



**Ombudsman submission  
to the Review of  
Police Oversight  
in New South Wales**

June 2015

## Foreword

Effective civilian oversight of the New South Wales Police Force is now an accepted part of police accountability and is essential to maintaining public confidence in police and the criminal justice system. A review such as this provides a valuable opportunity to identify possible improvements to established police oversight arrangements. We therefore welcome this opportunity to contribute to this review of police oversight in NSW.

The Terms of Reference require Mr Andrew Tink AM to provide advice about ‘options for a single civilian oversight model for police in NSW’. In particular, Mr Tink must address perceptions that the current system ‘is outdated, complex and confusing, with overlapping responsibilities amongst agencies’.

This submission explains the principles underpinning the current model and how it works in practice, so that any recommendations for reform are informed by a proper understanding of the evidence, a careful examination of claims that this system is dysfunctional, and a rigorous assessment of both the benefits and risks associated with abandoning an established system in favour of implementing a single civilian agency oversight model for NSW police.

We agree that action is needed to reduce some of the complexities of the current system, deal with gaps and potential duplication, and strengthen its efficiency and effectiveness. In particular, there is an urgent need for new laws to remedy significant gaps in the current arrangements for overseeing police investigations into critical incidents involving deaths or serious injuries that occur in the context of policing operations. This submission therefore includes advice from our previous reports and submissions about critical incidents. With respect to identifying broader measures to remedy other deficiencies in the civilian oversight of police, we also review a number of the changes proposed in our detailed submission to the statutory review of the *Police Act 1990*.

Establishing a single civilian oversight model for police may – or may not – streamline some aspects of police oversight. However, it would mark a radical departure from the principles that underpin and shape the police oversight framework established in accordance with the recommendations of the Royal Commission into the NSW Police Service. The Wood Royal Commission recognised that fighting corruption and overseeing the police handling of complaints are distinct yet complementary functions. More importantly, combining these functions within a single agency risks creating undue complexity and reduces the advantages of allocating these functions to separate agencies.

Any proposal to establish a single civilian oversight model for police in NSW must be able to demonstrate the need for such a radical change and that any new model is likely to strengthen – not

weaken – the existing framework. Furthermore, in designing any single external agency model, it is critical that the many risks associated with implementing such a model should be adequately managed.

Despite claims that the current system is dysfunctional and in need of ‘root and branch’ reform, there is little evidence to support such assertions. The experience of jurisdictions that have attempted to incorporate police corruption fighting and police complaints oversight roles within a single agency, demonstrates the acute challenges associated with combining these functions. As recent reviews of police oversight systems in the United Kingdom and Queensland show, there is a high risk that combining the corruption investigation functions currently performed by the PIC and the police complaint oversight functions performed by the Ombudsman into a single agency will result in less effective oversight.

Any reforms aimed at simplifying and improving police accountability must also recognise that police and modern policing services are an inseparable part of broader government service systems. In our view, any oversight model that proposes to deal with issues relating to police in isolation of other government services will create unacceptable gaps in the overall accountability of police. There is a risk that a stand-alone civilian oversight model that deals solely with police will not increase, but instead diminish, public confidence in the system.

I am strongly of the view that principles underpinning the current police oversight framework are sound, and that this system has served the public interest well. While it is important to review existing processes and use this review to identify and drive systemic reforms, I have strong reservations about the proposal to abandon the existing arrangements in favour of an unproven and outdated single civilian oversight model for police. I therefore urge careful consideration of the information in this submission so that any recommendations for reform strengthen, rather than weaken, the efficiency and effectiveness of police oversight arrangements and build public confidence in police.

A handwritten signature in black ink, appearing to read 'B. A. Barbour', written in a cursive style.

Bruce Barbour  
**Ombudsman**

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## Terms of Reference

On 21 May 2015, the NSW Government published the following Terms of Reference for the 'Review of Police Oversight in NSW' to be conducted by Mr Andrew Tink AM.

Police officers protect public safety and uphold the rule of law protecting our community. Police officers need to maintain the highest standards of ethical conduct and integrity, and effective oversight is required to achieve this. The purpose of police oversight is to prevent, detect and investigate corruption and misconduct by police officers and provide accountability for the exercise of police powers. However, the current system for doing this is out-dated, complex, and confusing with overlapping responsibilities amongst agencies.

The police oversight system, which is subject to this review, involves the NSW Police Force, the Ombudsman, the Police Integrity Commission, the Inspector of the Police Integrity Commission, the Parliamentary Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission (PJC), and in relation to police critical incident investigations the Coroner and WorkCover. Each agency operates under its own legislation.

A number of recent reports have highlighted the overlapping nature of police oversight system in NSW, including:

- a. The McClelland Review of the system for investigation and oversight of critical incidents (January 2014).
- b. The Parliamentary Joint Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission (the PJC) (August 2014).
- c. The Select Committee on Operation Prospect (February 2015).
- d. The 2011 Statutory Review of the Police Integrity Commission Act 1996.

Mr Andrew Tink AM is commissioned to consider and report to the Deputy Premier, the Hon. Troy Grant MP, by 31 August 2015 on:

1. Options for a single civilian oversight model for police in NSW, including identifying measures to improve efficiency and effectiveness of oversight.
2. Any gaps in the current police oversight system.
3. Functional overlap between oversight bodies and if that contributes to ineffectiveness, unnecessary complexity, inefficiencies, or impairs transparency or police accountability.
4. Best practice models from around the world, including the UK Independent Police Complaints Commission and their applicability and adaptability to NSW.
5. A recommended model for police oversight including guidance on its design, structure, cost and establishment. Consideration should be given to:
  - a. Eliminating unnecessary duplication, overlap and complexity.
  - b. Increasing transparency, efficiency and effectiveness of police oversight.
  - c. Promoting public confidence in policing, police oversight, and the criminal justice system.
  - d. Providing accountability for the powers and discretion exercised by police.
  - e. Creating a user friendly system for complainants, police officers, and other affected parties.
  - f. The interaction of disciplinary decisions and performance management mechanisms (ie Part 9 of the *Police Act 1990*) with the recommended police oversight model, while ensuring the

Commissioner of Police maintains responsibility and accountability for disciplinary decisions and performance management.

- g. Ensuring the police oversight system does not create processes that would prejudice criminal or coronial processes.
6. Any implications for maintaining oversight of the NSW Crime Commission arising from the recommended model of police oversight, while aiming to minimise unnecessary duplication and overlap.
7. The Review will not consider:
  - a. Matters relating to particular decisions to investigate, not to investigate, or to discontinue investigation of a particular complaint; or findings, recommendations, determinations or other decisions in relation to a particular investigation or complaint.
  - b. Issues relating to WorkCover that do not involve overlap with the police oversight system.

Consultation with existing police oversight and integrity agencies, law enforcement agencies, and other community members should be conducted to inform the review.

## 1. Executive summary

This inquiry has been established to address perceptions that the current system for preventing, detecting and investigating corruption and misconduct by police officers is, according to the Terms of Reference, *‘outdated, complex and confusing, with responsibilities that overlap amongst agencies’*. Notably, these concerns were the subject of findings and recommendations made by the Legislative Council Select Committee on the Conduct and Progress of the Ombudsman’s Inquiry ‘Operation Prospect’ (‘the Select Committee’) on 25 February 2015.

The invitation to contribute to this review states that Mr Andrew Tink AM must consider and report to the Government on police oversight with respect to:

- Options for a single civilian oversight model for police in NSW.
- Any gaps in the current police oversight system.
- Functional overlap between oversight bodies.
- Best practice models from around the world.
- A recommended model for police oversight including guidance on its design, structure, cost and establishment.<sup>1</sup>

We welcome this opportunity to make a submission on the future of police oversight in NSW and support the need to clarify and improve the arrangements for civilian oversight of police. However, it is our strong view that consideration of options to eliminate any perceived ‘gaps’ or ‘functional overlap’ in the current police oversight system should be informed by a proper understanding of the current model and a rigorous examination of whether there is evidence to demonstrate that this model is unsatisfactory or dysfunctional.

Further, in assessing the potential benefits that *might* flow from abandoning established oversight arrangements in favour of a new, unproven police integrity model, this review must also assess the associated risks. In particular, any new model of civilian oversight of police must recognise that a substantial – and increasingly important – part of the Ombudsman’s work involves examining ‘whole of government’ issues that concern both the NSWPF and one or more other public sector agencies. Establishing a ‘single civilian oversight model for police in NSW’ might, to some extent, create a ‘one stop shop’ for complaint oversight and corruption investigation issues that relate solely to the NSWPF. However, it is important to recognise that police increasingly turn to other agencies to help deal with

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<sup>1</sup> [www.haveyoursay.nsw.gov.au/consultations/](http://www.haveyoursay.nsw.gov.au/consultations/), accessed 21 May 2015.



or prevent child abuse, domestic violence, the abuse of alcohol and other drugs, mental illness and other problems confronting frontline police. The notion that modern policing can be viewed in isolation of other government services is dangerous and outdated. When systems fail, the NSWPF might have only some of the answers. Therefore, there is a need for this review to consider the likely impact of splitting the police complaints oversight role from the Ombudsman's broader statutory responsibilities, and how these functions could be effectively managed into the future.

In Chapter 2, we examine the principles underlying the NSW system for civilian oversight of police complaints as envisaged by the Royal Commission into the NSW Police Service. These principles distinguish the respective roles of the Ombudsman and the Police Integrity Commission (PIC) and the rationale for allocating these functions to separate agencies. The Royal Commissioner, the Hon. Justice James Wood, assessed four potential models of police oversight. He determined that NSW needed a combined 'Internal and External Investigation' model whereby:

1. The Ombudsman provides external civilian oversight of police investigations of complaints about police, and works closely with the NSW Police Force (NSWPF) to modernise its complaint handling practices in line with broader public sector principles, and
2. Corruption investigation functions are the responsibility of a separate agency that has the extraordinary powers and specialist expertise needed to identify and prevent corrupt activities.

Importantly, Justice Wood considered whether these 'distinct but complementary functions' could be given to a 'single external agency'. After assessing the advantages and disadvantages of this model, Justice Wood concluded that it could not be adopted in the NSW context '*without unduly complicating the system or compromising the tactical advantages of such an agency*'.<sup>2</sup>

Since these reforms were introduced, every review of police oversight in NSW has concluded that the principles underpinning the current scheme are sound, and that the concerns that led Justice Wood to recommend establishing this framework remain valid. We submit that any decision to modify or abandon the current framework in favour of adopting a single external agency for police, must address Justice Wood's concerns that combining complaints oversight and corruption investigation functions within a single external agency would create undue complexity and diminish the tactical advantages of keeping these functions separate.

In Chapter 3, we explain how the current system works in practice, with the Ombudsman and the PIC performing distinct but complementary roles within the framework of civilian oversight of police. It

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<sup>2</sup> Royal Commission into the NSW Police Service (RCPS), *Interim Report*, Chapter 5 'A new system', February 1996, at [5.11].

begins with advice about the current arrangements for investigating and resolving complaints about alleged police misconduct. Consistent with the Wood Royal Commission's reforms, the present system recognises that the NSWPF – like any other government authority – has principal responsibility for investigating and/or resolving complaints about its personnel and its systems. The reforms introduced by Justice Wood have, over time, put the onus on police commanders to take responsibility for addressing concerns about police conduct raised by members of the public, and to modify and manage the performance of officers who engage in serious misconduct. The Ombudsman's principal responsibility is to hold commanders to account for their decisions and, where appropriate, ask them to remedy deficient investigations, reconsider inadequate or inappropriate management decisions and recommend other measures to improve outcomes. The Ombudsman also monitors and reports on the adequacy of the NSWPF's systems for handling complaints. In practice, this requires working cooperatively with local commanders and their managers to develop practical strategies to improve their complaint resolution processes. Since the Royal Commission, this office's work in this area has markedly improved the efficiency and effectiveness of complaint handling by the NSWPF.

Chapter 3 also describes the PIC's specialist responsibility for tackling corruption. Although the PIC may oversight police investigations into complaints, its principal functions are to detect, investigate and prevent police corruption. Like other anti-corruption bodies, the PIC has expertise in the techniques needed to expose corrupt activities. Consistent with its specialist investigative functions, the PIC has extraordinary powers, including search warrant, telephone intercept and listening device warrant powers, the power to run controlled operations, and the ability to establish task forces within NSW, seek the establishment of joint task forces with the Commonwealth or other states or territories, and coordinate or cooperate with specialist task forces. In exercising its functions, the PIC may work in cooperation with other investigative bodies and consult with, and disseminate intelligence and information to, certain agencies.

Whereas complaints oversight requires broad engagement and an open approach when advising commanders on strategies to deal with large numbers of complaints about an array of issues, corruption-fighting typically involves conducting small numbers of large-scale, resource-intensive investigations, often using covert investigation techniques. The police integrity framework in NSW recognises that there are cogent reasons for a structure that separates these functions. Moreover, allocating these distinct functions to separate agencies has largely succeeded in ensuring that NSWPF commanders take responsibility for managing complaints about their own officers and processes, while remaining vigilant to integrity risks identified by the PIC. Significantly, we provide evidence to

demonstrate that, in practice, duplication and overlap by the two agencies in this framework is negligible, and that concerns about ‘systemic dysfunction’ are unfounded.

In Chapters 4 to 8, we address the main terms of reference for this review.

In Chapter 4, we identify and discuss two options for single civilian oversight. We argue that the success of a single agency model will depend on whether it is provided with adequate functions and powers and that the scope of its powers should be comparable, and not less than, those currently exercised by the PIC and the Ombudsman in relation to complaints about police. Determining the scope of functions to be exercised by a single civilian agency is not straightforward as the Ombudsman exercises a broad range of additional functions involving oversight of police and these could not be transferred. Importantly, we argue that the transfer of the Ombudsman’s functions under Part 8A of the *Police Act 1900* to a single agency will seriously diminish the effectiveness of police oversight as it will result in a loss of the synergies the Ombudsman has achieved across his broad responsibilities relating to police. Against that background we detail an alternative model to the single civilian agency model that encompasses significant measures to strengthen accountability and oversight, including recommendations to amend the *Police Act 1990*.

In Chapter 5, we discuss ‘*Any gaps in the current police oversight system*’, with particular reference to the urgent need to establish a system that provides for the external oversight of police investigations into critical incidents. We provide copies and summarise our submissions to the McClelland review to assist the present review in its consideration of these important matters.

In Chapter 6, we discuss ‘*Functional overlap between oversight bodies*’. We acknowledge that there is a perception that agencies have ‘overlapping’ oversight of police and the need to clarify their roles in respect of critical incidents. These concerns should be addressed by establishing a new statutory scheme for civilian oversight of police critical incident investigations. In terms of the general operation of the police complaint system, the information we provide indicates that, in practice, there is minimal duplication or overlap between the PIC and the Ombudsman in overseeing complaints about police with the PIC overseeing less than 1% of complaints.

In Chapter 7, we discuss ‘*Best practice models from around the world*’, including the UK Independent Police Complaints Commission and the broad-based anti-corruption models elsewhere in Australia, and their applicability and adaptability to NSW. We provide a summary of recent reviews of agencies and discuss the challenges of combining functions relating to corruption investigation, complaint oversight, and critical incident investigations within a single agency. This information suggests that there are significant practical challenges in implementing a single agency model for police and that the NSW model already incorporates many important elements of best practice.

In Chapter 8, we conclude with a discussion of '*A recommended model for police oversight*' including suggestions about its design, structure, cost and establishment. It is our strong view that the case for new model of civilian oversight of police in NSW needs to demonstrate that it will deliver tangible benefits and improvements to the current system. It is our concern that this case has not been met. There is no cogent evidence that the current system is failing or dysfunctional and there are significant risks that the integration of the corruption investigation functions with complaint oversight functions currently performed by the PIC and Ombudsman respectively will undermine rather than enhance the effectiveness of the overall system.

## 2. Principles of the current police oversight system in NSW

External oversight of police conduct is now an accepted part of police accountability in NSW. As the ‘Review of Police Oversight in NSW’ to be conducted by Mr Andrew Tink will, in part, consider options for establishing a single civilian oversight model for police in NSW, it is therefore necessary to revisit the arguments advanced by the Wood Royal Commission for not combining external review and corruption investigation roles within a single agency – arguments that were examined and subsequently endorsed by the Committee on the Office of the Ombudsman and the Police Integrity Commission in its 10-year review of the oversight system.

The review of police oversight provides opportunities to achieve real efficiencies and improvements to the system for civilian oversight of police in NSW, and to identify ways to make the system much more user-friendly to all involved. As we have noted in previous reports and submissions – and throughout our submission for this review – urgent consideration should be given to updating and streamlining the legislative provisions, simplifying the current scheme to remove any unnecessary complexity, and clarifying the respective roles of those involved in corruption fighting and complaint oversight to eliminate any unnecessary confusion.

In this chapter we examine the principles underpinning the current police complaints oversight in NSW, starting with the Royal Commission’s reasons for recommending that the Ombudsman retain responsibility for the oversight of the police complaints system, while urging that functions relating to the ‘*detection and investigation of serious police corruption*’ should be given to an agency with specialist expertise in the covert techniques needed to expose and prevent corrupt activities.<sup>3</sup>

### 2.1. Framework for reforming the NSW Police Force

The reasons for Justice Wood’s call to establish a police integrity framework that allocated different functions to the NSWPF, the PIC and the Ombudsman are set out in the Royal Commission’s first *Interim Report* in February 1996. The Commission identified significant deficiencies with the system for the management of complaints and discipline in place at that time, including that this system was:

- complex, inconsistent and inflexible
- counter-productive because of its adversarial nature and its concentration on punitive, rather than remedial action
- directed towards command and control, rather than management of its members

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<sup>3</sup> RCPS, *Interim Report*, Chapter 5 ‘A new system’, February 1996, at [5.30].

- characterised by substantial delay
- prone to leaks, collaboration and ineffective investigations
- affected by bias
- typified by an almost instinctive reaction to defend any charge, no matter how indefensible, and to appeal against any decision made
- conducive of fear and want of openness in dealings between members and the organisation, and
- productive of anxiety and uncertainty during the long waiting period, sometimes leading to genuine stress-related illness.<sup>4</sup>

Against this background, the Royal Commission's reforms<sup>5</sup> established a framework that aimed to:

- give the NSWPF primary responsibility for managing the conduct of its staff, foster ethical decision-making, and promote a professional culture of service to members of the public
- through the Ombudsman, provide independent civilian scrutiny of the standards applied by police commanders in relation to the management of complaints and conduct, and of the systems established by police to manage complaints, and
- through the specialist corruption investigation and prevention work of the PIC, maintain 'a focussed, sophisticated and aggressive approach ... to uncover and combat serious police misconduct and corruption'.<sup>6</sup>

These basic principles have informed successive reviews of the reforms initiated by the Royal Commission, particularly the legislative amendments to Parts 8A and 9 of the *Police Act 1990* in 1998, and further legislative and procedural changes following the 'Ten Year Review of the Police Oversight System in New South Wales' by the Committee on the Office of the Ombudsman and the Police Integrity Commission's in November 2006.

## **2.2. Giving commanders responsibility for managing their officers**

The Wood Commission's primary concern was to move the complaints system from an adversarial to a managerial or remedial model that placed responsibility for managing complaints and discipline on local commanders. Its recommendations were aimed at integrating the management of complaints and

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<sup>4</sup> Summary list of criticisms in the first *Interim Report*, as noted at RCPS, *Final Report – Vol II: Reform*, at [4.1]

<sup>5</sup> RCPS, *Interim Report*, Chapter 5 'A new system', February 1996.

<sup>6</sup> RCPS, *Interim Report*, Chapter 5 'A new system', February 1996, at [5.3].

discipline with the local supervision and management of police the subject of complaint. In proposing a managerial model, the Commission commented:

This involves a somewhat radical change and it has the potential to evoke public scepticism. How it might be asked, can a Service with the shortcomings outlined in this report, be expected to set its own satisfactory standards and to enforce them?

