is to allow the Ombudsman, following agreement with the Police Integrity Commissioner, to decide which complaints must be notified by the NSWPF.

In general terms the guidelines require the NSWPF to notify complaints that suggest serious misconduct by police to ensure that these matters receive rigorous civilian oversight. At the same time the guidelines allow the NSWPF to manage complaints that do not suggest serious misconduct (for example, complaints about poor customer service or rudeness) without formal oversight.

Note that where a complaint is not required to be notified under these guidelines those complaints may still be inspected by the Ombudsman to ensure that Part 8A is being complied with and to keep under scrutiny systems within the NSW Police Force for dealing with complaints pursuant to section 160 of the Act.

MATTERS THAT MUST BE NOTIFIED TO THE OMBUDSMAN (NOTIFIABLE COMPLAINTS) PURSUANT TO SECTION 121

The Police Integrity Commission and the Ombudsman, after consultation with the Commissioner of Police, hereby agree that:

Complaints (whether by a member of the public or an internal police complainant) alleging or indicating the following conduct **must** be notified to the Ombudsman:

1. Criminal conduct.
2. Corrupt conduct.
3. Conduct which, if substantiated, might warrant the taking of action under section 181D or section 80(3) of the Act, or "reviewable action" as defined by section 173 of the Act. This includes complaints referred for consideration by a Commissioner's Advisory Panel or Internal Review Panel which have not previously been notified.
4. Conduct which, if substantiated, might warrant a warning notice or conduct management plan. This includes complaints that were initially not required to be notified under section 122(2) but which result in these actions. It excludes complaints originally dealt with as 'not notifiable' and dealt with by performance management plans.
5. Conduct indicating a lack of integrity.¹
6. Conduct causing or contributing to a failed prosecution, where the conduct is unreasonable or indicates serious incompetence.

Factors to consider include:

- a. the seniority of the involved officer
- b. the reasons for the failure or withdrawal of the prosecution
- c. whether there are multiple failings on the part of the officer or a pattern of conduct involving a number of failed prosecutions
- d. whether the proceedings concerned more serious criminal matters
- e. whether there was a costs award made against the prosecution

¹ Including dishonest conduct, allegations of improper association, or allegations about conflict(s) of interests.

- f. whether any adverse comment was made by a court about the conduct of police officers involved in the prosecution.
7. Unauthorised secondary employment in high-risk industries.²
 8. Harassment, victimisation or unlawful discrimination³ of a member of the public.
 9. Apprehended violence including intimidation or stalking.⁴
 10. Workplace bullying, harassment, victimisation or unlawful discrimination⁵ of a member of the NSW Police Force, but only where the police officer(s) who is alleged to have committed the conduct has previously been the subject of similar complaints.⁶
 11. Detrimental action or reprisal (including any possible payback complaint) against a police officer or other person making a protected disclosure, a protected allegation, or a protected report.
 12. Any unreasonable conduct:⁷
 - a. resulting in death
 - b. resulting in injury
 - c. resulting in significant⁸ financial loss
 13. Any unreasonable conduct involving the use, discharge or safe keeping of police issued weapons including firearms, Tasers, OC Spray and batons, including but not limited to

² These industries are nominated in the NSW Police Force's *Secondary Employment Policy and Guidelines* and include Security, Liquor, Commercial and Private Inquiry Agents, Gaming and Racing and Transport Industries.

³ Including discrimination on the basis of sex, race, marital status, age, disability, homosexuality, transgender and carer responsibilities.

⁴ Refers to complaints about police officers as alleged perpetrators of domestic violence as defined in sections 7 and 8 of the *Crimes (Domestic and Personal Violence) Act 2007*

⁵ Including discrimination on the basis of sex, race, marital status, age, disability, homosexuality, transgender and carer responsibilities.

⁶ If a first instance complaint of workplace bullying, harassment, victimisation or unlawful discrimination by a police officer includes allegations that fall within other clauses of this agreement the complaint must be notified.

⁷ Includes but not limited to conduct arising from a failure to provide customer service, a police pursuit or response to urgent duty.

⁸ In assessing whether a loss is significant, factors to be considered include the value of the goods, property or money involved and the financial position or means of the person who has sustained the loss. For example, a loss of goods of a small monetary value may be significant to a person who is without an income or who is on a pension.

breaches of relevant NSWPF standard operating procedures, guidelines or policies (but see the excluded Taser 'spark test' matters below).

14. Any unreasonable conduct resulting in and/or from the search, arrest or custody of a person.
15. Complaints about the conduct of a police officer where the alleged conduct also constitutes "reportable conduct" as defined by Part 3A of the Ombudsman Act. [Note: "Reportable allegations" only concern alleged conduct occurring in the course of a police officer's conduct while on duty – not while off duty.]⁹
16. Any complaint dealt with in accordance with section 122(2) of the Act which the Ombudsman or Police Integrity Commission require to be notified.¹⁰

⁹ Part 3A of the Ombudsman Act defines "reportable conduct" as:

(a) any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence or an offence involving child abuse material (within the meaning of Division 15A of Part 3 of the *Crimes Act 1900*)), or

(b) any assault, ill-treatment or neglect of a child, or

(c) any behaviour that causes psychological harm to a child,

whether or not, in any case, with the consent of the child. Reportable conduct does not extend to:

(a) conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards, or

(b) the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures, or

(c) conduct of a class or kind exempted from being reportable conduct by the Ombudsman under section 25CA.