The answer lies at the heart of the reform process. The best platform for change does not involve the preparation of a new set of rules and regulations and the imposition of a more vigorous regime for enforcement. Rather it involves the Service setting proper professional standards and then doing whatever it can to encourage its members, in a managerial way, to lift their performance. Unless this is achieved, no system of discipline or complaint management will ever bring about reform. At best it will be a safety net.<sup>7</sup>

The Commission set out recommendations for the scope and exercise of managerial processes to be followed by police. Local commanders would be empowered and held accountable for the conduct and performance of their officers and would be expected to take remedial action (non-reviewable actions) to address poor conduct and at the same time reinforce standards that corrupt and criminal behaviour would not be tolerated. The recommendations included the establishment of new sanctions for serious misconduct (reviewable actions) including dismissal following a ‘loss of confidence’ by the Commissioner.

### **2.3. Representing the interests of the members of the public**

The Commission recommended that the Ombudsman retain its role to oversight the police complaints system and identified this as essential to the success of the new managerial model.

The Ombudsman should play a vital role in the proposed model. Her office represents the interests of the members of the public in seeing that the Service deals properly and effectively with their grievances and in ensuring the maintenance of standards of integrity and fair dealing... It is expected that the Office of the Ombudsman would:

- Ensure that Local Commanders’ decisions are appropriate
- Conduct random checks on the progress of non-reportable matters
- Report to the complainant on the outcome of any managerial action in reportable matters
- React to any complaint by a member of the public that the management of any particular matter was ineffective or inappropriate, and carry out its own investigations if necessary

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<sup>7</sup> RCPS, *Final Report – Vol II: Reform*, at [4.13]-[4.14].

- Maintain close liaison with the PIC, and
- Report to Parliament, in the same way that it does at present, in relation to matters concerning the complaint system, human resource issues and matters of service delivery.<sup>8</sup>

## 2.4. Models for civilian oversight of police

The Royal Commission assessed four potential models of police oversight, including submissions to establish a ‘Single External Agency’ model that combined the functions of the Office of Professional Responsibility (now the NSWPF’s Professional Standards Command), the Ombudsman, the Independent Commission Against Corruption (ICAC), the NSW Crime Commission (NSWCC) and the Bureau of Crime Statistics and Research (BOCSAR) as they relate to police. Justice Wood considered whether these ‘distinct but complementary functions’ could be given to a ‘single external agency’, but concluded that a single agency approach could not be adopted in the NSW context ‘without unduly complicating the system or compromising the tactical advantages of such an agency’.<sup>9</sup>

Justice Wood acknowledged that a single external agency model could, if implemented properly, reduce fragmented management processes, stop individual cases falling through the gaps, centralise record-keeping and intelligence collection, provide some cost savings, and address other such issues. On the other hand, he warned there were significant disadvantages with a single agency approach, notably:

- the openness and cooperation required in complaints oversight conflicts with the secrecy required of anti-corruption bodies
- the difficulties single agency models experience in balancing the demands of managing large volumes of complaints, while remaining focused on corruption-fighting and prevention
- the need to overcome disincentives for police management to assume ownership and responsibility for dealing with police problems and ‘to pursue integrity as a first priority’, and
- there may be fewer opportunities to intervene early and enforce appropriate standards.<sup>10</sup>

After listing the advantages and disadvantages of a single external agency approach, Justice Wood concluded that:

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<sup>8</sup> RCPS, *Final Report – Vol II: Reform*, at [4.83] to [4.85].

<sup>9</sup> RCPS, *Interim Report*, Chapter 5 ‘A new system’, February 1996, at [5.11].

<sup>10</sup> RCPS, *Interim Report*, Chapter 5 ‘A new system’, February 1996, at [5.8].



... the employment of a single external agency is unsuitable for NSW... There are significant differences in the approaches required to manage and supervise misconduct and disciplinary complaints, to investigate serious corruption, and to perform a corruption prevention, research and education function...<sup>11</sup>

Instead, the model he recommended for NSW was a ‘combination of internal and external investigation’ that gives police commanders a ‘*meaningful role in dealing with management matters, customer service complaints, and certain matters of misconduct*’, provides for civilian oversight of those NSWPF functions by the Ombudsman, and has a specialist investigator that can assume ‘*external responsibility to investigate serious corruption*’.<sup>12</sup> The agency subsequently created to perform the latter role was the PIC.

This model was favoured because:

- police retained a degree of responsibility for self-regulation
- public confidence would be underpinned by external review of police investigations of complaints and corruption, and
- the most serious matters would be investigated externally.

Significantly, there were strategic reasons for creating a framework whereby these discreet but complementary functions were allocated to different agencies:

Although combining these external oversight and corruption investigation responsibilities in a single agency would have the attraction of simplifying and integrating the process, that option is not favoured because of:

- the different approaches needed for supervision of the complaint system, and for corruption investigation
- the need for a specific focus on corruption with an aggressive and sophisticated investigative capacity, and
- the resources needed for effective monitoring of the complaint system.<sup>13</sup>

Having determined that there should be a structural separation that placed the functions relating to civilian oversight of police complaint processes and the responsibilities for external investigations of serious police corruption in separate agencies, the Royal Commission then considered whether the job of investigating police corruption should be allocated to a police corruption division within the ICAC,

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<sup>11</sup> RCPS, *Interim Report*, Chapter 5 ‘A new system’, February 1996, at [5.9] -[5.10].

<sup>12</sup> RCPS, *Interim Report*, Chapter 5 ‘A new system’, February 1996, at [5.17].

<sup>13</sup> RCPS, *Interim Report*, Chapter 5 ‘A new system’, February 1996, at [5.18].

or whether there was a need to create a purpose-built agency to take on these responsibilities. Ultimately, the Royal Commission concluded that NSW required an agency that is *'purpose-built, with a specific focus upon the investigation of serious police misconduct and corruption'* and that *'the responsibility of the Ombudsman would continue unchanged, and the ICAC would still retain significant public sector responsibilities'*.<sup>14</sup>

In the next chapter we explain how the model recommended by the Royal Commission operates in practice.

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<sup>14</sup> RCPS, *Interim Report*, Chapter 5 'A new system', February 1996, at [5.26] and [5.29].

### **3. Civilian oversight of complaints about police in practice**

In the previous chapter we noted the principles underlying the establishment of the current framework for civilian oversight of police in NSW, including the rationale for assigning responsibility for oversight of the police complaint system and the responsibility for a specialist corruption investigation role to separate agencies. As the Terms of Reference indicate that the premise for reviewing police oversight in NSW is that the current system is ‘*out-dated, complex and confusing*’ and that a single oversight model is needed to reduce ‘*overlapping responsibilities amongst agencies*’, it is important to understand how the current police integrity system works in practice, and what evidence there is to support the view that the current system must be replaced. This chapter addresses those issues.

It is our submission that the principles underpinning the model proposed by the Wood Royal Commission have been successfully implemented. Importantly, the combined ‘Internal and External Investigation’ model has enabled the PIC and the Ombudsman to make significant contributions to the NSWPF’s progress in transforming the culture of its organisation and to achieving continuous improvement to its complaint handling systems.

The roles that Justice Wood recommended for police, the Ombudsman, and the PIC formed the basis of legislative reforms introduced by Parliament, particularly with the enactment of the Police Integrity Commission Act in 1996 and by amendments to Parts 8A and 9 of the *Police Act 1900* in 1998.

However, we recognise the need to make the current system much more user-friendly, especially for those who are unfamiliar with the respective roles and responsibilities of each of the agencies involved in assessing and responding to concerns about the NSWPF. In this chapter, and elsewhere in our submission, we refer to recommendations in our previous reports and submissions, particularly those aimed at updating and streamlining the current Police Act requirements, reducing the complexity of the current arrangements and eliminating any unnecessary confusion.

#### **3.1. The roles and responsibilities of the NSW Police Force**

Since 1998 the NSWPF has developed policies and procedures aimed at implementing the intent of Justice Wood’s recommendations to develop a managerial model of complaint handling. Successive reviews of the legislative framework, and updates to policies and procedures, have sought to strengthen their managerial model, including the capacity for local commanders (and their equivalent in specialist commands) to address day-to-day officer performance and conduct issues in the context of their broader service responsibilities. The legislation recognises that the NSWPF – like any other

government authority – has principal responsibility for investigating and/or resolving complaints about its personnel and its systems.

### ***3.1.1. The role of local area commanders***

In practice, most complaints about police are received directly by, or are referred to, the relevant local area commander, who is usually at the rank of Superintendent. There are 76 local area commands across NSW.

Each commander is supported by a Complaint Management Team (CMT), which usually consists of a Professional Standards Duty Officer (PSDO) and Crime Manager, both at the rank of Inspector, an Executive Officer, and other senior officers at the discretion of the commander. The role of the CMT is to provide expert advice and support to the commander in relation to the management of complaints, particularly in relation to the investigation of complaints of serious misconduct, and any related managerial and /or disciplinary action.

The PSDO is delegated by the local area commander to assess new complaints to determine what, if any, action needs to be taken. This initial assessment is referred to by police as the ‘triage’ process. If a complaint falls within the operation of the Act, the NSWPF must record the complaint on its ‘customer assistance tracking system’ (‘c@ts.i’) complaints database. The Police Act gives the NSWPF discretion as to whether or not to investigate the matter (s.139). If the NSWPF decides to investigate, s.145(1) requires that the investigator must carry out the investigation in a manner that is both effective and timely, and must have regard to any matters specified by the Commissioner or Ombudsman as needing to be examined or taken into consideration.

Police determine the manner in which a complaint is investigated and may employ a range of investigation techniques. Depending on the seriousness of the alleged conduct, these range from evidence-based methods for investigating allegations of criminal conduct, through to informal or outcome-focused techniques to resolve complaints that may be characterised as concerns relating to customer service.

The legislation requires that the NSWPF keep complainants informed of the progress of its inquiries and, upon completing those inquiries, advise them of the outcome and seek their views on whether they are satisfied with how their concerns were addressed (s.150).

#### ‘Non-reviewable’ management actions

Local commanders are delegated to take a range of remedial management actions under Part 9 of the Police Act in response to complaints. Such actions typically include advice, training, counselling or

advice and guidance, warnings, performance enhancement agreements and conduct management plans.<sup>15</sup> These actions are classified as ‘non-reviewable’ as the police officer does not have a right of review in the NSW Industrial Relations Commission.

### ‘Reviewable’ actions

If an investigation uncovers evidence of serious misconduct, a local area commander may recommend that the Commissioner consider taking ‘reviewable’ action under Part 9. Reviewable actions include a reduction of the police officer’s rank or grade, a reduction of the police officer’s seniority, or a deferral of the police officer’s salary increment. Alternatively, the Commissioner may consider dismissing the officer if he does not have confidence in the officer’s suitability to remain within the NSWPF, having regard to the police officer’s competence, integrity, performance or conduct. Such actions are described as ‘reviewable’, because the officer may seek a review by the Industrial Relations Commission on the ground that the action is harsh, unreasonable or unjust.

#### **3.1.2. *The role of Region Commands***

Each of the six geographical Region Commands also has a CMT. These are led by a Commander at the rank of Assistant Commissioner. The region commands provide support to local commands in relation to managing complaints, including the investigation of complaints in some circumstances.

#### **3.1.3. *The role of the Professional Standards Command***

The NSWPF’s Professional Standards Command (PSC) provides a broad range of complaint handling and specialist internal investigation support services to commanders across the NSWPF. The PSC is responsible for publishing and updating the NSWPF’s *Complaint Handling Guidelines* and other policies and procedures that provide guidance to commanders on how to respond to different types of complaints, the investigation techniques that should be considered and, if an inquiry establishes serious misconduct, procedures for taking reviewable action.

The PSC provides other specialist support, including through its:

- Professional Standards Unit, which assesses and manages complaints accepted for investigation by PSC investigators.

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<sup>15</sup> Schedule 1 of the *Police Act 1990* (Non Reviewable Actions).

- Investigations Unit, which directly investigates serious and/or criminal allegations, and provide oversight of critical incident investigations and tactical intelligence support.
- Management Action and Workplace Services (MAWS) Legal Advice Team, which provides legal advice and support in relation to the handling of Part 8A complaint investigations and Part 9 management decisions.
- Panel Operations MAWS, which manages the administrative function of the NSWPF's Internal Review Panel, Commissioner's Advisory Panel, Charged and Suspended officers, and the Integrity in Promotions Panel. More generally, the PSC provides support to the Commissioner and commanders in relation to decision-making processes relating to reviewable action taken under Part 9.
- Complaint Support Unit, whose functions include liaising with the Ombudsman, providing advice and training to commands and investigators, and developing complaint handling policies and procedures including the *Complaint Handling Guidelines*.
- Internal Witness Support Unit.
- Industrial Relations Commission Operations – which provides advice and support in relation to IRC appeals.
- Administration Officer Conduct Unit – which manages investigations into alleged misconduct by administration officers.

The PSC is also responsible for providing business and HR support to commanders, corporate support to the NSWPF Commissioner Executive Team, drug and alcohol testing of sworn and civilian personnel, advice on preventing misconduct, and providing strategic and trend analysis data to commands.

### **3.2. The roles and responsibilities of the Ombudsman**

While the Police Act requires the NSWPF to take appropriate action in response to all complaints, taking into account the circumstances of each case, police investigators and commanders are expected to be accountable for their decisions. Therefore, in giving police much greater flexibility to determine how to resolve the grievances of members of the public, the reforms introduced by Parliament in 1998 also broadened the Ombudsman's capacity to 'keep under scrutiny' the NSWPF's handling of complaints.

In practice, the responsibility under the Police Act to oversight the NSWPF handling of complaints means that the Ombudsman is required to:

- consider the adequacy of the police handling of all 'notifiable' complaints, and

- keep under scrutiny the systems for handling complaints involving police to ensure the maintenance of standards of integrity and fair dealing (s.160).

### **3.2.1. Requirement that police notify the Ombudsman of certain complaints**

In relation to complaints about police that are made directly to police (whether by a member of the public or by an internal police complainant), the NSWPF must provide the Ombudsman with copies of all ‘notifiable’ complaints (s.130) – that is, complaints that contain allegations of conduct that are serious enough to warrant notification to the Ombudsman. The ‘class or kind’ of complaints that must be notified to the Ombudsman is set out in guidelines established by the PIC and the Ombudsman, after consultation with the Commissioner of Police (s.121). The NSWPF must also advise the Ombudsman of its decision regarding whether or not the complaint needs to be investigated. If we disagree with the police decision, we may require that police investigate the complaint (s.139).

In practice, the decision about whether a complaint needs to be notified to the Ombudsman is made by the PSDO as part of the initial triage process. Once the complaint has been registered on the NSWPF’s c@ts.i database, it can be notified to the Ombudsman electronically.

A check of complaints finalised shows that, on average,<sup>16</sup> the NSWPF notifies the Ombudsman of about 3,200 complaints a year. Of these, the NSWPF investigates about 1,950. The Ombudsman overturns the decision by police that no investigation is required for about 40 complaints a year.

### **3.2.2. Ombudsman referral of complaints to the police**

When the Ombudsman receives complaints about police, the Police Act requires that these matters be referred to the NSWPF (s.132), together with our advice as to whether the police must investigate.

The Ombudsman refers about 700 complaints to police each year. Of these, 270 are not the subject of further oversight by the Ombudsman as they are not ‘notifiable’ and 220 are referred to the police for investigation.<sup>17</sup>

### **3.2.3. Ombudsman oversight of police complaint investigations**

The Ombudsman directly oversees about 2,170 police complaint investigations each year.

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<sup>16</sup> NSW Ombudsman Resolve database, based on complaints finalised between 1 July 2009 and 30 June 2014.

<sup>17</sup> NSW Ombudsman Resolve database, based on complaints finalised between 1 July 2009 and 30 June 2014.

In assessing the adequacy of police complaint investigations, we focus on whether police investigators complied with the legislative requirements set out in of the Police Act, including:

- Whether the investigation was effective and timely, having regard to the circumstances of the case (s.145).
- Whether reasonable inquiries were made into matters specified by police and/or our office (s.145).
- The adequacy of any action already taken or proposed to be taken as a result of the investigation's findings (s.150).
- Whether the complainant was consulted during the investigation, and whether the complainant was satisfied with the action taken, or proposed to be taken (s.150).

These standards are central to our direct oversight of complaints, and also to our use of audits to track police progress in implementing improvements over time.

The Police Act allows the Ombudsman to monitor the NSWPF investigations in real time through Ombudsman staff directly observing interviews conducted by police during NSWPF investigations (s.146). These monitors are conducted in accordance with arrangements that have been agreed and documented between the Ombudsman and the Commissioner of Police.

If we are not satisfied that a complaint has been properly investigated, we can ask the NSWPF to conduct a further investigation, specifying any deficiencies that were not properly addressed in the initial police inquiry (s.153). Similarly, if we are not satisfied with the NSWPF's decision concerning any action to be taken as a result of an investigation, including a decision to take action under Part 9 of the Act, we may ask the NSWPF to review that decision (s.154).

If the NSWPF decides not to further investigate, or decides not to change the action to be taken, it must provide reasons for disagreeing with our request.

The Ombudsman may prepare a report in relation to a complaint investigation or a decision about action to be taken, and may include such comments and recommendations as the Ombudsman considers appropriate. The Ombudsman must provide a copy of the report to the complainant, the Police Minister and to Commissioner (s.155).

#### ***3.2.4. Inspecting police records and monitoring the systems for managing complaints***

The distinction between more serious 'notifiable' complaints and less serious 'non-notifiable' complaints is crucial to our oversight role. In practice, we concentrate our limited resources on overseeing police investigations of more serious notifiable complaints- usually evidence-based



investigations. However, we also audit the handling of less serious non-notifiable complaints to ensure that the NSWPF has appropriate systems in place to investigate and resolve those matters. These less serious matters generally concern customer service issues that are dealt with by police through informal outcome-focused inquiries. It is important to recognise that, even if a complaint is not notifiable to the Ombudsman, or a complaint is notifiable but does not need to be investigated under the Police Act, Part 8A still requires the NSWPF to take appropriate action in relation to the matter, having regard to the issues raised and the circumstances of the case. Generally, we expect local commanders to resolve less serious matters, or make brief inquiries and take suitable remedial action, without the need for our involvement.

To check that the NSWPF is taking appropriate action in response to all complaints, the Police Act requires that we inspect the NSWPF's records at least once every 12 months, and may inspect the records at any time, for the purpose of ascertaining whether the NSWPF is complying with Part 8A of the Act. In particular, we check to ensure that:

- The NSWPF is complying with the obligation to record all complaints on its complaints information system.
- Complaints are notified to the Ombudsman in accordance with s.121 of the Act.
- Appropriate action has been taken to resolve complaints where there is no requirement to notify the Ombudsman (s.160).

In addition, the Ombudsman must 'keep under scrutiny' the systems established within the NSWPF for dealing with complaints. For that purpose, the Ombudsman may require the NSWPF to provide information about those systems and their operation. The Ombudsman may report on matters arising out of the exercise of his function of keeping the complaint system under scrutiny, and include such comments and recommendations as the Ombudsman thinks fit, and provide a copy of the report to the Minister and the Commissioner.

### **3.2.5. *Ombudsman powers to directly investigate***

The Ombudsman may decide to directly investigate a complaint if of the opinion that it is in the public interest to do so (s.156). The Ombudsman may also conduct an 'own motion' investigation in relation to any conduct of a police officer that could be, but is not, the subject of a complaint (s.159). In practice, the Ombudsman exercises these powers sparingly, given that the NSWPF is primarily responsible for investigating complaints about police.

Consistent with the Ombudsman's role in providing oversight of police systems for managing complaints, the 'subject' of an Ombudsman investigation is usually the administrative conduct of the

NSWPF as a ‘public authority’ rather than the conduct of individual police officers. The findings and recommendations of the Ombudsman’s reports therefore tend to be directed towards improvements to police administration and service delivery, including complaint policies and procedures relating to the management of complaints and the conduct of police. For example, Ombudsman investigations into the conduct of the NSWPF in recent years have included the following subjects:

- Compliance with provisions of the Police Act in relation to managing complaints about police.
- Compliance with obligations in the *Law Enforcement (Powers and Responsibilities) Act 2002* to destroy finger and palm print records.
- NSWPF policies and procedures relating to the use of Tasers by police officers.
- NSWPF’s handling of domestic and family violence complaints.

### **3.2.6. Working collaboratively with police**

The development and maintenance of positive working relationships between Ombudsman staff and police is essential to effective oversight of the police complaints system. Our work with the NSWPF includes regular liaison meetings between our staff and officers of the Professional Standards Command. These meetings provide opportunities to review and discuss state-wide issues involving complaint handling practices, consult with each other about any challenges facing complaint practitioners, and consider any draft policies and guidelines being developed by the PSC to improve complaint handling.

It is also important that we maintain professional and cooperative links with commanders and other officers who have primary responsibility for complaint handling. Such links enable Ombudsman officers to make informal contact with investigating officers and Professional Standards Duty Officers to discuss the progress of matters and, where possible and appropriate, to facilitate quick resolution of complaints. In relation to straightforward complaints where informal resolution appears likely to avoid the need for a formal inquiry, we sometimes contact the relevant duty officer or senior officer to discuss options for resolving the complainant’s concerns ‘on the spot’.

Our senior staff also meet with Professional Standards Duty Officers, Professional Standards Managers and commanders to discuss complaint handling issues, trends and the progress of individual complaints. Those talks also regularly involve discussions about risk management strategies for officers identified as a potential risk to the command.

Our work with Professional Standards Duty Officers includes developing strategies to respond to difficult or unreasonable complainants. We do this to minimise the waste of limited NSWPF and

Ombudsman resources, reduce the stress to complaint handlers and complainants, and ensure that particularly difficult matters are handed in an equitable and consistent manner.

Ombudsman investigators are regularly invited to give training presentations to NSWPF investigators. Our senior investigation officers also present to regional professional standards forums. These forums provide opportunities for complaint handlers, CMT members and administrative staff to ask questions, draw attention to any problems or gaps, and assist complaint handlers to deal effectively and fairly with complaints and improve complaint handling systems.

Our more experienced investigation officers also give presentations to the students attending NSW Police College to educate new recruits on our role and deal with common misunderstandings or confusion about the police complaints system.

### **3.3. The roles and responsibilities of the PIC**

The PIC's principal functions are to detect, investigate and prevent police corruption and, where necessary, directly conduct external investigations of systemic misconduct.

#### **3.3.1. *The PIC's specialist role uncovering and combating corruption and serious misconduct***

Although the PIC's independent corruption-fighting functions do not bar it from overseeing complaint investigations where it sees a need to do so, the principal objects provisions in section 3 of the *Police Integrity Commission Act 1996* (PIC Act) provide clear guidance about the PIC's primary responsibilities:

- (a) to establish an independent, accountable body whose principal function is to detect, investigate and prevent police corruption and other serious officer misconduct, and
- (b) to provide special mechanisms for the detection, investigation and prevention of serious officer misconduct and other officer misconduct, and
- (c) to protect the public interest by preventing and dealing with officer misconduct, and
- (d) to provide for the auditing and monitoring of particular aspects of the operations and procedures of the NSW Police Force and the New South Wales Crime Commission.

The PIC's principal functions are to prevent officer misconduct and to detect or investigate, or manage or oversee other agencies in the detection or investigation of, officer misconduct. In performing these functions, the PIC Act requires the PIC to turn its attention principally to serious misconduct by NSW police officers (s.13).

The PIC's independent corruption-fighting responsibilities are reflected in the powers provided in the PIC Act to perform these functions. In addition to a number of conventional investigative powers,

including powers to conduct investigations on its own initiative (s.23), to conduct ‘preliminary’ investigations (s.24), hold hearings (s.32), and summon witnesses and require the production of documents and other evidence (s.38), the PIC also has specialist powers to investigate corruption, including powers to use search warrants (s.45 and s.46) and listening device warrants (s.50), and to establish task forces within NSW, seek the establishment of joint task forces with the Commonwealth or other states or territories, and coordinate or cooperate with specialist task forces (s.17). In exercising its functions, the PIC may cooperate with investigative agencies and other bodies. It may also consult with, and disseminate intelligence and information to, investigative agencies and other bodies (s.18).

The PIC is entitled to make assessments and form opinions on the basis of its investigations, or investigations that it has managed or oversaw, as to whether police misconduct (or other misconduct) has or may have occurred, or is occurring or may be about to occur. It may make recommendations as to whether consideration should be given to the prosecution of a person or persons and/or the taking of disciplinary action against a person or persons. It may also make recommendations for other appropriate action (s.16).

The PIC has other functions ‘regarding police activities and education programs’, including:

- undertaking enquiries into or auditing police activities for the purpose of ascertaining whether there is police misconduct or circumstances conducive to police misconduct
- monitoring the quality of the management of NSWPF investigations
- making recommendations concerning police corruption education and police corruption prevention programs conducted by NSWPF, the Ombudsman and the ICAC, and
- advising police and other authorities on ways to eliminate police misconduct (s.14).

### **3.3.2. *The PIC’s functions relating to complaints about police***

The PIC exercises its oversight powers in connection with the principal objects of the PIC Act. The PIC may at any time take over the investigation of a complaint (s.70). In these circumstances, the complaint ceases to be a complaint for the purposes of Part 8A of the Police Act and the Ombudsman no longer has any jurisdiction to oversight the matter.

Although the PIC may oversight NSWPF investigations into police complaints, the legislation does not provide the PIC with formal powers of the type given to the Ombudsman and which are associated with its role as the primary complaint oversight agency. Unlike the Ombudsman, the PIC does not have powers to require police to investigate complaints, to monitor police complaint investigations in

real time, or to request further investigation or information from police following an investigation. The oversight role of the PIC is qualified by section 13(4) of the PIC Act as follows:

The reference in this section to *overseeing* other agencies in the detection or investigation of officer misconduct is a reference to the provision by the Commission of a lower level of such guidance, relying rather on a system of guidelines prepared by it and progress reports and final reports furnished to it. [emphasis in the original].

In practice, the PIC's primary focus is on carrying out its responsibilities as a specialist investigator of police corruption. As a result, it oversees only a very small number of complaints that are relevant to these functions. In overseeing these matters it may make informal requests to the NSWPF for further information.

#### Complaints received by the PIC

Complaints can be made directly to the PIC. Although the PIC may directly investigate any complaint it receives, in practice it refers the majority of these complaints to the NSWPF to be handled under Part 8A of the *Police Act*. The PIC refers about 90 complaints to the NSWPF each year. These complaints are registered on c@ts.i by the PSC and referred to the relevant local area command (or specialist command) for attention.

#### **3.3.3. Oversight of police complaints by the PIC in practice**

The PIC oversees a small number of complaints and less than 1% of those received by the NSWPF. This is discussed further in 'Chapter 6 – Functional overlap between oversight bodies'. Guidelines agreed between the Ombudsman and the PIC pursuant to the Police Act provide for arrangements for consultation between the agencies in circumstances where the PIC decides to oversee a complaint.

The PIC has access to the NSWPF's c@ts.i database and scans new complaints as they are registered by police on that system. Following consultation with the Ombudsman, the PIC notifies the NSWPF of its decision to oversee a complaint, and the Ombudsman then ceases its oversight and closes its complaint file. In most cases, this consultation occurs before the Ombudsman has taken any significant steps to oversee the complaint.

### **3.3.4. *Direct investigations by the PIC***

The PIC has broad powers to directly investigate, as is required for the investigation of corruption and serious misconduct matters. These include powers to execute search warrants and listening device warrants.

The Commission may hold hearings as part of its investigation process. The decision to hold a hearing in private or public is made by the Commissioner who must have regard to the relevant considerations under the PIC Act when making this decision, particularly those factors set out in s 33(3A) regarding the public interest.

Although the PIC can investigate the handling of complaints by police, and systems for complaint handling, their investigations more commonly focus on allegations of corruption and serious misconduct by individual officers. Recent examples include:

- Operation Montecristo, which centred on police officers alleged to have engaged in serious criminal conduct, including allowing a well-known gambler to use their identities to place on-line bets.
- Operation Barmouth, where certain officers were accused of engaging in serious misconduct in the arrest and detention of a young man at Ballina in 2011, and in his subsequent prosecution for offences the police alleged he had committed.

### **3.4. *Distinguishing corruption fighting from complaint oversight***

As noted throughout this report, the PIC's focus on fighting corruption and the Ombudsman's responsibilities for supporting improved service delivery mean that, in practice, the two agencies perform distinct yet complementary roles.

As the summary in Figure 1 shows, the differing approaches required of an anti-corruption agency and an Ombudsman are particularly evident in the way that each body approaches its statutory responsibilities relating to the oversight of complaints – in this case, complaints about police.

**Figure 1: Characteristics of the PIC’s and the Ombudsman’s distinct roles relating to complaints about police**

<b>Characteristics of the PIC’s corruption fighting processes</b>	<b>Characteristics of Ombudsman police-related complaints oversight</b>
<p><b>Complaint oversight role:</b> Directly oversees relatively few NSWPF complaint investigations.</p>	<p>Oversights large volumes of police complaints, and reviews appeals against NSWPF decisions not to investigate.</p>
<p><b>Subject matter:</b> Reports of corruption and serious misconduct.</p>	<p>An array of complaints ranging from unreasonable behaviour through to serious misconduct.</p>
<p><b>Investigative approach:</b> Focus on identifying and preventing corruption.</p> <p>Relies on various sources of intelligence and information (of which complaints are just one) to detect corruption and serious misconduct.</p> <p>Conducts a small number of large-scale, resource-intensive investigations, often using <u>covert</u> techniques and resources.</p> <p>Strict secrecy, no prior notification of persons or bodies the subject of investigation.</p> <p>Conducts private and formal public hearings, using adversarial and inquisitorial approaches.</p> <p>Primary focus on identifying corrupt conduct by individual officers.</p> <p>Resource intensive.</p>	<p>Focus on service improvement.</p> <p>Relies primarily on complaints, complaint-related information and contemporaneous police records.</p> <p>Conducts a large number of mainly small-scale investigations, generally using <u>more open</u> techniques and informal procedures.</p> <p>Relative openness, notifies agencies of inquiry (often at the outset) and the conduct to be investigated.</p> <p>May conduct investigation hearings in private using an inquisitorial approach.</p> <p>Primary focus on improving NSWPF’s administration, policies and procedures, including its systems for handling complaints.</p> <p>Relatively inexpensive.</p>
<p><b>Accessibility to the public:</b> Consistent with its use of covert techniques, generally regards complainants as sources of information.</p>	<p>Provides ongoing information to complainants about the progress and outcome of investigations.</p>
<p><b>Outcome where allegation sustained:</b> Criminal Prosecution, disciplinary dismissal or action. At times, systemic changes recommended.</p>	<p>Rectify unreasonable decisions, management action to address misconduct, amend legislation, policy and procedures to prevent further unreasonable or unlawful behaviour.</p>

Source: Adapted from presentation by NSW Deputy Ombudsman Chris Wheeler to the 2012 National Administrative Law Conference, Adelaide, 19 July 2012. Published in *AIAL Forum No. 71*.

As the information in Figure 1 demonstrates, although the PIC and the Ombudsman each have responsibilities relating to the oversight of complaints about police, the focus and approach of the PIC – as an anti-corruption agency – is generally quite different to the approach usually required in relation to the oversight performed by the Ombudsman.

If consideration is to be given to establishing a single agency model for police in NSW, the challenge is to find an efficient and effective way to maintain these distinct yet complementary approaches. We discuss these issues in more detail in ‘Chapter 8 – A recommended model for police oversight’.

### **3.5. Comment about the current police integrity framework in NSW**

In this chapter, we have provided an overview of how the current framework for civilian oversight of police operates in practice. The roles performed by the NSWPF, the Ombudsman and the PIC reflect the recommendations made by the Royal Commission for an effective system of civilian oversight of police.

It is our view that any options aimed at improving the current system must be informed by a clear understanding of the rationale for the current integrity framework, which provides for a separation of the distinct functions performed by the agency primarily responsible for investigating corruption and the agency responsible for the oversight of complaint matters and systems.

In the next chapter we discuss the options for establishing a single civilian oversight model for police. We submit that any new framework must include consideration of the range of police oversight functions that are likely to be included.



## 4. Options for a single civilian oversight model for police in NSW

This chapter considers the first term of reference for this review:

Options for a single civilian oversight model for police in NSW, including measures to improve the efficiency and effectiveness of oversight.

### 4.1. Addressing the Terms of Reference

The Terms of Reference do not specify the functions that should be included in any single civilian oversight model for police, only that the '*purpose of police oversight is to prevent, detect and investigate corruption and misconduct by police officers and provide accountability for the exercise of police powers*'.<sup>18</sup> As such, there are no formal constraints as to the range of police-related functions that might or might not be incorporated into a new integrity framework.

In this chapter, we outline the two most likely options for establishing a single civilian oversight body with responsibility for policing issues in NSW, then discuss the main police-related functions currently performed by the Ombudsman. It is our view that some, but not all, of these functions could be incorporated into a single agency model. If NSW is to adopt a new model for oversight of police, it is essential that consideration be given to the most efficient and effective way to perform all police-related oversight functions into the future, not just those that might become the responsibility of any new oversight body.

Throughout this chapter we refer to our previous reports and submissions on the need to amend and update the existing complaint handling provisions in Parts 8A and 9 of the Police Act, and for new laws to remedy significant gaps in the current arrangements for the external oversight of police investigations into critical incidents involving deaths or serious injuries occurring in the context of policing operations. Regardless of the police oversight model ultimately recommended by this review, we submit that the model must address these existing issues.

### 4.2. Models of single civilian oversight

As a starting point to this discussion about the options for a single civilian oversight model for police, it is our view that the only models that should be considered are those that provide functions and powers that are comparable to, and not less than, those currently exercised by the PIC and

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<sup>18</sup> Introduction to the Terms of Reference, *Review of Police Oversight*, 21 May 2015.

Ombudsman. In order for a single civilian oversight agency to operate effectively, at a minimum it will require the same specialist investigative functions currently provided to the PIC and all of the oversight functions currently provided to the Ombudsman under the Police Act.

#### **4.2.1. *Single civilian oversight models for police in NSW***

If there is genuine interest in establishing a single civilian oversight model for police, and if many or most of the police oversight and corruption investigation functions described in Chapter 3 are to continue in some form, realistically there are just two options for incorporating these functions into a single civilian organisation that deals solely with policing issues:

##### **Option A: PIC takes on the Ombudsman's current Police Act functions**

This model involves removing the Ombudsman's functions under the Police Act and placing those responsibilities with the PIC, enabling the PIC to continue its existing corruption investigation and prevention functions, while establishing a separate unit or division within the PIC to take on responsibility for the direct oversight of notifiable complaints about police misconduct and to keep under scrutiny the NSWPF's systems for handling complaints.

##### **Option B: Establish a purpose-built police complaints and corruption agency**

Under this model, both the Ombudsman's complaint oversight functions under the Police Act and the PIC's corruption investigation and prevention functions under the PIC Act would be scrapped, and a new purpose-built police complaints and corruption agency would be established to take on these responsibilities.

Option A and Option B are similar in that the range of functions is the same in each model. Both would lead to the creation of a stand-alone agency that deals solely with policing issues, and both envisage the Ombudsman retaining responsibility for overseeing complaints about other public sector agencies, including services and programs that have significant NSWPF involvement – see our discussion of the Ombudsman's various statutory functions noted at sections [4.5] and [4.6]. The modelling for both options should involve appropriate legislation and resources to facilitate the exchange of information where the oversight agencies are likely to have shared responsibilities for investigations or audits of service improvement initiatives involving NSWPF.

The principal difference between the two models is that Option A envisages that the current array of anti-corruption functions under the *Police Integrity Commission Act 1996* and the police complaints oversight functions Part 8A of the *Police Act 1990* would remain largely intact. Although the

legislation for these functions might be incorporated into one Act, Option A assumes the clear distinction between these functions would remain, perhaps with a specialist division within the PIC taking on responsibility for investigating police corruption, while a separate division would be responsible for police complaints oversight and ‘keep under scrutiny’ service improvement roles. On the one hand, this might be the least damaging and disruptive option for bringing the police anti-corruption and police complaint oversight roles into a single stand-alone body. On the other, if the new scheme merely replicates the existing arrangements, it is difficult to see what would be gained from such a restructure.

Although a clear delineation or distinction between the corruption fighting and complaint oversight functions could also be achieved under Option B, the latter model might be considered if the review determines that a purpose-built agency with a completely new organisational structure, management and/or investigative approach is needed.

#### **4.2.2. *Combining the police oversight functions within a broad-based anti-corruption body***

In addition to models that provide for the creation of a single civilian corruption fighting and complaint oversight agency that deals solely with policing issues, consideration might also be given to other potential options for combining these various police-related functions within a single external agency, including:

##### **Option C: Establish a police complaints and corruption division within the ICAC**

This involves the Independent Commission Against Corruption (ICAC) taking over all of the PIC’s functions and all of the Ombudsman’s Police Act functions. In effect, the ICAC would add policing to its existing broad-based anti-corruption functions and, for the first time, take on a complaints oversight role – but only for police complaints. The Ombudsman would retain responsibility for overseeing complaints about public sector agencies other than the NSWPF.

##### **Option D: Establish a single broad-based anti-corruption and complaint oversight agency**

This model envisages establishing a single civilian body responsible for taking on all of the functions currently performed by the ICAC, PIC and Ombudsman.

As the ICAC is not included in the Terms of Reference for the review of police oversight, Options C and D are clearly beyond the scope of the review. Also, even though Option C would combine the police corruption investigation and police complaints oversight functions within a single external agency, these functions would be additional to and potentially incompatible with the ICAC’s existing charter to investigate and prevent corruption in the NSW public sector. As such, it would not be single

civilian oversight model for police and therefore outside the Terms of Reference for this review. For the same reason, Option D is also beyond the Terms of Reference.

On the other hand, if consideration is given to adding the PIC's police corruption fighting role and the Ombudsman's Police Act functions to the ICAC's broad public sector anti-corruption responsibilities, or if the various functions of all three agencies were to be incorporated into a single broad-based anti-corruption and complaint oversight agency, it is essential that any such modelling include advice on how the PIC's current charter to provide a specific focus on investigating police corruption could be maintained in such an agency. Similarly, the modelling for these options should include advice on how the police complaints oversight functions currently performed by the Ombudsman should be managed. In particular, the current system in NSW has created a structural separation of the police corruption fighting and complaint oversight roles to ensure that there is a clear distinction between these different but complementary functions. Any new model should include advice on whether and how this distinction could be achieved within a single agency.

#### **4.2.3. Other potential models**

Theoretically, there is at least one other option for combining the police corruption investigation and police complaints oversight functions within a single agency:

##### **Option E: Establish a police corruption division within the Ombudsman's office**

This model envisages the possibility of establishing a police corruption investigation division within the Ombudsman's office to take on responsibility for the functions currently performed by the PIC. This would necessitate giving the Ombudsman – or a division of the Ombudsman – access to the extraordinary investigative powers needed to expose corrupt police officers, including powers to execute search warrants, intercept telephone calls, use surveillance devices and engage in controlled operations.

In our view, placing specialist corruption-fighting functions (and the powers to undertake those functions) within this office would seriously compromise our broader responsibilities to provide independent oversight of the delivery of services by public sector agencies. It would also directly conflict with the Ombudsman's current statutory role in monitoring uses of these extraordinary specialist investigative powers through regular inspections of the records of agencies that use the powers. Placing our auditing function within a single oversight body would, in effect, require that body to audit its own uses of the powers.