Note : Examples of conduct that would not constitute "reportable conduct" include (without limitation) touching a child in order to attract a child's attention, to guide a child or to comfort a distressed child; a school teacher raising his or her voice in order to attract attention or to restore order in the classroom; and conduct that is established to be accidental.

¹⁰ This provision is designed to address the legislative difficulty created for matters that fall within the section 122(2) agreement. It ensures that, where appropriate, individually identified matters can still be oversights or investigated by the Ombudsman under Part 8A of the Act.

MATTERS WHICH DO NOT NEED TO BE NOTIFIED TO THE OMBUDSMAN PURSUANT TO SECTION 121

Despite the inclusion of 'criminal' conduct in the definition of 'notifiable complaint' the following types of complaints **do not need** to be notified to the Ombudsman:

- One-off allegations that an officer was not ill while claiming sick leave.
- Allegations of very minor misuse of police assets.
- Traffic offences, although technically criminal in nature, are not appropriate to be notified to the Ombudsman. Unless the alleged offence raises other notifiable issues, the Ombudsman only requires notification of 'major offences' as defined in section 3 of the *Road Transport (General) Act 2005*.

Despite the inclusion of 'unreasonable conduct' involving the use, discharge or safekeeping of police issued weapons, complaints about the accidental discharge of a Taser during a 'spark test' **do not need** to be notified.

In addition, the following complaints **do not need** to be notified:

- Allegations of minor misuse of email, such as forwarding emails with rude, sexist or otherwise offensive content (but not unlawful content or content which would be restricted to adults).¹¹
- Allegations of embellishments in police promotions applications.
- Complaints concerning incompetence only, where the complaints are not otherwise notifiable.
- Matters that concern performance management only, such as unsatisfactory completion of a performance agreement or reports of unsatisfactory work diligence and output, will generally not be complaints under Part 8A of the Act, and should not be dealt with as complaints. These matters are also not required to be notified to the Ombudsman. Only where performance issues raise notifiable conduct matters is there a requirement to notify the Ombudsman.

¹¹Excluded content is any material that would be Category 1-Restricted, Category 2-Restricted or Refused Classification under the 'Guidelines for the Classification of Publications 2005' under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

MATTERS WHICH DO NOT NEED TO BE TREATED AS PART 8A COMPLAINTS PURSUANT TO SECTION 122(2)

Background

The effect of section 122(2) is that the Police Integrity Commission and the Ombudsman, after consultation with the Commissioner of Police, may agree that certain kinds of complaints need not be dealt with in accordance with Part 8A. These matters therefore do not need to be notified to the Ombudsman. However, they must be dealt with in accordance with the guidelines below.

Agreement

The Police Integrity Commission and the Ombudsman, after consultation with the Commissioner of Police, hereby agree that, subject to the conditions discussed below, that the following matters **do not need** to be dealt with under Part 8A of the Act:

- Complaints that are not 'notifiable' to the Ombudsman under the section 121 Agreement.
- One-off complaints that are 'notifiable' to the Ombudsman under the Section 121 Agreement that the Ombudsman decides should be dealt with by the NSW Police Force as a section 122(2) complaint.
- Complaints that the Police Integrity Commission decides to oversight pursuant to its functions under section 13 of the *Police Integrity Commission Act 1996*.

Conditions:

1. Even if a matter is dealt with under section 122(2) of the Act, the NSW Police Force should take appropriate action in relation to it. This includes any investigation, conciliation and such managerial action as may be necessary in all the circumstances of the matter.
2. If the Ombudsman receives correspondence from a complainant or a subject officer expressing dissatisfaction with the NSWPF handling of a complaint managed under section 122(2) the Ombudsman will refer it to the NSWPF for appropriate attention and response.
3. Proper records must be kept of all matters dealt with under section 122(2) of the Act and any action taken in relation to them. All complaints must be receipted and registered on

the Customer Assistance Tracking System (c@tsi) unless exempted under the terms of the Memorandum of Understanding between the Commissioner of Police, the Police Integrity Commission and the NSW Ombudsman under Section 128(2) of the Police Act 1990.

4. The NSW Police Force will conduct an annual survey to measure the satisfaction of complainants in the handling of matters that fall under the section 122(2) agreement. The survey will, at a minimum, include a random sample of contactable external complainants selected from the pool of complaints finalised in the preceding six-month period. Survey results will be reported to the NSW Ombudsman and will also be published in the NSW Police Force Annual Report. The NSW Ombudsman will be consulted on the survey instrument and methodology. This condition will no longer apply once the Ombudsman and Police Integrity Commission are satisfied that the NSW Police Force has made appropriate enhancements to its complaint handling guidelines and to its complaint information system c@ts.i to allow recording and reporting of complainant satisfaction information.
5. Where the matter is only about the issuing of traffic or parking infringement notice and raises no other issues (for example, rudeness or a specific allegation of lack of integrity), Conditions 1 and 2 do not apply. However, the matter should be referred to an appropriate senior officer for independent internal review of the decision to issue the infringement notice and response to the complainant. If any other issues are raised, they shall be dealt with in accordance with these agreements.
6. Where a matter is only a legal representation for review of criminal charges and raises no other issues (for example, a specific allegation of lack of integrity), Conditions 1 and 2 do not apply. However, the matter should be referred to Prosecuting Services for consideration and response. If any other issues are raised, they shall be dealt with in accordance with these agreements.
7. The Police Integrity Commission will notify the Ombudsman and the NSW Police Force of its decision to oversight a matter and when its oversight has been finalised. Condition 2 of this agreement does not apply to matters oversighted by the Police Integrity