Finally, although not specifically provided for in the Terms of Reference for this review, consideration should also be given to the option of:

#### **Option F: Taking action to remedy problems within the existing model**

This would entail leaving corruption-fighting functions with the PIC and functions relating to the oversight of police complaints and service delivery improvement with the NSW Ombudsman – but strengthening the framework by amending Parts 8A and 9 of the Police Act to remove unnecessary complexities from the current provisions and make them more user-friendly, and introducing new laws to remedy significant gaps in the current arrangements for the external oversight of critical incident investigations.

This option would provide a practical way to deal with the most significant gaps and deficiencies in the current police oversight arrangements and build upon what is an effective and strong system.

#### **4.3. Tackling pre-existing concerns**

Irrespective of the model ultimately preferred by the NSW Government as a result of the review of police oversight, there is a need to ensure that the recommended framework addresses the deficiencies noted in Option F. That is, any new or updated oversight system must:

- a. Amend or replace the existing complaint handling provisions to clarify and remedy the legislative issues noted by the Ombudsman and others in the current statutory review of the Police Act.
- b. Further streamline police complaint handling procedures.
- c. Create a scheme for the external oversight of police critical incident investigations.

##### ***4.3.1. Our submission to amend the Police Act 1990***

Our submission to the current statutory review of the Police Act included 25 recommendations to improve the effectiveness of civilian oversight of police complaints. A copy of our submission is attached at Annexure A.

Our submission recognises that the NSWPF has undertaken significant work to improve the quality and effectiveness of its complaint-handling procedures. Our recommendations seek to build on that work, and include a number of proposals to make the system more user-friendly for anyone who is unfamiliar with police complaints processes.

For example, for many years we have been concerned that considerable resources are spent by both us and the NSWPF in consulting and negotiating about whether certain matters should be recorded and/or managed as ‘complaints’. We therefore recommended that the legislation define what constitutes a ‘complaint’ about police, and that the provisions should include a simple mechanism for resolving any disagreement about whether particular matters should be dealt with as complaints.

Other proposals intended to improve the operation of the legislation include recommendations to:

- Insert a provision in the Act that simplifies police obligations to report allegations of serious misconduct.
- Provide a practical mechanism for ensuring that certain complaints made verbally by members of the public are recorded in a way that enables us to oversee how they are handled.
- Allow the Ombudsman to discontinue oversight of a police complaint investigation, thereby removing the requirement that the NSWPF must provide reports on such matters.

#### **4.3.2. *Further streamlining of NSWPF complaint handling procedures***

It is our view that there is also scope to further improve the police complaint system under the current legislation by amending the NSWPF's complaint handling practices. It has been our experience that ineffective complaint handling practices sometimes emerge within the NSWPF, often through the use of mandatory policies and guidelines. Recent examples of practices and procedures we have encouraged the Professional Standards Command to review and amend include:

- *Project Lancaster*: Following a Professional Standards Command initiative called Project Lancaster, the NSWPF introduced procedures to afford procedural fairness to subject officers during investigations of complaints under Part 8A. These procedures duplicate formal procedural fairness requirements under Part 9 of the Act. We have previously recommended that police streamline their practices to address unnecessary duplication and to introduce simpler, fairer processes.
- *Removing formal processes from informal inquiries*: The NSWPF's *Complaint Handling Guidelines* explain the procedures for outcome-focused investigations, referred to by the NSWPF as 'resolutions'. Although resolutions are aimed at complaints that should be dealt with less formally, the guidelines include the use of formal techniques, such as the making of formal findings. We have previously suggested that these procedures be reviewed and streamlined.

#### **4.3.3. *A scheme for the external oversight of police critical incident investigations***

In relation to the need to strengthen the external oversight of critical incident investigations by the NSWPF, our reports and submissions on this issue are also attached.

Our work in this area includes our Special Report to Parliament, *Ombudsman monitoring of the police investigation into the death of Roberto Laudisio-Curti* (February 2013), which identifies gaps in the current arrangements for the external oversight of critical incident investigations (at Annexure B); our formal submission dated 15 October 2013 to a review by the Hon Robert McClelland into the NSWPF's handling of critical incident investigations (at Annexure C); and a copy of our January 2014 response to an invitation to comment on the recommendations in his report, *Oversight of Police Critical Incidents* (at Annexure D).

As we explain in the discussion about 'gaps in the current police oversight system' at Chapter 5, there are a number of concerns about the current arrangements relating to critical incident investigations that are in urgent need of reform.

It is important to note that simply moving the Ombudsman's police complaint handling functions to another agency will not, in and of itself, rectify the pre-existing deficiencies noted in these reports. More importantly, if any new single agency model was to replicate the problems associated with the existing framework, this is likely to compound public concerns about police oversight in NSW. To build public confidence in policing, police oversight and the criminal justice system, it is crucial that any changes to the current integrity framework result in noticeable improvements. We therefore submit that any recommended model must address these existing (and well-documented) concerns.

As the model suggested at Option F indicates, these issues can be addressed without moving to a single external agency model. In fact, it would be almost certainly cheaper, easier and more efficient to amend the complaint-handling provisions under Part 8A of the *Police Act 1990* and to establish a new critical incident oversight function within an established integrity framework, than to attempt to manage such changes while simultaneously trying to establish a new, largely unproven model of investigation and oversight.

#### **4.4. Identifying police-related functions to incorporate into a single civilian oversight body**

Any recommendation to shift the Ombudsman's functions under the Police Act to a stand-alone police oversight agency must address questions about which of the Ombudsman's many other police-related functions should also be incorporated into the new model.

In this section we discuss the main functions performed by the Ombudsman's Police and Compliance Branch that are additional to its Police Act responsibilities. These are the functions that are most likely to be incorporated into a new single civilian oversight model. Then in section [4.5.1] we list a number of the Ombudsman's broader statutory functions that often include substantial police involvement.

The model recommended as a result of this review must address questions about which of these functions should be incorporated into the new body, which functions should remain with the Ombudsman and which functions should cease. We submit that not all of the functions currently performed by the Ombudsman's Police and Compliance Branch can be incorporated into a single oversight model for police. Also, any new police oversight body must either take on or find ways to replicate at least some of the established formal and informal functions currently performed by other parts of the Ombudsman's Office.

#### **4.4.1. *Police and Compliance Branch functions additional to its Police Act responsibilities***

Additional to our responsibilities under the Police Act, there are a number of other formal police-related functions that are currently performed by the Ombudsman's Police and Compliance Branch. They include our role in:

- External investigations into alleged NSWPF maladministration
- Independent auditing of the use of covert powers by law enforcement agencies
- Adjudicating witness protection appeals
- Monitoring uses of terrorism powers
- Reporting on police uses of emergency powers relating to riots and public disorder, and
- Legislative reviews – monitoring and reporting on the use of new police powers.

#### Complaints about NSWPF maladministration

The Ombudsman has jurisdiction under Part 3 of the *Ombudsman Act 1974* to investigate complaints about NSW public authorities, including the NSWPF, about conduct that may be illegal, unreasonable, unjust or oppressive, improperly discriminatory, based on improper motives irrelevant grounds, based on a mistake of law or fact, or is otherwise wrong. This means the Ombudsman can deal with complaints concerning maladministration by the NSWPF, NSW police officers, and unsworn or civilian NSWPF employees, just as we can for any other public sector agency or conduct.<sup>19</sup> Examples of matters regularly dealt with under Part 3 include complaints of unreasonable administrative conduct by NSWPF commands such as the Firearms Registry and the Criminal Records Unit.

As demonstrated by our July 2012 report to Parliament, *Safe as houses? Management of asbestos in Police buildings*, investigations into administrative conduct of the NSWPF can identify and address

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<sup>19</sup> Excluding the conduct of a police officer when exercising functions with respect to crime and the preservation of peace (Schedule 1, Clause 13 of the *Ombudsman Act 1974*).



significant systemic concerns. This investigation drew heavily on our earlier work on how public sector agencies manage a range of asbestos-related risks – see our 2010 report to Parliament, *Responding to the asbestos problem: the need for significant reform in NSW*.

In our subsequent inquiry into the risks posed to police officers and their families by exposure to asbestos and lead-based paint in 1350 police properties across NSW, our powers under the *Ombudsman Act 1974* enabled us to require evidence from NSW Treasury, Ernst and Young, United Group Limited, current and former NSWPF senior managers and managers, the Ministry for Police and Emergency Services, WorkCover and the State Property Authority. The fact that the NSWPF acted so quickly to address the issues identified in our report, highlights the value of administrative investigations such as these.

This investigation also demonstrates the overlap of issues such as this across different agencies. Our report made findings relating not only to the NSWPF, but also to the State Property Authority. If these responsibilities were transferred to a body with jurisdiction over NSWPF alone, consideration should be given to the mechanisms needed for such a body to conduct a thorough investigation into these kinds of issues. While it could be done, it is unlikely to be as effective.

#### Independent auditing of the use of covert powers by law enforcement agencies

The Ombudsman also provides independent oversight of various covert investigation powers used by the NSWPF, the NSW Crime Commission, the ICAC, and the PIC. Our statutory role in monitoring uses of these extraordinary specialist investigative powers includes responsibility for conducting regular inspections of the records of these agencies to ensure compliance with legislation allowing:

- the interception of telephone conversations under the *Telecommunications (Interception and Access)(New South Wales) Act 1987*
- the use of listening, optical surveillance, tracking and data surveillance devices under the *Surveillance Devices Act 2007*
- the use of covert search warrants and criminal organisation search warrants by the NSWPF and the NSW Crime Commission in accordance with Part 19 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, and
- controlled operations under the *Law Enforcement (Controlled Operations) Act 1997*, which permits undercover investigators from the NSWPF, the NSW Crime Commission, the ICAC and the PIC to engage in certain activities that would otherwise involve breaches of the law, such as possessing illicit drugs.

We prepare reports under each Act and, for most of these functions, provide the reports to the Attorney General. All reports except for the telecommunications interception report are tabled in Parliament.

As previously noted (at [4.2.3]), placing these kinds of auditing and compliance responsibilities within the same agency that uses the powers would represent a significant conflict of interest, as this would effectively require the new body to audit its own uses of the powers. For this reason, we do not believe that these functions could be accommodated within a single civilian oversight body for police.

#### Adjudicating witness protection appeals

The *Witness Protection Act 1995* provides for the establishment of a witness protection program to protect the safety and welfare of Crown witnesses and others who give information to police about criminal activities. The Commissioner of Police can refuse to allow a person to enter the witness protection program or decide to remove them from it. A person directly affected by such a decision can appeal to the Ombudsman who must then make a decision within seven days. The Ombudsman's decision is final and must be acted on by the Commissioner of Police. People who have a right to appeal to the Ombudsman are given full information about how they can do this when the Commissioner decides they should not be included in, or should be removed from, the program. We also have a specific role in resolving complaints from protected witnesses about matters covered in the witness's agreement with the Commissioner relating to how they are managed and assisted within the program.

It is important to note that many of the individuals affected by these decisions are often sources registered with the Crime Commission and/or the PIC and have often provided assistance to investigations conducted by them. It would therefore be highly inappropriate to place this adjudication function within the same agency that uses the information provided by those sources and/or carries out those investigations.

#### Monitoring uses of terrorism powers

Section 26ZO of the *Terrorism (Police Powers) Act 2002* requires the Ombudsman to keep under scrutiny the exercise of preventative detention powers conferred on police and correctional officers under Part 2A of the Act. The Commissioner must notify the Ombudsman when uses of these provisions have been authorised by the Supreme Court so that uses of the powers can be monitored in real time. We must also respond to complaints from persons held under these powers while they are being detained in a police facility, correctional centre, juvenile justice centre or any other place. We

currently use teams of at least two staff for this role, consisting of one with police oversight experience and one with experience in custodial environments and issues.

Section 27ZC requires the Ombudsman to keep under scrutiny the exercise of covert search powers conferred under Part 3 of the Act on members of the NSWPF, the Crime Commissioner and members of staff of the NSW Crime Commission.

The Ombudsman must prepare reports every three years about the exercise of these powers and furnish a copy to the Attorney General and the Minister for Police for tabling in the NSW Parliament. Our most recent report, tabled in 2014, highlighted the need for Corrective Services to complete its procedures for preventative detention and for the Police Commissioner to then review these procedures and those of Juvenile Justice NSW to ensure consistency and operational readiness across all relevant agencies. As a result of our persistence, appropriate arrangements were in place when the powers were first used.

In our view, the teams designated to monitor uses of the preventative detention provisions should be made up of staff who, through their day-to-day work with the NSWPF, are well-acquainted with operational policing issues, and through their oversight of Corrective Services issues, understand the practical issues associated with operating in a prison environment. Regardless of whether the external oversight of functions under the Terrorism Act remains with the Ombudsman, or becomes the responsibility of a new single civilian oversight body, this issue must be addressed if effective external oversight of these powers is to continue.

#### Reporting on police uses of emergency powers relating to riots and public disorder

Section 87O of *Law Enforcement (Powers and Responsibilities) Act 2002* requires the Ombudsman to keep under scrutiny the exercise of special powers conferred on police officers to prevent or control large-scale public disorder in a public place. These include powers to establish cordons or roadblocks, to search persons and seize things, and to disperse groups. The Commissioner must notify the Ombudsman if a use of these powers has been authorised so that the use of the powers can be monitored in real time. As required by the Act, our annual report includes a report of the Ombudsman's monitoring activities relating to the use of these powers by police.

#### Legislative reviews – monitoring and reporting on the use of new police powers

As part of the introduction of new police powers and other law enforcement provisions, the NSW Parliament often requires the Ombudsman to monitor the implementation of those powers for an initial specified period – usually between one and three years. Since 1997, a total of 28 new Acts have been accompanied by these kinds of legislative review provisions. These are listed at Annexure E.

Our completed legislative reviews include reports on provisions used by general duties police to search individuals, require identification, give directions to persons in public places, issue on-the-spot fines for minor criminal offences, and manage crime scenes. We have also reviewed and reported on powers used by specialised police or for specific police operations, such as the use of drug detection dogs, the management of DNA evidence, and the police monitoring of people in the community who have committed offences against children. Current legislative reviews include monitoring the implementation of new police powers to disrupt criminal organisations and criminal activities involving the possession and use of illegal firearms.

At the end of each review the Ombudsman must provide a report – usually to the Minister for Police and/or the Attorney General – for tabling in the Parliament. The reports detail comprehensive observations from each review, and recommend practical changes to improve the effectiveness and fairness of the provisions.

As most of our legislative reviews functions primarily relate to scrutiny of new police powers, it is likely that any decision to establish a single external oversight body for police means that these functions could be incorporated into that body. Although our researchers might benefit from working more closely with the PIC's and/or the ICAC's research and prevention staff, it is important to note that we already cooperate with the PIC to exchange information about our respective police-related reviews and to discuss research methods and sources of information. Our reports from these reviews have been produced to a consistently high standard. As a result, the Ombudsman is widely recognised as a leading provider of 'action research' that produces reports founded on a strong collaboration with frontline police officers and managers.

Removing this function from the Ombudsman's office is likely to impact on our overall effectiveness. One of the practical benefits of maintaining this kind of research capacity within the Ombudsman's office is that we have been able to successfully apply action research methods to broader operational policing issues. Our success in using action research to identify and drive holistic improvements to the policing of domestic and family violence, child protection risks, offending by young people, and concerns raised by disadvantaged Aboriginal communities is discussed further at [4.4]. Significantly, much of this work is conducted at the request of the Commissioner of Police.

#### **4.5. Managing the Ombudsman's statutory functions that also involve the NSWPF**

Any new model for civilian oversight of police must recognise that a substantial – and increasingly important – part of the Ombudsman's work involves examining 'whole of government' issues that often include the NSWPF, together with other public sector agencies. To some extent, establishing a single external agency model for police – such as the models proposed in Option A and Option B –

might create a ‘one stop shop’ for complaint oversight and corruption investigation issues that relate solely to the NSWPF. However, there is a need to consider the likely impact of splitting the police complaints oversight role from the Ombudsman’s broader statutory responsibilities, and how they could be effectively managed into the future.

#### **4.5.1. Other statutory functions that involve the NSWPF**

Although much of our contact with the NSWPF arises from our responsibilities under the *Police Act 1990*, police commanders across NSW often also deal with the Ombudsman’s office when:

- responding to **public interest disclosures** by staff who report wrongdoing (*Public Interest Disclosures Act 1994*)
- dealing with notifications of reportable allegations and convictions made by government and certain non-government agencies responsible for children (Part 3A – **Employment-related child protection**, *Ombudsman Act 1974*)
- responding to requests relating to our monitoring and assessment of Aboriginal community programs that involve the NSWPF as a partner (Part 3B – **Aboriginal programs**, *Ombudsman Act 1974*)
- reporting, or receiving reports about, offences against people with a disability who live in supported group accommodation (Part 3C – **Protection of people with a disability**, *Ombudsman Act 1974*)
- **reviewing the deaths of certain children and people with disability** (Part 6, *Community Services (Complaints, Reviews and Monitoring) Act 1993*)
- assisting the Ombudsman in his responsibilities for providing a wide range of support to (including convening) the NSW **Child Death Review Team**, a multi-agency body responsible for reviewing the deaths of all children in NSW in order to recommend measures to prevent and reduce the incidence of child deaths (Part 5A, *Community Services (Complaints, Reviews and Monitoring) Act 1993*).

The inclusion of police in these regulatory compliance and multi-agency oversight arrangements recognises that the NSWPF, like other public sector agencies, has an important role to play in improving the quality and effectiveness of NSW Government services generally. Modern policing is not just about protecting public safety and upholding the rule of law. While law and justice will always be central to policing, increasingly the NSW Government recognises that law and justice initiatives are often integral to broader efforts to improve government services, especially when trying to address issues and improve outcomes in high-need locations and to assist vulnerable people and communities.

## Employment-related child protection

The NSW Ombudsman was provided with certain responsibilities relating to employment related child protection following the Wood Royal Commission. These functions, outlined in Part 3A of the Ombudsman Act, include:

- keeping under scrutiny the systems that government and certain non-government agencies have in place to prevent reportable conduct and the way in which they handle reportable allegations and convictions involving their employees, and
- receiving and dealing with notifications of reportable allegations and convictions that arise in the course of an employee's work with children.

The refinement of the Ombudsman's Part 3A work has included provision for us to access, and make very effective use of, information directly from policing and child protection/Community Services' databases. This information, combined with our own intelligence holdings, provides us with unique access to important information which is not readily accessible to the frontline service agencies.

When we receive notifications, we check the various databases and review our own information holdings. We then assess the adequacy of the agency response to any risks to children using all of the information available to us. As we are often the only agency with access to all relevant information about a particular matter, we take an active role in ensuring information is shared with appropriate agencies and that necessary action is taken. Where we believe additional action may be required, we telephone the involved agency to explain our concerns and canvass options for strengthening the response. Our most experienced investigators regularly liaise with senior police from local commands and the NSWPF Child Abuse Squad in relation to the investigation of serious reportable allegations, particularly if the matter involves a service provider that is relatively inexperienced in handling reportable conduct and interacting with police.

In addition, we routinely refer detailed briefings to police which often result in the commencement and/or enhancement of police investigations and the preferment of criminal charges. We are presently handling 120 open cases concerning individuals charged with criminal offences relating to children. We also work closely with employers who have not recognised their responsibility to refer allegations or certain evidence to the police, guiding them through the process, and ensuring that their workplace response does not compromise any police investigation.

To mitigate risks to children, we work closely with Community Services, the Children's Guardian and employers to ensure that critical child protection information is identified, shared and managed. The timely reporting of criminal allegations to police is critical to ensuring that any criminal response is not compromised. A number of agencies within our jurisdiction have recognised our beneficial role in

facilitating the provision of information to the NSWPF, Community Services and other agencies, and have regularly sought advice and support from our office about liaising with these agencies. Because of our strong relationship with police, we were able to help the NSWPF develop Standard Operating Procedures which provide a guarantee for ongoing support and advice by police to agencies where child-related employment investigations are also the subject of police attention.

### Aboriginal programs

We established an Aboriginal unit in 1996 after the Wood Royal Commission's first *Interim Report* advised that '*the supervisory function of the Ombudsman would be significantly improved if it were given the resources to establish an Aboriginal Complaints Unit*' that could:

- focus upon the significant volume of complaints by Aboriginal people concerning police misconduct
- research and monitor issues concerning the complex and often troubled relationship between police and the Aboriginal communities, and prepare reports on these matters
- assist in establishing better liaison, particularly in remote areas, and
- assist in the implementation of the Police Service Aboriginal Strategic Plan and the recommendations of the Royal Commission into Aboriginal Deaths in Custody.<sup>20</sup>

Establishing an Aboriginal unit enabled us to harness information gathered through our police complaint oversight functions to tackle systemic problems that had historically impeded the ability of police to establish and maintain effective partnerships with Aboriginal communities. As part of this work, we used our Police Act powers to initiate a program of audits focused on monitoring the implementation of the NSWPF's *Aboriginal Strategic Direction 2003-2006* policy, especially in locations affected by high levels of crime, disadvantage and dysfunction. Over a three-year period we carried out 36 comprehensive audits, including 14 follow-up audits aimed at measuring local commands' compliance with our recommendations.

These audits culminated in our 2005 report to Parliament, *Working with Aboriginal Communities*, which summarised police attempts to strengthen links in a range of key areas. In addition to highlighting effective initiatives, our report recommended systemic improvements, particularly in relation to supporting Aboriginal recruitment; the management and development of Aboriginal Community Liaison Officers (ACLOs); better sharing of information about successful initiatives across commands; and local partnerships with Aboriginal communities to fight crime.

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<sup>20</sup> RCPS, *Interim Report*, Chapter 5 'A new system', February 1996, at [5.111].

Our ongoing use of complaint oversight, investigation and auditing powers to turn a spotlight on to the policing of Aboriginal communities has helped identify practical ways to address entrenched problems and to improve local-level service delivery. Over time, this has strengthened the relationships between local police officers and Aboriginal community members, and has had a demonstrable impact on the success of crime prevention initiatives, the ability to build intelligence holdings, and the willingness of victims and witnesses to report crime and become involved in the criminal justice system. The Police Commissioner commented on the significance of these ‘breakthroughs’ in his introduction to the *Aboriginal Strategic Direction 2012-2017*. Our office has also contributed to policy reform through 16 years of participation in the Police Commissioner’s Police Aboriginal Strategic Advisory Committee (PASAC) meetings, which has become the key forum for driving improvements in this area.

Increasingly, our audits and investigations of service delivery to Aboriginal communities now include other government and non-government agencies within our jurisdiction. In many cases, our recommendations to address issues affecting the delivery of basic services by these agencies has helped the NSWPF further enhance the reach and effectiveness of its work to improve outcomes for these communities.

The recent addition of functions under Part 3B (Aboriginal programs) of the *Ombudsman Act 1974* and the appointment of a Deputy Ombudsman for Aboriginal Programs recognise the important role our office now plays in ensuring that all government and community partners deliver on their commitments to improve local-level services, particularly in high-need communities. This includes using our ‘keep under scrutiny’ powers to monitor and audit the quality and effectiveness of strategies that make up the NSW Government’s plan for Aboriginal Affairs, *Opportunity, Choice, Healing, Responsibility, Empowerment* (OCHRE). Our role in independently monitoring and reporting on designated Aboriginal programs presents some real opportunities to effect lasting improvements in the provision of services to Aboriginal communities – starting with OCHRE strategies such as Connected Communities, Local Decision Making, Opportunity Hubs and Aboriginal Language and Culture Nests.

In summary, our Aboriginal unit was established to put a sustained focus on policing issues. The success of the unit’s audits and investigations has been a significant factor in the NSWPF’s success in achieving an historic shift in the way that Aboriginal communities across NSW now view police partnerships with these communities. However, our work with Aboriginal people now encompasses a much broader array of functions and responsibilities than envisaged by Justice Wood. Although this important work will continue even if our Police Act powers and functions are removed, it is crucial that the current review of police oversight consider how any recommended structural changes is likely to adversely affect the efficiency and effectiveness of our ability to oversight Aboriginal programs.



### Systemic investigations and audits to improve service delivery

Our oversight of police complaints provides an important source of information about trends and issues that appear to warrant further, systemic examination. We have undertaken a number of systemic investigations and audits in the policing area, often using an ‘action research’ approach that is founded on strong collaboration with frontline police officers and managers.

This approach has been instrumental in eliciting first-hand information about the operational challenges facing police; communicating these within the NSWPF as well as to partner agencies and the public; and identifying well-targeted, achievable ways of strengthening the capacity of police to meet these challenges. It has also facilitated the development of constructive professional relationships with police, both corporately and at a local level, that have significantly aided the work of police in complex areas such as working with Aboriginal communities, family violence, and serious child sexual abuse.

Much of our systemic investigations and auditing work is directed at identifying, and recommending responses to, entrenched issues that impede the collaborative work of multiple agencies within our jurisdiction – including the NSWPF. This includes a number of ‘whole of government’ service improvement strategies that the NSW Government is using – with increasing effect – to help agencies strengthen their responses to issues such as child protection risks, offending by young people and chronic domestic and family violence. These plans often rely on law and justice initiatives developed by police.

Similarly, the NSWPF is also crucial to maximising the effectiveness of ‘Connected Communities’ and other such ‘place-based’ service strategies that bring agencies together to improve outcomes in particular locations, especially those affected by chronic disadvantage and poor service delivery. While the Department of Education and Communities has lead-agency responsibility for Connected Communities, which develops various local education, training, employment and social strategies aimed at Aboriginal children and young people in these communities, the scheme relies heavily on feedback provided by other frontline service providers – including local police – to ensure that its initiatives successfully engage families whose children are at greatest risk. Our 2012 report, *Responding to Child Sexual Assault in Aboriginal Communities*, highlighted the pivotal role often played by the NSWPF in supporting holistic place-based service improvement initiatives.

Because these systemic audits and investigations relate to our broader statutory responsibilities, our role in supporting and recommending improvements to various interagency programs or place-based service initiatives will undoubtedly continue. While moving our Police Act functions to another

agency will not end our broader oversight work, it is highly likely to undermine our efforts to strengthen these important initiatives and will undoubtedly lead to a less comprehensive – and therefore less effective – approach.

#### **4.5.2. *Comment about other statutory functions involving police***

The breadth of the Ombudsman’s jurisdiction provides opportunities to drive ‘whole of government’ service reforms across agencies – particularly in helping the NSWPF to develop strategic relationships with other primary service agencies such as Family and Community Services, Education, Housing, and certain non-government agencies and community leaders. In effect, the Ombudsman provides a ‘one stop shop’ to the NSWPF and members of the public in relation to these and other statutory frameworks. For the NSWPF, this reduces the complexity and administrative burden associated with complying with its obligations.

There is no suggestion that Ombudsman functions other than our direct police oversight functions should be incorporated into a single civilian oversight body for police. However, it is highly likely that the quality and effectiveness of our overall functions – including investigations into the effectiveness of various high profile NSW Government service improvement strategies – would be diminished were we to lose our Police Act functions and the day-to-day contact with police associated with those functions.

Significantly, although the NSWPF is usually just one of many bodies involved in the NSW Government’s major service sector reform programs, and rarely has lead-agency responsibility for such work, its role as one of the few frontline service providers with an active presence in all high-need communities in NSW means that local police often bring crucial insights to the programs.

There is a risk that moving our Police Act functions to a separate agency will hamper our ability to effectively monitor and support these strategies and, over time, diminish the opportunities for us to drive positive changes across the public sector. In short, valuable synergies will be lost.

#### **4.6. *Improving the efficiency and effectiveness of the NSWPF oversight role***

The Terms of Reference for this review require any options for a single civilian oversight model for police to include ‘*measures to improve the efficiency and effectiveness of oversight*’. Therefore, in addition to this review providing guidance as to which formal statutory functions should be incorporated into a new agency, and how to manage any broader police-related functions that remain with the Ombudsman, consideration should be given to how any new oversight model will add value to the work of the NSWPF.

#### **4.6.1. *Using influence as independent oversight agency to broker agreements***

Our in-depth knowledge of operational policing acquired through our police complaint oversight and systemic work means we often play a pivotal role in ‘brokering’ acceptable approaches to complex issues that affect multiple stakeholders, while ensuring that the operational needs of frontline police are considered and addressed.

For example, in 2011 we facilitated a roundtable meeting between the NSWPF, Legal Aid and the Aboriginal Legal Service to address concerns that the nature of the legal advice being routinely provided to young people was effectively hampering police from using the diversionary options available under the *Young Offenders Act 1997*, leading to the potentially avoidable criminalisation of young people, and creating significant frustration and additional resource intensive work for police. The meeting resulted in an agreement by all parties to a plan aimed at increasing the use of diversions, and ultimately to the commencement in 2014 of a new Protected Admissions Scheme (PAS). Under the PAS, police can give a written assurance to the young person and their parent/guardian that any admission they make in relation to the offence for which they are eligible to be cautioned will not be used in any criminal proceedings against them. This should increase the number of young people who receive cautions at the outset and reduce the number of matters coming before the Children’s Court.

We have provided advice to the NSWPF about ways they could strengthen accountability for using the scheme and measure its impact. (In 2009, the final report of the Special Commission into Child Protection Services in NSW noted the findings of our investigation into the use by police of diversionary options for young offenders and endorsed our recommendation that this use should be continued to be closely monitored by police).

More recently, at the request of Legal Aid NSW, we have been working with a number of agencies, including police, to progress the development of a joint protocol in response to growing awareness that young people living in residential out-of-home care are at increased risk of coming into contact with police and other elements of the criminal justice system. The protocol aims to provide guidance to service staff and police about the practical steps they can take to minimise the contact of these young people with the criminal justice system. We are working closely with all of the potential signatories to the protocol to ensure it is consistent with the operational and legislative safeguards within which police work.

#### **4.6.2. *Using policing information to identify broader service reforms***

As previously noted in the discussions of ‘Aboriginal programs’ and ‘systemic investigations and audits to improve service delivery’ at section [4.5], our day-to-day oversight work with police at all

levels of the NSWPF enables us to identify trends and issues that appear to warrant systemic examination, and to use this information to inform inquiries related to our broader statutory functions.

An example of a major systemic inquiry that had its genesis in information gathered through our police oversight functions was our investigation into the policing of domestic violence, which culminated in our 2006 report to Parliament, *Domestic violence: improving police practice*. This report drew heavily on our auditing of local police work with Aboriginal people, which identified significant inconsistencies in the quality of operational and strategic work carried out by local area commands in relation to the policing of domestic violence.

An initial analysis of issues raised by complaints about policing responses to domestic violence formed the basis of extensive consultations with frontline police and other stakeholders. We also sought the expert advice of key figures in the NSWPF, who helped formulate recommendations for changes to policies and practices, then convened a roundtable discussion involving more than 20 police commanders to ‘test’ the practicality of the proposed changes. As a result, our special report to Parliament was widely supported and led to significant improvements to operational policies and practices, and an enhancement to police resourcing.

Our investigations and audits into these and other systemic issues involving police are ongoing. Increasingly, our efforts to improve the efficiency and effectiveness of public sector services recognise that the NSWPF is just one of a number of agencies with significant responsibilities for delivering improvements to frontline services, often in challenging circumstances. Through our strategic projects program, we often employ action research initiatives to identify measures aimed at helping the NSWPF – usually in partnership with other agencies – to improve the efficiency and effectiveness of their services. These include strategic projects that culminated in the following reports to Parliament:

- *The implementation of the Joint Guarantee of Service for People with Mental Health Problems and Disorders Living in Aboriginal, Community and Public Housing, 2009.*
- *Improving service delivery to Aboriginal people with a disability, 2010*
- *Inquiry into service provision to the Bourke and Brewarrina communities, 2010*
- *Addressing Aboriginal disadvantage – the need to do things differently, 2011, and*
- *Responding to Child Sexual Assault in Aboriginal Communities.*

As previously noted, our cross-agency work with the NSWPF is increasingly focused on developing strategies to improve responses to complex child abuse concerns. In addition to liaising with police in relation to individual child protection matters, our strategic projects, audits and investigations work

seek to strengthen and reinforce the NSWPF's capacity to respond to child protection concerns in a range of other ways.

As the following examples demonstrate, almost all of the Ombudsman's major strategic investigations have a significant policing component and the involvement and support of the NSWPF. We have a proven track record in harnessing our various statutory oversight roles to drive improvements to the efficient and effective delivery of policing services. Ideally, any new model recommended by this review must incorporate and enhance the potential for these kinds of reform initiatives to continue for the benefit of the whole community.

#### Review of a group of school-aged children and young people in two Western NSW towns

In 2012, we undertook an intensive review of a group of 48 'at risk' school-aged children and young people in two Western NSW towns, which involved the participation of the relevant regional directors of Community Services, Education and Police. This project demonstrated the value of combining the existing case information holdings of each of these agencies in order to more accurately identify acute child protection risks, and to do so before such risks become entrenched.

Our subsequent report also recognised the positive contributions made by the NSWPF in seeking to constructively engage with at-risk children and young people in both towns, and highlighted the frustrating and resource intensive impact on police (as well as the negative consequences for the young people themselves) of young people continuing to fall through the gaps of other human services interventions.<sup>21</sup> The Police Commissioner welcomed our findings and has taken steps to implement the intelligence-driven child protection and place-based service delivery approach demonstrated by our review.

#### Addressing issues affecting the work of the Child Abuse Squad

Our consultations with police during our audit of the implementation of the NSW Interagency plan to tackle child sexual assault in Aboriginal communities, highlighted the impact of resourcing constraints and performance issues on the capacity of the Child Abuse Squad (CAS) to respond effectively to child sexual abuse as the lead criminal investigation partner in the Joint Investigation Response Team (JIRT). Our audit report in January 2013 contained several recommendations aimed at strengthening

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<sup>21</sup> This report was not released publicly due to the confidential nature of the subject matter.

the JIRT. The then Police Minister subsequently announced an additional 30 CAS positions. More recently, the Premier has committed to a further 50 positions for the CAS.

#### Review of the NSW child protection system

Our 2014 special report to Parliament, *Review of the NSW child protection system: Are things improving?* recommended that consideration be given to providing designated police positions with direct access to the Community Services' case management system ('KiDS') in order to enable them to quickly access all relevant child protection information when responding to incidents – including domestic violence incidents – that may involve serious risks to children. We also recommended that Family and Community Services and NSWPF should work together to develop improved guidance and support to police in conducting child welfare checks.

#### NSWPF and Aboriginal out-of-home care agencies

In December 2014, we hosted a forum in partnership with AbSec – the peak body providing advice on issues affecting Aboriginal families involved in child protection and the out-of-home care system – which brought Aboriginal out-of-home care agencies together with senior police and local police from across the state. Attended by 160 participants, the forum was aimed at developing a better understanding of respective responsibilities in relation to protecting children from abuse, and discussing practical ways of working together at a local level. The outcomes of the forum will be built into the monitoring and accountability framework for the NSWPF's Aboriginal Strategic Direction.

#### **4.7. Comment about the options for a single external oversight model**

At the beginning of this chapter, we noted that any model recommended as a result of this review of police oversight must address questions about which of the Ombudsman's many police-related functions should go, which should stay and which should cease. The purpose of describing the various police oversight functions currently performed by the Ombudsman is to assist the review in its deliberations.

Although moving our Police Act responsibilities to another agency would not put an end to our broader complaint oversight and 'keep under scrutiny' functions, it would undoubtedly adversely impact on this work. Moreover, in assessing how efficient and effective a new single external oversight model might be, it is important to recognise that any new corruption investigation and complaints oversight body would largely be starting from scratch, and would have to overcome the challenges of dealing with policing issues in isolation from broader public sector service reforms. Both

the new agency and the NSWPF will inevitably face a period of significant disruption and difficulties during the period needed for any new model to become established.

Our success in investigating and driving reforms to major service improvement programs demonstrates the value that can be added through our oversight role. There is no guarantee this can be replicated in a new agency. Our ability to influence positive practice in the policing area relies heavily on the influence and knowledge acquired through many years of working with police and local communities. The synergies achieved through using our various statutory oversight functions to inform our work with police, will be difficult to replicate in an agency focused solely on policing.

In our view, the anticipated – but largely illusory – benefits of a single external oversight model for police do not justify the enormous risks associated with such a far-reaching change.

## **5. Any gaps in the current police oversight system**

This chapter responds to the second term of reference, which requires the review of police oversight to address *'any gaps in the current police oversight system'*.

In the first part of this chapter we describe the gaps in the current system which relate to civilian oversight of critical incident investigations. We explain the role of the various agencies that may be involved in a critical incident, and the background to our previous recommendation for a new statutory scheme relating to critical incidents. We also provide a summary of our submissions to and following the McClelland Review about these issues. The Chapter concludes with some brief comments about historical gaps in the system relating to complaints about police in the NSW Crime Commission.

### **5.1. Civilian oversight of critical incident investigations**

The most significant gap in the current system for civilian oversight of police relates to the independent oversight of NSWPF investigations into critical incidents. In a policing context, 'critical incidents' are incidents that involve the death of or serious injury to a person as a result of an interaction with police, whether through the discharge of firearms, the use of other weapons or physical force, arising from a police pursuit, while the person was in police custody, or during a NSWPF operation.

There is a clear public interest in subjecting the NSWPF investigation of these incidents to strong and effective independent civilian oversight. The government, community and the families of victims expect there will be thorough and impartial investigations into such incidents to establish what occurred, whether there was any unreasonable or improper conduct by any police officer, and that action is taken to address any identified shortcomings in police systems and procedures.

However, there are significant gaps in the current system because the level of civilian oversight of critical incident investigations depends on a number of factors, including whether the incident resulted in a death, and whether there has been a complaint about the conduct of police involved in the incident. Even if a complaint about police conduct is made, there are practical impediments to effective oversight of the NSWPF investigation by the Ombudsman or the PIC.

These issues have already been the subject of a Special Report to Parliament by the Ombudsman, and submissions by the Ombudsman in response to the inquiry by the Hon Robert McClelland. Copies of these documents are provided for your information at Annexures B, C and D. In this chapter we provide an overview of the issues raised in our earlier report and submissions.



With the consent of the State Coroner, we have attached at Annexure F a copy of his comments on Mr McClelland's recommendations. We have endeavoured to reflect the Coroner's views in our discussion on critical incident investigations in this chapter, and in the discussion on 'functional overlap between oversight bodies' in Chapter 6.

There is an urgent need to develop and implement a mechanism for improving civilian oversight of critical incident investigations, and the agency responsible for such oversight should be given functions and powers comparable to those exercised by the Ombudsman to oversight police complaint investigations under Part 8A of the Police Act.

## **5.2. Roles of agencies involved in investigating critical incidents**

The potential involvement of agencies during a critical incident investigation will depend on the particular circumstances of the incident including whether it resulted in a death or a serious injury. The main agencies that can potentially have involvement in the investigation of such incidents are:

- NSWPF
- State Coroner
- PIC
- NSW Ombudsman
- WorkCover Authority of NSW.

The NSWPF is responsible for investigating all critical incidents. Our recommendation for a statutory scheme for civilian oversight of critical incident investigations aims to provide the same level of oversight irrespective of whether or not a complaint has been made about police under Part 8A of the Police Act.

In the following sections we describe the roles of the NSWPF and the civilian agencies to explain the gaps in the current system of civilian oversight of critical incidents.

### **5.2.1. *The NSW Police Force***

Police investigations of critical incidents are expected to establish what occurred by collecting evidence from the police officers involved and other witnesses and sources. The evidence gathered through this process serves important, yet separate, purposes:

- It enables the NSWPF to identify, and take timely and appropriate action to address, any criminal conduct, any misconduct by police, and any deficiencies in policy, procedures, practices, training or systems.

- Where the critical incident has resulted in a death, the evidence can also be used to assist the Coroner to conduct an inquest into the person's death.

It is important to recognise that the question of possible criminal conduct by a police officer involved in a critical incident is one for police to investigate, and potentially a matter for the Office of the Director of Public Prosecutions to consider. Where there is complaint about police conduct police have an obligation under section 148(1) of the Police Act to determine whether there is sufficient evidence to establish the elements of a criminal offence and if sufficient evidence exists commence proceedings. Police cannot be directed by the Coroner on this aspect of their critical incident investigation.

#### Guidelines to assist in managing, investigating and reviewing critical incidents

The NSWPF has developed *Critical Incident Guidelines* to assist in the management, investigation and review of critical incidents. The guidelines note that when the actions of police result in death or serious injury to a person, such incidents are often the subject of heightened public interest and scrutiny. Accordingly, there is an expectation that critical incidents will be 'rigorously and thoroughly investigated'.

An introductory message describes the intent and purpose of the guidelines in the following terms:

These guidelines have been developed to assist in the management and investigation of critical incidents. They are intended to assist officers and provide an outline of the key actions required when managing, investigating and reviewing all critical incidents. The NSW Police Force is committed to investigating all critical incidents in an effective, accountable and transparent manner. If public credibility is to be maintained, such investigations are most appropriately conducted independently. Accordingly, the identification of an incident as a critical incident activates an independent investigative process to be conducted by a specialist and independent critical incident investigation team, and a review of that investigation by an independent review officer.

Managing, investigating and reviewing an incident as a 'critical' one should remove any doubts that might otherwise endure about the integrity of involved officers and provide reassurance that:

- any wrongful conduct on the part of any members of the NSW Police Force is identified and dealt with
- officer welfare implications associated with the incident have been considered and addressed
- consideration is given to improvements in NSW Police Force policy or guidelines to avoid recurrences in the future.

These guidelines are a statement that the community can have full confidence that the facts and circumstances of these incidents will be thoroughly examined and reviewed by the NSW Police Force.

These guidelines impose accountability for the investigation of critical incidents at senior levels. In so doing, the community, members of the NSW Police Force and their families can be assured that all critical incidents are handled professionally, with integrity and that the decisions made and processes used are appropriate and reasonable.<sup>22</sup>

The guidelines define the kinds of incidents that must be the subject of critical incident investigations. They also explain the procedures that Senior Critical Incident Investigators, Critical Incident Investigation Teams and other police personnel must apply when responding to such incidents, and provide specific instructions in relation to their reporting responsibilities.

### **5.2.2.      *The State Coroner***

Under the *Coroners Act 2009*, the Coroner is responsible for inquiries into deaths in police custody, such as deaths in police cells, shootings or police pursuits (s.23 and s.27(b)). The Coroner has no role in relation to inquiries into critical incidents that result in a serious injury (unless the injury is the result of a fire or explosion, matters that fall within the Coroner's jurisdiction).

The main statutory function of a coronial inquest is to make findings about the death of a person, particularly the person's identity, the date and place of their death, and the manner and cause of death. Since 2003, the Coroner has had the power to give directions to police officers 'concerning investigations to be carried out for the purposes of coronial proceedings or proposed coronial proceedings' (s.51).

The Coroner may make recommendations in connection with a death, fire or explosion the subject of a coronial inquiry. In the context of a critical incident, the Coroner may make recommendations relating to the conduct of individual police officers involved in the incident or about NSWPF policies or procedures. However, findings and recommendations made by the Coroner must not indicate or in any way suggest that any person has committed an offence (s.82(3)).

If during the course of an inquest the Coroner forms the opinion that:

- the evidence is capable of satisfying a jury beyond reasonable doubt that a known person had committed an indictable offence, and
- there is a reasonable prospect that a jury would convict the known person of the indictable offence, and

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<sup>22</sup> NSWPF, *Critical Incident Guidelines*, August 2012, Version 5, p.6.

- the indictable offence would raise the issue of whether the known person caused the death with which the inquest is concerned,

the Coroner may either suspend the inquest, or continue with the inquest and make findings and recommendations (in practice, the former is the usual course of action). The Coroner must forward the evidence adduced at the inquest to the Director of Public Prosecutions, and specify the name of the known person and the particulars of the indictable offence (s.78).

As highlighted by the Royal Commission into Aboriginal Deaths in Custody, and reiterated by the Wood Royal Commission, the Coroner plays a vital role in ensuring public confidence in the impartiality of police investigations into critical incidents resulting in a death. However, the Coroner's ability to oversight the police critical incident investigation is limited in respect of possible criminal conduct by police. As outlined above, the Coroner currently has no power under the Coroners Act to investigate criminal conduct or to oversight a police investigation of possible criminal conduct.

The State Coroner has emphasised the importance of police investigations into critical incidents involving a death being subjected to external oversight '*as they occur*' and not some time later:

To mitigate the risk of evidence being lost or degraded as a result of the occasional reluctance of police investigators to critically examine the actions and motivations of involved officers, real time monitoring of the investigation by an independent agency is essential.<sup>23</sup>

Our recommendation for a statutory scheme for the civilian oversight of NSWPF critical incident investigations aims to provide real time monitoring of such investigations. A major gap in the current system is that this does not occur unless a complaint about police conduct has been made under Part 8A of the Police Act.

### **5.2.3. *The Police Integrity Commission***

The PIC's principal functions are to detect, investigate and prevent police corruption and serious misconduct. In practice, the PIC rarely oversights police investigations of critical incidents.

The PIC generally only becomes involved when other agencies such as the Coroner have identified serious misconduct issues during the investigation of critical incidents. For example, Operation Calyx examined the critical incident investigation into the death of Adam Salter. There had been no

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<sup>23</sup> 'Response of the State Coroner to McClelland recommendations', 2014 – see Annexure F.

complaint originally made in relation to this matter, so the investigation initially had no independent external oversight.

#### **5.2.4. The NSW Ombudsman**

Where the Ombudsman receives a complaint about the conduct of police in relation to the death of a person, that death may also be the subject of a coronial inquiry. In these circumstances the NSWPF may have concurrent obligations to conduct an investigation for the purposes of both the Coroners Act and the Police Act.

Until recently, the NSWPF managed its concurrent obligations under both Acts by requiring critical incident investigators to apply the investigative procedures set out in the NSWPF's *Critical Incident Guidelines*, whereby:

All aspects of police conduct can be expected to be reviewed even when it is unlikely that there will be grounds for criticism of police.<sup>24</sup>

The Ombudsman's primary role in the police complaints system is to oversee the NSWPF handling of more serious complaints about police officers. In performing this role, the Police Act enables us to specify matters that we consider should be examined or taken into consideration by the NSWPF when investigating a complaint (s.145(1)). We review finalised investigation reports to ensure that the investigation has been adequate, the findings appropriate, and any action taken in response to findings of improper or unreasonable conduct is suitable.

If we are not satisfied with the investigation or action taken, the Police Act provides us with powers to request further information (s.151), further investigation (s.153) or a review of any action to be taken (s.154). In addition, we can make a report to the Commissioner of Police and Minister for Police outlining our concerns about the complaint investigation or outcome (s.155). Where it is in the public interest to do so, we can also make a special report to Parliament which may be made public by the Parliament (s.161).

We have the powers under the Police Act to directly investigate a complaint and/or a complaint investigation if we determine it is in the public interest to do so (s.156). We can also initiate an 'own motion' investigation into the conduct of police (s.159). However, in practice, we do not exercise these

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<sup>24</sup> NSWPF, *Critical Incident Guidelines*, August 2012, Version 5, at 12.

powers in relation to critical incidents given that the NSWPF has primary responsibility for investigating critical incidents.

We also ‘monitor’ the progress of a complaint investigation if we are of the opinion that it is in the public interest to do so (s.146). This means we can track police investigations in real time to ensure that they are being conducted appropriately and that the interests of all parties are taken into account. We assess the adequacy of proposed investigative strategies, review evidence as it is gathered, and provide suggestions on particular action to be taken. We may also elect to be present during any interviews with complainants, witnesses and police officers.

However, the Ombudsman’s power to review a critical incident investigation depends on whether a complaint has been made about police conduct. In practice, this means that very few critical incident investigations are oversights by this office. In our view, this creates a serious gap in the system of civilian oversight of critical incident investigations.

From 1 July 2009 to date, the Ombudsman has received 14 complaints about police involved in critical incidents. Although we do not have records about the number of critical incident investigations that were conducted by police during this period, in September 2013 the NSWPF began providing the Ombudsman with its media releases announcing the commencement of critical incident investigations. Between September 2013 and June 2015, the NSWPF commenced 42 critical incident investigations. These figures indicate that the majority of critical incidents are investigated by the NSWPF without any external oversight.

#### **5.2.5. *The WorkCover Authority of NSW***

The WorkCover Authority of NSW (WorkCover) is responsible for the promotion of productive, healthy and safe workplaces for workers and employers in NSW and ensuring compliance with work health and safety laws.

Section 38(1) of the *Work Health and Safety Act 2011* provides:

A person who conducts a business or undertaking must ensure that the regulator is notified immediately after becoming aware that a notifiable incident arising out of the conduct of the business or undertaking has occurred.

For the NSWPF, this means that it must immediately notify WorkCover about any death or serious injury or illness, or dangerous incident that occurs as a result of policing activities or operations.

WorkCover's functions include the power to investigate and prosecute breaches of workplace health and safety laws. The exercise of these powers has the potential to intersect with the oversight functions performed by other agencies.

- NSWPF: If there is an indication that the incident may involve criminal conduct, WorkCover is expected to work collaboratively with the NSWPF. Police have responsibility for investigating any criminal conduct, while WorkCover is responsible for investigating any breaches of work health and safety laws.<sup>25</sup>
- State Coroner: If the critical incident involves a death, the Coroner is responsible for determining the manner and cause of death of the person, while WorkCover investigates and prosecutes any breaches of work health and safety laws that may have caused or contributed to the death.
- Ombudsman: While it is possible that a critical incident may result in both a complaint about police to the Ombudsman and a notification by the NSWPF to WorkCover, this is rare. Where this does occur, the Ombudsman consults with WorkCover. If WorkCover is actively investigating a matter, we exercise our discretion to defer any assessment under Part 8A of the Police Act until WorkCover has finalised its inquiry. We are unaware of any matters oversights by the Ombudsman where a parallel inquiry by WorkCover has caused difficulty for the NSWPF.

WorkCover may have an involvement following a critical incident regardless of whether a complaint about police has been made under Part 8A of the Police Act. However, as WorkCover's oversight role is focussed solely on issues relating to workplace safety, the gaps in the system remain.

### **5.3. Recommendations to strengthen the system of civilian oversight**

The processes set out in NSWPF's *Critical Incident Guidelines* should result in rigorous, timely and objective investigations, and provide appropriate mechanisms for the investigations to be managed and reviewed by senior officers of the NSWPF. However, failures by critical incident investigators and review officers to properly perform the roles and functions required in the guidelines have in some

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<sup>25</sup> Pursuant to a Memorandum of Understanding between the Chief Executive Officer of the WorkCover Authority of NSW and the Commissioner of Police.

instances led to inadequate investigations that have attracted criticism by a Deputy State Coroner,<sup>26</sup> the Ombudsman<sup>27</sup> and the PIC.<sup>28</sup>

In February 2013, our special report to Parliament on the *Ombudsman monitoring of the police investigation into the death of Roberto Laudisio-Curti*, highlighted concerns about a failure by police to comply with the *Critical Incident Guidelines*, and the need to strengthen civilian oversight of critical incidents.

In June 2013, the PIC tabled its *Operation Calyx* report, that detailed its concerns about the police critical incident investigation into the fatal police shooting of Mr Adam Salter. The PIC investigation was in response to a complaint from the counsel who had appeared for Mr Salter's family at the coronial inquest. Counsel complained that the investigation had not complied with the *Critical Incident Guidelines*, and the principle that police, when investigating a critical incident, should act and be seen to act with particular thoroughness and complete impartiality. The PIC found that a number of officers involved in the case had failed to comply with their obligations under the guidelines.

Non-compliance by police with the processes prescribed in the guidelines defeats their purpose and has the potential to erode public confidence in the ability of the NSWPF to impartially and objectively investigate critical incidents. The NSWPF's lack of compliance with *Critical Incident Guidelines* requirements in some recent cases, is compounded by the fact that so few critical incident investigations are the subject of external scrutiny until after the investigation is complete, meaning that any deficiencies often cannot be rectified.

#### **5.4. McClelland review of systems for overseeing police critical incident investigations**

Following the reports by the Ombudsman and PIC discussed above, the NSW Government retained the Hon Robert McClelland to conduct a review of the system for investigating and overseeing critical incidents. Terms of reference for this review required that Mr McClelland specifically consider:

... whether improvements can be made to the oversight of critical incidents to guarantee accountability and transparency, including:

- how and when oversight responsibilities are allocated between different agencies,

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<sup>26</sup> Magistrate Scott Mitchell, Deputy State Coroner, *Findings of the inquest into the death of Adam Salter*, 14 October 2011.

<sup>27</sup> NSW Ombudsman, *Ombudsman monitoring of the police investigation into the death of Roberto Laudisio-Curti*, February 2013.

<sup>28</sup> Police Integrity Commission, *Report to Parliament – Operation Calyx*, June 2013.



- what gives rise to, and the purpose of, that oversight, and
- whether there is any unnecessary duplication of roles or responsibilities and, if so, how that might be resolved...<sup>29</sup>

In his November 2013 report to the Premier, Mr McClelland concluded that the purposes of a critical incident investigation, and oversight of that investigation, should be to:

- undertake a thorough and objective investigation that establishes the facts
- independently assess compliance with relevant policies and procedures
- independently assess and test the substance of the investigation and its findings, and
- recommend any systemic improvements and, where appropriate, hold individuals to account for any serious misconduct or criminal offences.

The report endorsed recommendations in our Special Report on the police critical incident investigation into the death of Mr Laudisio-Curti which advocated that the NSW Parliament should consider amending the Police Act to require the NSWPF to notify the Ombudsman immediately of all critical incidents, and provide the Ombudsman with appropriate powers to effectively oversight critical incident investigations.<sup>30</sup>

In supporting our recommendations, Mr McClelland called for the creation of a mandatory notification scheme with additional oversight powers for the Ombudsman's office. Mr McClelland also called for a 'Framework of Cooperation' that would establish the following 'order of precedence', with respect to the oversight of critical incident investigations:

- the criminal process
- the Coronial process
- the PIC
- the Ombudsman.

These measures were intended to remedy the gap in the current system for independently overseeing critical incident investigations by police.

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<sup>29</sup> *Oversight of Police Critical Incidents*, Report to the Hon Barry O'Farrell Premier of NSW by the Hon Robert McClelland 29 Nov 2013, Chapter 1, 'Terms of Reference'.

<sup>30</sup> *Oversight of Police Critical Incidents*, Report to the Hon Barry O'Farrell Premier of NSW by the Hon Robert McClelland 29 Nov 2013 p IX

## **5.5. Responses to the McClelland review**

The Department of Premier and Cabinet invited a number of interested stakeholders, including the Ombudsman, to provide responses to Mr McClelland's report.

While we welcomed the report and agreed with a number of the findings and recommendations, our response to the report also highlighted concerns about some aspects of the proposed model for civilian oversight of critical incidents.

### **5.5.1. *Monitoring investigations 'as they occur'***

We agree with Mr McClelland that the 'criminal process' should take precedence over the 'Coronial process'. It therefore follows that the first priority for any police investigation should be to gather and examine all available evidence relating to any possible criminal conduct arising from a critical incident.

At the same time, critical incident investigators should also investigate any alleged misconduct by any officers, and any deficiencies in policy, procedures and practices that might have been a factor. In conducting investigations into possible criminal or improper conduct at the outset, the NSWPF can meet its obligations to deal with these issues expeditiously. This may include commencing criminal proceedings or taking remedial action in relation to the involved officers, and taking steps to address any failures in police systems.

We highlighted this issue in our special report to Parliament on the police investigation into the death of Roberto Laudisio-Curti:

We have also recommended that police guidelines be amended to ensure that investigators are aware of the need to consider and take appropriate and timely action to address issues identified during the investigation, and that a senior officer takes responsibility for, and properly reviews, the investigation before any coronial inquest examining the death of a person during policing activities.

We can see no good reason to delay taking action given that coronial inquests often take many months and sometimes years to be finalised. The NSW Police Force (and not the Coroner) is responsible for identifying and taking appropriate and timely action to address any identified criminal conduct, officer misconduct or shortcomings in policy, procedures or training. The failure to take timely and appropriate

action means that the NSW Police Force is abrogating its responsibility to address foreseeable risks to the community and the organisation.<sup>31</sup>

There is a need for independent civilian oversight, in real time, of police investigations into any alleged criminal conduct by police involved in a critical incident. In our view, this oversight function is not and cannot be performed by the Coroner. Nor should it be deferred until after a coronial inquest, as suggested by Mr McClelland.

The Coroner has supported the proposal for mandatory notification of critical incidents to the Ombudsman and real time monitoring of critical incident investigations notwithstanding that the issues being oversights may be further considered during an inquest or, in certain cases, criminal proceedings. He argued that external scrutiny of such incidents was intended to instil public confidence in the integrity of police investigations into critical incidents, and should not be contingent on whether there has been an indication of wrong-doing by any of the involved officers.

In relation to critical incidents involving a death, the Coroner has argued that any new scheme to investigate and oversight such incidents should address the following elements:

Experienced Homicide Squad detectives, properly supported and resourced, are best placed to gather the evidence needed to establish who did what, to whom, where and when.

Because of their understandable empathy for the police officers involved in such incidents homicide detectives and over-viewing police officers have difficulty objectively assessing whether what was done by the police officers involved was reasonable and/or necessary.

An independent, expert agency needs to monitor and overview these investigations as they occur and there needs to be a mechanism for quickly addressing shortcomings when they are detected.

The various office-holders and agencies with responsibility for responding to such incidents need to work collaboratively while maintaining their independence and utilising agreed protocols to resolve conflicts.<sup>32</sup>

The Coroner has also said:

It is not suggested police officers investigating deaths that occur in an operational setting deliberately seek to 'cover up' misconduct or 'run dead'. Rather ... the understandable empathy more senior officers

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<sup>31</sup> NSW Ombudsman, *Ombudsman monitoring of the police investigation into the death of Roberto Laudisio-Curti*, February 2013.

<sup>32</sup> 'Response of the State Coroner to McClelland recommendations', 2014 – see Annexure F.

feel for the junior officers usually involved in these incidents can undermine the impartiality of investigating and reviewing officers. Because the primary victim frequently precipitates the deadly interaction by aberrant behaviour, there is a tendency to characterise the involved officers' actions as a matter of operational judgment that can't be validly critiqued.

Consequently, for the assessment of compliance with police policies to be independent, it needs to be undertaken by an agency external to the NSWPF.

Similarly, if the testing of the findings and substance of the investigation is to be independent that also needs to be undertaken by an external agency.

The State Coroner considers the Ombudsman can initially best undertake these tasks, notwithstanding they will be further considered during the inquest and by disciplinary or prosecuting authorities if the evidence warrants it.<sup>33</sup>

We concur with the State Coroner's comments about the need for agencies to work collaboratively while maintaining independence, and have made recommendations in our previous submissions to amend the *Critical Incident Guidelines* to clarify the respective roles and responsibilities of the NSWPF, the Ombudsman and the Coroner in relation to the oversight of critical incident investigations. We discuss these issues further in Chapter 6 – Functional Overlap.

Attached to this submission are copies of our special report to Parliament about the Laudisio-Curti investigation, our submission to Mr McClelland's inquiry and our response to his report. All are on the public record. With the consent of the State Coroner, we have attached a copy of the Coroner's response to Mr McClelland's recommendations.

The Ombudsman and the other relevant stakeholders are awaiting the advice of government about its response to the McClelland review.

#### **5.5.2. *Police decisions to 'suspend' complaints about critical incidents***

In our view, a key deficiency that must be addressed under any revised arrangement relates to situations where police fail or refuse to comply with NSWPF's *Critical Incident Guidelines*.

Police have recently adopted a practice of 'suspending' an investigation for the purpose of the Police Act until after the coronial inquest has been completed. This is at odds with the stated intent of the

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<sup>33</sup> 'Response of the State Coroner to McClelland recommendations', 2014 – see Annexure F.

*Critical Incident Guidelines*, which emphasise the NSWPF's commitment to 'investigating all critical incidents in an effective, accountable and transparent manner'. The guidelines provide for investigations to be conducted in a way that concurrently fulfils police obligations to the Coroner under the Coroners Act and the requirement to investigate complaints about police conduct under the Police Act in a timely and effective manner

The NSWPF recently advised the Ombudsman of its decision to 'suspend' an investigation of a complaint about police involved in a critical incident that had commenced under Part 8A of the Police Act until after the finalisation of the coronial inquest. This decision to defer the investigation relied in part on a concern that information obtained during the Part 8A investigation would be inadmissible in the coronial proceedings by virtue of section 170 of the Police Act. Section 170 provides that certain documents brought into existence for a Part 8A investigation are not admissible in evidence in certain proceedings, and may therefore pose practical problems in the effective conduct of both criminal and coronial proceedings. We have not been able to identify any cogent reason why this section should apply to criminal prosecutions and coronial proceedings, and therefore have recommended amending the section to create exceptions for these matters – see Annexure A. While critical incident investigators need to be mindful of section 170, we do not consider that it should result in the Ombudsman being unable to oversight a critical incident investigation.

In relation to the decision to 'suspend' the Part 8A investigation, the NSWPF advised us as follows:

The NSW Police Force has determined that any access to critical incident investigations will be assessed on a case by case basis taking into consideration the views of the Critical Incident Investigation Team, current legislation, whether the Coroner is involved or not given the important oversight role he plays in investigations involving deaths, the impact of possible competing oversight on investigations and the public interest associated with the matter.<sup>34</sup>

The Police Act is designed to allow the Ombudsman to independently determine whether it is in the public interest for a complaint to be investigated by the Commissioner and, if so, whether it should be monitored in 'real time'. The position taken by the NSWPF undermines the fundamental principles of the current police complaint system.

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<sup>34</sup> Letter from the Commissioner of Police to the Ombudsman, 17 March 2015, ref. C/2014/7336.

## **5.6. Historical gaps in the system relating to the NSW Crime Commission**

Given that the current review of police oversight appears in part to have been established in response to the findings made by the Legislative Council Select Committee on the ‘Conduct and Progress of the Ombudsman’s Inquiry Operation Prospect’ (the Select Committee), we believe that it is appropriate to comment on the Select Committee’s findings that suggested ‘gaps in the current system’. (Our comments are also relevant to the sixth term of reference relating to the NSW Crime Commission.)

The Select Committee said:

The fact that the allegations arising from Operation Mascot more than 15 years ago have failed to be addressed by the current system is clear evidence of its dysfunction. It is important to note that the delays and lack of resolution impact as seriously on police, who are the subject of unresolved allegations and inordinately delayed investigations, as they do on the public. Both the public and police have a right to expect that if a complaint is made against police then it will be dealt with quickly, fairly and independently. The existing system largely fails on all three of these measures.<sup>35</sup>

We wish to make the following observations:

In October 2012, the NSW Government announced that the Ombudsman would investigate allegations concerning the conduct of officers of the NSWPF, the NSW Crime Commission and the PIC in relation to a number of joint investigations which occurred between 1998 and 2002. These investigations included Operations Mascot and Florida, and were mostly joint-agency investigations. The allegations included a wide range of serious misconduct occurring over a significant period of time.

The delays associated with the investigation of complaints relating to Operation Mascot before 2012 were unreasonable and have had a serious impact on complainants, on police the subject of allegations, and on the three agencies that were part of the joint operations the subject of these complaints. The actions taken by the agencies to deal with these complaints will be the subject of the Ombudsman’s special report to Parliament following the conclusion of Operation Prospect and for that reason will not be the subject of further detailed discussion in this submission.

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<sup>35</sup> Select Committee on the Conduct and Progress of the Ombudsman’s Inquiry “Operation Prospect”, *The conduct and progress of the Ombudsman’s inquiry “Operation Prospect”*, 25 February 2015.

The Ombudsman was unable to deal with these complaints prior to the establishment of Operation Prospect because he did not have jurisdiction to investigate the conduct of the NSW Crime Commission or the PIC. This situation was only remedied by legislative amendments to the *Ombudsman Act 1974* commencing on 26 November 2012.

The reasons for the delay in investigating these particular complaints involved unique and exceptional circumstances. Therefore, for this reason, we do not agree with the Select Committee's assertion that the delays associated with dealing with allegations arising from Operation Mascot constitute 'clear evidence' of dysfunction in the broader system for oversighting NSWPF investigations into complaints about police.

There was a gap in the system of civilian oversight of police working for the NSW Crime Commission. This gap has now been remedied by the Parliament. On 22 April 2013, the Hon Graham Bar was appointed as the inaugural Inspector of the Crime Commission. The Inspector's functions include dealing with complaints of misconduct and maladministration by the Crime Commission and its officers.

## 6. Functional overlap between oversight bodies

In this chapter we discuss the third term of reference for Mr Tink’s review: *Functional overlap between the oversight bodies and if that contributes to ineffectiveness, unnecessary complexity, inefficiencies, or impairs transparency or accountability.*

We begin by discussing concerns about the oversight of police investigations into critical incidents, then examine the operation of the police complaint system as a whole.

### 6.1. Functional overlap in relation to the oversight of critical incident investigations

At the conclusion of its recent inquiry, the Legislative Council Select Committee on the Conduct and Progress of the Ombudsman’s Inquiry ‘Operation Prospect’ cited various concerns about the current police complaints system. At the heart of its concerns was a perception that:

[7.49] ... there are several agencies with responsibility for investigating police actions, conduct or corruption in New South Wales. This multi-agency approach can be confusing and has the potential to undermine each agency’s findings.<sup>36</sup>

A close examination of the evidence provided to the Select Committee suggests that its concern about overlapping functions related primarily to the external oversight of police critical incident investigations. As discussed in the previous chapter, these issues were canvassed extensively in our submissions to the McClelland Review, whose terms of reference included ‘*an examination of the responsibilities of oversight agencies, whether there is any unnecessary duplication, and if so, how that might be resolved*’. While we do not propose to reproduce our arguments in full in the present submission, we mention some of the information in those documents here because it is relevant to the issue of ‘functional overlap’ between oversight bodies.

### 6.2. Concerns about ‘functional overlap’ between the Coroner and the Ombudsman

The roles of agencies that may be involved in a critical incident investigation, including the Coroner and the Ombudsman, have been outlined in Chapter 5. As discussed, the purpose of a critical incident investigation is twofold:

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<sup>36</sup> Select Committee on the Conduct and Progress of the Ombudsman’s Inquiry “Operation Prospect”, *The conduct and progress of the Ombudsman’s inquiry “Operation Prospect”*, 25 February 2015.



- It enables the NSWPF to identify, and take timely and appropriate action to address, any criminal conduct by police officers, misconduct by police, and or deficiencies in policy, procedures, practices, training or systems.
- In relation to critical incidents involving the death of a person, the evidence can later be used to assist the Coroner to conduct an inquest into the death.

Under the *Coroners Act 2009*, the Coroner is responsible for inquiries into deaths in police custody, such as deaths in police cells, police shootings and police pursuits (s.23 and s.27(b)). The main statutory function of a coronial inquest is to establish and make findings about the death of the person, particularly the person's identity, the date and place of the death, and the manner and cause of death. The coroner may give directions, including directions to police officers, 'concerning investigations to be carried out for the purposes of coronial proceedings or proposed coronial proceedings' (s.51) The Coroner's findings may include recommendations about individual police officers and NSWPF policies and procedures.

The Ombudsman may receive a complaint relating to the death of a person during policing activities that is also the subject of a coronial inquiry. In these circumstances the NSWPF may have concurrent obligations to conduct an investigation under both the Coroners Act and the Police Act. As previously noted at section [5.2.4], until recently the NSWPF successfully managed these concurrent obligations by applying the *Critical Incident Guidelines*. Indeed, a primary function of the guidelines was to ensure that any concerns about police conduct were addressed as part of the critical incident investigation.

Concerns about overlapping functions of the Coroner and the Ombudsman arose in the context of the critical incident investigation into the death of Mr Roberto Laudisio-Curti. This matter was the subject of both a NSWPF complaint investigation monitored by the Ombudsman and a coronial inquiry.

Since 1 July 2009, the Ombudsman has exercised his powers under section 146 of the Police Act to monitor police complaint investigations relating to three critical incidents. The investigation into the death of Mr Roberto Laudisio-Curti is the only occasion on which concerns have been raised about the overlapping functions of the Ombudsman and the Coroner.

The submission by the Commissioner of Police to the McClelland Review suggested that the overlapping functions of the Coroner and the Ombudsman had resulted in conflicting requirements being imposed on the police critical incident investigators, and that the Coroner and the Ombudsman had reached inconsistent findings about the quality of the critical incident investigation.

Unfortunately, in dealing with these suggestions, Mr McClelland's report contained a number of statements and contentions that were factually inaccurate, including an inaccurate characterisation of the Ombudsman's role in monitoring investigations pursuant to section 146 of the Police Act.

Mr McClelland provided the following summary about the agency submissions in his report:

... the relevant Agencies do have overlapping responsibilities in respect to the investigation of critical incidents... To a degree, the Agencies are managing issues of overlapping responsibilities. However, this can be done in a more coordinated and cooperative way. Further, it is clear that there are some issues that give rise to significant tension, particularly at the important investigatory/coronial stage that require legislative resolution.<sup>37</sup>

The model proposed by Mr McClelland would expand the role of the Ombudsman by requiring police to notify all critical incidents to this office. However, Mr McClelland sought to address concerns about the perceived overlap in the roles of the Coroner and the Ombudsman by removing our ability to monitor a critical incident investigation in 'real time' under section 146 of the Police Act.

I am of the view that the tension that existed between the Coroner and the Ombudsman, with respect to the investigation of the death of Mr Laudiso-Curti, can be resolved and the Government's goal of improving public confidence in the justice system can be enhanced by adopting a commonsense position whereby the Ombudsman is empowered to provide oversight of the investigation of critical incidents without exercising intrusive powers that have the potential to interfere with either the process of the investigation or, in the case of a death, a Coronial inquest.

Accordingly, I will recommend that the Government give consideration to amending the Police Act to include a specific part requiring notification of police critical incidents to the Ombudsman and empowering the Ombudsman to undertake appropriate oversight without exercising powers which have the potential to unreasonably intrude into the investigative process or the Coronial process by making or giving directions that may be at odds to those given by the Coroner.<sup>38</sup>

In the Ombudsman's response to Mr McClelland's report he said:

Mr McClelland refers (at 7.170) to the potential for 'inconsistent instructions' between this office and the Coroner during a critical incident investigation involving a death. Mr McClelland suggests that 'a

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<sup>37</sup> *Oversight of Police Critical Incidents*, Report to the Hon Barry O'Farrell Premier of NSW by the Hon Robert McClelland 29 Nov 2013.

<sup>38</sup> *Oversight of Police Critical Incidents*, Report to the Hon Barry O'Farrell Premier of NSW by the Hon Robert McClelland 29 Nov 2013, p. 69.

critical incident investigation, involving death, is intended to be shaped by instructions from the Coroner and a Part 8A investigation can be shaped by instructions from the Ombudsman’.

The Coroner has the discretionary power to direct that police officers conduct certain investigations for the purpose of the coronial proceedings. The Ombudsman has no power to direct or issue instructions to investigators. We can only request that certain matters be taken into account. There is no obligation on the Commissioner of Police to accede to any requests as he has the discretion to investigate as he thinks fit.

Accordingly, I do not accept the contention that oversight of critical incident investigations has the potential to cause inconsistent instructions. I would note that the investigators, rather than the Coroner or the Ombudsman, are responsible for conducting and ‘shaping’ the investigation. However, if the investigators feel that there are ‘inconsistent instructions’, then these should be raised with the Coroner who in turn could discuss and cooperatively resolve any differences with the relevant agency.<sup>39</sup>

The model proposed by Mr McClelland does not adequately address the gaps in the current system described in Chapter 5, or meet the minimum requirements for effective civilian oversight which include ‘real time’ monitoring of critical incident investigations. Significantly, it would provide a lower level of police accountability for critical incidents than for complaints about much less serious conduct – for example, a complaint about an unreasonable search or arrest.

In contrast to the model suggested by Mr McClelland, the Coroner said that the Ombudsman should have the discretion of using monitoring powers similar to those contained in section 146 of the Police Act, whereby officers of the Ombudsman may be present during interviews and may confer with investigators about the conduct and progress of an investigation. The Coroner recognised that:

It is important that the monitoring or oversight of an investigation does not negatively impact upon it, as would occur if the investigators were given inconsistent or impractical directions.<sup>40</sup>

However, he went onto say:

In view of the limited and circumscribed power of the Ombudsman to monitor under s 146, it is difficult to envisage this occurring provided the section is strictly complied with.<sup>41</sup>

We agree with the Coroner’s analysis on this issue.

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<sup>39</sup> NSW Ombudsman response to Mr McClelland’s report, 5 February 2014 – see Annexure D.

<sup>40</sup> ‘Response of the State Coroner to McClelland recommendations’, 2014 – see Annexure F.

<sup>41</sup> ‘Response of the State Coroner to McClelland recommendations’, 2014 – see Annexure F.

Significantly, a recent report by the Parliamentary Joint Committee on the Ombudsman, the PIC and the Crime Commission noted, but did not accept, Mr McClelland's findings with respect to overlap in the oversight of critical incident investigations.

The Committee is not convinced that duplication exists in respect of the oversight of police critical incidents. Each agency involved performs distinct and valuable oversight roles in relation to the way that police respond to critical incidents. The Ombudsman monitors and reports on police investigations into critical incidents, such as the death of Roberto Laudisio-Curti. In addition to investigating police misconduct connected with critical incidents, the PIC is undertaking research work to ensure critical incidents are prevented and investigated appropriately. The Committee supports the PIC and Ombudsman's work and considers that prevention and research, and monitoring of police investigations into specific critical incidents, are vital to the management of critical incidents.<sup>42</sup>

It remains our view that there is a clear public interest in establishing an effective system for civilian oversight of critical incident investigations conducted by police, and that the overlapping functions of agencies can be adequately managed by clearly articulating the roles and responsibilities of each agency.

### **6.3. 'Functional overlap' between the Ombudsman and the PIC**

The Select Committee suggested that the overlapping roles of agencies in relation to critical incident investigations was evidence of a general dysfunction in the police complaints system, and that this was an important factor behind its call to establish a stand-alone civilian oversight agency for police. In this section, we present evidence about the impact of the potentially overlapping roles of the PIC and the Ombudsman on the general operation of the police complaints system. The data suggests that the claims of widespread 'dysfunction' in the current system are unfounded.

#### **6.3.1. *Responsibility for oversight of complaints about police***

In Chapters 2 and 3 we described the distinct and complementary roles of the Ombudsman and the PIC. Although the Ombudsman and the PIC both have a role in the oversight of police, in practice there is minimal overlap. The Ombudsman has primary responsibility for overseeing complaints about police; the PIC is responsible for investigating and preventing corruption.

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<sup>42</sup> NSW Parliament, Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission, Report 8/55 – August 2014, 2014 General Meetings, at [1.30].

Table 1 below provides information about the number of police complaints received by the NSWPF between the financial years 2009-2010 and 2013-2014, and how many of those complaints were oversights by the Ombudsman and the PIC respectively.

**Table 1: Formal complaints about police handled by agency, 1 July 2009 to 30 June 2014**

	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014
<b>NSW Police Force</b>	5196	5516	5135	4928	4995
<b>Ombudsman*</b>	3093	3278	3390	3178	3249
<b>PIC#</b>	50	51	39	19	24

\* NSW Ombudsman, *Annual Report 2013-2014*. # Police Integrity Commission Annual Reports.

Consistent with the key functions of each agency as described in Chapter 3, the Ombudsman oversights between 60% and 65% of police complaint investigations, whereas the PIC oversights less than 1% of such investigations. As the PIC's direct access to police databases, including c@ts.i, means that it can readily access a wide array of information about complaints investigated under Part 8A, it rarely needs to oversight a police complaint investigation. This is reflected in the data.

Furthermore, when the PIC does advise the NSWPF of its decision to take over the oversight of a police complaint inquiry, it consults with the Ombudsman before doing so. Following a decision by the PIC to oversight a complaint, we have no further involvement.

Similarly, if the PIC decides to directly investigate a complaint, the matter is no longer dealt with as a complaint under the Police Act, and the Ombudsman has no further involvement.

### **6.3.2. Responding directly to members of the public**

Table 2 below provides information about the number of police-related complaints and inquiries made by telephone or email to each oversight agency.

**Table 2: Telephone and email inquiries about police by agency, 1 July 2009 to 30 June 2014**

	2009-10	2010-11	2011-12	2012-13	2013-14
<b>Ombudsman – all inquiries</b>	23,797	24,147	23,849	28,041	25,951
<b>Ombudsman – police-related inquiries*</b>	2498	2596	2361	2365	2301
<b>PIC#</b>	637	541	498	864	591

\* NSW Ombudsman, *Annual Report 2013-2014*. # Police Integrity Commission Annual Reports.

The volume of calls received by the NSW Ombudsman reflects its role as the agency primarily responsible for handling complaints about the NSW public sector.

### 6.3.3. *Conflicting decisions by oversight agencies*

The Police Association of NSW made the following claim in its January 2015 submission to the Legislative Council’s Select Committee on the Conduct and Progress of the Ombudsman’s Inquiry ‘Operation Prospect’:

In a system where this are [sic] multiple oversight agencies, a matter may be assessed by one or more agencies as not warranting further investigation, only for another agency to launch a full investigation. In such cases, justice is put at risk and important questions are raised about the reasons for the differing decisions and the appropriateness of the decision to investigate where more than one agency declined to do so.<sup>43</sup>

It is true that the PIC *may* at any stage commence an investigation of any matter relating to a police complaint, and may do so even if the NSWPF and the Ombudsman have previously determined that the complaint need not be investigated.<sup>44</sup> Table 3 shows the number of complaints where the PIC has taken over the investigation of a complaint.

**Table 3: Actions taken by PIC in relation to complaints about police, 1 July 2009 to 30 June 2014**

	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014
<b>NSWPF complaint investigations</b>	1894	1977	2155	1874	1742
<b>PIC takes over NSWPF investigation</b>	8	12	13	9	33

\* Source: Ombudsman’s Resolve database, as at June 2015.

Cases involving conflicting decisions by the oversight agencies are extremely rare. Table 3 shows that the PIC took over responsibility for only 75 complaints in the five years between 1 July 2009 and 30 June 2014. In 38 of these cases, the PIC advised the NSWPF of its decision to take over the investigation before the Ombudsman had even been notified of the complaint, or before a decision had been made about the need for an investigation. In 36 cases, the PIC took over an investigation that had already been commenced by the NSWPF.

We found only one case where the PIC took over an investigation of a complaint following a decision by the Ombudsman that an investigation was not required. This clearly shows that the claim that oversight agencies routinely overturn each other’s decisions about complaints is highly misleading.

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<sup>43</sup> Police Association of NSW submission to the Select Committee on the Conduct and Progress of the Ombudsman’s Inquiry “Operation Prospect” pp 23-24.

<sup>44</sup> *Police Integrity Commission Act 1996*, s. 70.

#### **6.4. Whether the functional overlap of oversight bodies contributes to ineffectiveness, unnecessary complexity, inefficiencies, or impairs transparency or accountability**

Since its establishment in 1999, the current system for civilian oversight of police has been the subject of ongoing monitoring by the Parliamentary Joint Committee. Significantly, the committee's 2006 report, *Ten Year Review of the Police Oversight System in NSW*, confirmed that the operation of the system as recommended by Justice Wood was effective, and that the principles underpinning the system remained valid.

The 2011 Statutory Review of the *Police Integrity Commission Act 1996* explicitly rejected the argument that the functions of the various integrity bodies in NSW should be rationalised. While there might be potential synergies achieved from merging some functions, the review concluded that the reasons why the Royal Commission had recommended structural separation of these responsibilities had not changed. Moreover, the instability and upheaval needed to make these kinds of structural changes carries enormous risks.

We recognise the need for a clearer, more transparent system, starting with amendments to the Police Act to clarify and confirm the respective roles of each of the agencies and to streamline some processes. We also recognise the urgent need to address current gaps in the external oversight of critical incident investigations and improve public confidence in the system for overseeing these investigations. However, it is our submission that the functions and roles assigned to the NSWPF, the PIC and the Ombudsman largely reflect the reforms recommended by Justice Wood and that this framework is efficient and effective.

Importantly, the suggestion that the NSWPF is uniquely the subject of oversight by multiple agencies is misplaced. NSW public authorities and agencies are generally the subject of the jurisdiction of a corruption agency, the Ombudsman and WorkCover. The only distinction is that the NSWPF has a dedicated corruption agency in the PIC, and that all other public sector agencies are within the jurisdiction of the ICAC.

##### **6.4.1. *Measuring the effectiveness of the NSW complaints system***

In Chapter 3, we explained that the separation of corruption investigation and complaint oversight functions in NSW is designed to ensure the effectiveness of each of these functions. The role of the Ombudsman is to ensure that police commanders take appropriate managerial action in response to complaints. The information in Table 4 suggests that police take some managerial action in response to the majority of complaints that are investigated.

**Table 4: Action taken by NSW Police following complaint investigation**

	2009-2010		2010-2011		2011-2012		2012-2013		2013-2014	
<b>No action taken</b>	781	41%	874	44%	961	44%	844	45%	765	44%
<b>Management action</b>	1112	59%	1107	56%	1197	55%	1034	55%	977	56%

Source: NSW Ombudsman, *Annual Report 2013-2014*.

Table 4 shows that the majority of complaints that are investigated by police (and oversighted by our office) ultimately result in the NSWPF taking some management action under Part 9 of the Police Act. This indicates that valuable investigative resources are being appropriately targeted at more serious issues and/or those more likely to require a management response.

A second essential measure of a complaint system is the level of complainant satisfaction with the actions taken in response to a complaint. Table 5 shows information about satisfaction of in relation to complaints investigated by police and oversighted by the Ombudsman.

**Table 5: Complainant satisfaction in relation to complaints about police, 1 July 2009 to 30 June 2014**

	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014
<b>Satisfied</b>	465	462	490	393	326
<b>Not satisfied</b>	198	250	257	196	157
<b>Advice not provided*</b>	166	215	167	222	195

\* Includes all 'police fail to advise' and 'police unable to contact complainant', but excludes anonymous complaints, and investigations initiated in response to police internal reports. Source: Ombudsman's Resolve database, as at June 2015.

The figures indicate a relatively high level of satisfaction with the actions taken by police. Of the complainants contacted by police to seek their satisfaction with the complaints process, the records show that, on average, 67% of complainants reported they were satisfied with the handling of their complaint.

In the next chapter we discuss the fourth term of reference – *Best practice models from around the world*. The information in this next chapter suggests that the current oversight framework in NSW is not only working effectively but that there are significant risks and challenges faced by civilian oversight agencies that combine corruption investigation and complaint oversight functions in a single agency.



## 7. Best practice models from around the world

The Terms of Reference require the review to consider:

Best practice models from around the world, including the UK Independent Police Complaints Commission and their applicability and adaptability to NSW.

This chapter examines the single civilian oversight model currently used to oversight policing in the United Kingdom, and attempts to incorporate various police anti-corruption and complaints oversight functions into broad-based anti-corruption bodies in Queensland, Victoria and Western Australia. In particular, we consider the extent to which the various police oversight models in these jurisdictions are able to undertake statutory functions relating to corruption fighting, the oversight of the police handling of complaints about police misconduct and policing services, and the investigation of critical incidents involving police.

As the following discussion shows, recent reviews of these systems highlight the difficult challenges associated with combining all of these functions within the same agency. Nonetheless, there are lessons to be learned from the work of these agencies, including whether and how their work in relation to these issues can be adapted and applied to NSW.

### 7.1. Single civilian oversight models in the UK and Australia

In considering what ‘best practice’ lessons can be learned from the experience of the IPCC in the United Kingdom and the broad-based civilian oversight models in Australia, we have included information provided by these agencies and from reviews of their functions, particularly the recent reviews of the two most established oversight bodies, the IPCC and the Crime and Corruption Commission in Queensland.

#### 7.1.1. *The United Kingdom’s Independent Police Complaints Commission*

The Independent Police Complaints Commission (IPPC) was established by *Police Reform Act 2002* and commenced in 2004. Its main statutory functions are to oversight the systems for handling complaints about police in England and Wales, carry out its own investigations into the most serious allegations of police misconduct, and review appeals about police decisions in relation to complaints.<sup>45</sup>

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<sup>45</sup> Home Office, *Triennial review of the Independent Police Complaints Commission (IPPC)*, March 2015, at para [10].

The IPCC has 804 staff in sites across England and Wales, including 152 staff supporting its ongoing inquiry into the 1989 Hillsborough disaster.<sup>46</sup> Staffing is expected to increase to about 1000 in 2016.<sup>47</sup> The IPCC's budget for 2013-14 was £33.2m, with an additional £4.9m of capital spending and £8.9m in supplementary funding for its Hillsborough inquiry.<sup>48</sup> Its total budget allocation was increased to £73 million in 2014-15, and £78 million for 2015-16.<sup>49</sup>

The IPCC typically investigates about 150 cases a year while also providing supervision and management to investigations conducted by police professional standards departments, as well as handling appeals.<sup>50</sup> Following the recent increases to its funding, the IPCC opened 241 independent investigations in 2014-15 (the target was 186); and closed 120 independent investigations (more than in any previous year).<sup>51</sup>

In 2013-14, police forces across England and Wales recorded a total of 34,863 complaints. In the same year, the IPCC received 3176 complaint referrals from police forces, and 4079 appeals about the handling of complaints by police.<sup>52</sup> In practice, most complaints about the 43 police forces in England and Wales and other law enforcement bodies within the IPCC's jurisdiction are dealt with by police by way of local resolution or local investigation (usually by a supervisor or manager).

The requirements relating to police complaints system are set out in the *Police Reform Act 2002*, the *Police Reform and Social Responsibility Act 2011* and various supporting regulations, and are supported by a 135-page Statutory Guidance issued by the IPCC. Former IPCC Commissioner, Deborah Glass, has said that, in practice, the UK model:

- Relies on police to register and refer complaints and conduct matters.
- Requires the most serious matters to be referred to the IPCC, but provides the resources to investigate only a small fraction of those.
- Provides for four levels of investigation, only one of which is independent of the police.
- Provides five different rights of appeal to two different appeal bodies, one of which is independent of the police.
- Provides for little in the way of outcomes – the legislation allows the IPCC to recommend criminal, misconduct and unsatisfactory performance proceedings, but

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<sup>46</sup> Staffing as at 31 March 2015. Figures provided by IPCC, 12 June 2015.

<sup>47</sup> Figures provided by IPCC, 12 June 2015.

<sup>48</sup> Home Office, *Triennial review of the Independent Police Complaints Commission (IPCC)*, March 2015, at para [15].

<sup>49</sup> Figures provided by IPCC, 12 June 2015.

<sup>50</sup> Home Office, *Triennial review of the Independent Police Complaints Commission (IPCC)*, March 2015, at para [15].

<sup>51</sup> Figures provided by IPCC, 12 June 2015.

<sup>52</sup> Independent Police Complaints Commission, *Annual Report 2013-14*.

there is no clear statutory basis for the IPCC to make findings and recommendations about broader issues.<sup>53</sup>

A positive feature of the IPCC model is that it makes clear provision for the investigation of critical incidents, especially deaths following contact with police. However, the IPCC has the resources to directly investigate only some of these matters. Of the total referrals received by the IPCC (including mandatory referral of critical incident matters where no complaint has been made), about 94% are referred back to be dealt with by the police themselves, sometimes with some IPCC oversight.<sup>54</sup>

### Recent reviews

In recent years, the IPCC has been the subject of numerous reviews. A House of Commons Home Affairs Committee report on the IPCC in February 2013 found that:

... the IPCC is woefully under-equipped and hamstrung in achieving its original objectives. It has neither the powers nor the resources that it needs to get to the truth when the integrity of the police is in doubt... It lacks the investigative resources necessary to get to the truth; police forces are too often left to investigate themselves; and the voice of the IPCC does not have binding authority.<sup>55</sup>

By far the strongest concerns about the current scheme were voiced by the IPCC itself. In its February 2015 submission to a government inquiry into police complaints, the IPCC highlighted numerous gaps and deficiencies in the system for overseeing police forces in England and Wales:

The IPCC has long called for reform of the complaints and discipline systems. We have said that the complaints system is extremely complex, bureaucratic and slow, and that it is too focused on blame and individual conduct rather than resolution and systemic issues. We have also said that the police discipline system is not sufficiently independent or transparent. We have concerns about the quality of decision-making in some cases, and the timeliness with which it operates.<sup>56</sup>

Despite a boost to IPCC funding and the promise of legislative and other changes to start tackling some concerns, the current chairwoman of the IPCC, Dame Anne Owers, said much more is needed:

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<sup>53</sup> Glass, D. *Towards greater public confidence – A personal review of the current police complaints system for England and Wales*, March 2014.

<sup>54</sup> Glass, D. *Towards greater public confidence – A personal review of the current police complaints system for England and Wales*, March 2014.

<sup>55</sup> House of Commons Home Affairs Committee, note 227, page 4.

<sup>56</sup> IPCC submission to Home Office consultation, February 2015, at para [9].

We urgently need radical reforms to the system as a whole, to make it more accessible and straightforward, and to strengthen independent oversight.<sup>57</sup>

Among the concerns listed by the IPCC as requiring priority attention was that the current system of investigations and appeals lacks flexibility, is excessively concerned about questions of process, and is often unable to address the substance of issues raised. The IPCC emphasised that the limits on its powers to recommend procedural changes were a critical constraint on its effectiveness.

... we would support an Ombudsman-like role, with the ability to make determinations and recommend remedies, in place of our existing appellate function. This would play an important part in simplifying the complaints system and directing it towards resolution and remedy.<sup>58</sup>

A number of reforms are currently being considered as part of the Government's response to a triennial review of the functions, efficiency and governance of the IPCC published in March 2015.

### **7.1.2. *Queensland's Crime and Corruption Commission***

Queensland, Victoria and Western Australia each use broad-based anti-corruption commissions to review police complaint handling and investigate certain complaints and issues of misconduct. Of these, Queensland's Crime and Corruption Commission (CCC) is the most comprehensive, with established systems in place to support a range of investigative and oversight functions.

Until recently, the CCC was known as the Crime and Misconduct Commission (CMC), which was established through a merger of the former Criminal Justice Commission and the Queensland Crime Commission in 2002. In 2014 the CMC was renamed the CCC, and the *Crime and Misconduct Act 2001* was amended and renamed the *Crime and Corruption Act 2001*. The previous focus on 'official misconduct' was replaced with 'corrupt conduct' – a term which is more narrowly defined.

The CCC has a wide remit, part of which is to enhance integrity in the Queensland Police Service (QPS). The CCC performs a range of functions, including investigations, monitoring, capacity building, prevention, conducting research, intelligence gathering and protecting witnesses. Under the *Crime and Corruption Act 2001* police, like other public sector officials, are subject to the provisions regarding 'corrupt conduct'. They are also subject to provisions regarding 'police misconduct', which includes any police conduct that is 'disgraceful, improper or unbecoming a police officer; shows

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<sup>57</sup> Daily Mail Australia, *Police complaints needs reform*, 26 May 2015.

<sup>58</sup> IPCC submission to Home Office consultation, February 2015, at para [170].

unfitness to be or continue as a police officer; or does not meet the standard the community reasonably expects of a police officer.’<sup>59</sup> Under section 40, the CCC provides a direction to the QPS about the complaints it must notify. We understand that the CCC will soon reissue this direction to reflect the recent changes that raised the legislative threshold of matters that must be notified and reduce the number of matters that the QPS refers to the CCC.

When a complaint is within jurisdiction, the CCC can choose to investigate the allegations or refer the complaint to the agency concerned. In practice, the majority of complaints about police are referred back for the QPS to investigate in accordance with the ‘devolution’ provisions in the Act (s.34) which call for the CCC to refer as many matters as possible to the relevant agency for handling.

The CCC monitors how agencies deal with complaints by carrying out reviews and audits, as well as providing advice. For example, the CCC is expected to help agencies to build their own capacity to investigate matters that do not require the resources or special powers of the CCC, and provides guidelines for investigating that include case scenarios. There is also the capacity for the CCC to conduct co-operative investigations with the QPS.

The percentage of complaints investigated by the CCC has decreased over recent years. Recent reviews indicate that the CCC investigates about 2% of matters and refers about 80% to the QPS to deal with.<sup>60</sup> Of the rest, most are the subject of preliminary inquiries, often resulting in a decision of ‘no further action warranted’.

In 2013-14, the CCC’s budget was \$52.2 million and it had 329 full-time equivalent staff. In total, it received 1839 complaints containing 4398 allegations against police. The CCC conducted 61 misconduct investigations (all agencies), including 27 investigations into 150 allegations of police misconduct.<sup>61</sup> Most complaints were referred back to the QPS for investigation with no direct CCC oversight. However, matters that are not subject to individual review may be captured by the CCC’s audit program.<sup>62</sup>

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<sup>59</sup> *Crime and Corruption Act 2001*, Schedule 2 (Dictionary), definition of ‘police misconduct’.

<sup>60</sup> Report by the Independent Expert Panel, Simone Webbe, Hon. Glen Williams AO, QC, Felix Grayson APM, *Simple Effective Transparent Strong: An independent review of the Queensland police complaints, discipline and misconduct system*, May 2011.

<sup>61</sup> 2013-14 CMC *Annual Report*.

<sup>62</sup> Email advice provided by the CCC, 23 June 2015.

## Recent reviews of police oversight in Queensland

The CCC and its predecessor, the CMC, have recently been the subject of a series of critical reviews. In early 2009, government consultations highlighted concerns about the credibility of the police complaints, discipline and misconduct system. In response, the Attorney-General asked the CMC to review its processes for managing police discipline and misconduct cases. The CMC made 11 recommendations to improve the system and to ensure police accountability and integrity, including a proposal that the QPS, in conjunction with the CMC, review police complaints management policies and procedures with a view to creating a ‘simple, effective, transparent and strong’ system.

In response, the government appointed a panel of independent experts to conduct a further review. The work of this panel was overseen by a steering committee consisting of the CMC Chairperson, the Commissioner of Police and the Director-General of the Department of the Premier and Cabinet. In May 2011, the expert panel finalised a report entitled *Simple Effective Transparent Strong: An independent review of the Queensland police complaints, discipline and misconduct system*,<sup>63</sup> which opened with the following observation:

The Queensland police complaints, discipline and misconduct system is dysfunctional and unsustainable. Complainants and police are subjected to a complex, administratively burdensome, overly legalistic and adversarial process that is dishonoured by chronic delays, inconsistent and disproportionate outcomes.<sup>64</sup>

The expert panel continued:

The objective of the devolution policy implemented under the *Crime and Misconduct Act 2001* was to effect *quicker remedial* responses to complaints through police management taking responsibility. In the decade since, neither [the] remedial nor timely objective has been achieved. Implementation was flawed in essential respects because although the legal responsibilities and rationale moved to a capacity building intent for police to manage police conduct, the legislative and procedural complaints system itself remained an outdated and ineffectual orthodoxy of discipline and punishment. Public confidence was compromised by more ‘*police investigating police*’.<sup>65</sup>

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<sup>63</sup> Report by the Independent Expert Panel, Simone Webbe, Hon. Glen Williams AO, QC, Felix Grayson APM, May 2011.

<sup>64</sup> Report by the Independent Expert Panel, Simone Webbe, Hon. Glen Williams AO, QC, Felix Grayson APM, *Simple Effective Transparent Strong: An independent review of the Queensland police complaints, discipline and misconduct system*, May 2011.

<sup>65</sup> Report by the Independent Expert Panel, Simone Webbe, Hon. Glen Williams AO, QC, Felix Grayson APM, *Simple Effective Transparent Strong: An independent review of the Queensland police complaints, discipline and misconduct system*, May 2011.

The review concluded that the police complaints, discipline and misconduct system in Queensland should strengthen the focus on remedial outcomes, manage risks according to the circumstances, and look beyond discipline and punishment when implementing solutions. The panel made 57 recommendations to improve the system. In its August 2011 response to the report, the Queensland Government accepted 56 of the 57 recommendations.

In 2012, the newly elected Newman Government commissioned a further review of the CMC. Then, while that review was under way, the CMC's parliamentary committee convened a series of hearings in early 2013. These inquiries led to the following reports:

- Parliamentary Crime and Misconduct Committee, Inquiry into the Crime and Misconduct Committee and the destruction of Fitzgerald Commission of Inquiry documents, tabled 5 April 2013,<sup>66</sup> and
- Independent Advisory Panel (the Hon. Ian Callinan AC & Prof. Nicholas Aroney), *Review of the Crime and Misconduct Act 2001 and related matters*, tabled 18 April 2013.<sup>67</sup>

In its July 2013 response to both reports, the government accepted the Independent Advisory Panel's call for '*a large reduction in the matters going to, and being dealt with ... by the CMC*', noting that:

The Government agrees the number of complaints being made to the CMC act as a distraction for the CMC and divert the limited resources of the CMC away from its primary functions of crime prevention and detection and the investigation of official misconduct.<sup>68</sup>

The government subsequently committed to measures intended 'to reduce the number of complaints dealt with by the CMC', including:

- Redefining 'official misconduct' to restrict CMC reviews to issues of corruption
- Requiring complainants to swear a statutory declaration that the complaint is not baseless (at the time of making the complaint) to deter '*vexatious or intractable*' complaints, and
- Raising the threshold for when chief executives must report suspected official misconduct for CMC assessment.

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<sup>66</sup> <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T2923.pdf>

<sup>67</sup> <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T2447.pdf>

<sup>68</sup> 'Queensland Government Response to the Parliamentary Crime and Misconduct Committee Report No. 90 and the Independent Advisory Panel report', <http://www.cabinet.qld.gov.au>. Accessed 16 June 2015.

Amendments to the *Crime and Misconduct Act 2001*, which included a new governance structure for the CCC, and requirements that the commission limit its focus to preventing serious crime and serious corruption, commenced on 1 July 2014.

On 9 June 2015, the Acting Chair of the Parliamentary Crime and Corruption Committee announced a statutory review into the activities of the CCC. The committee must report to Parliament by 30 June 2016 on any action required in relation to the Act or the functions, powers and operations of the CCC.

### **7.1.3. *Anti-corruption commissions in Victoria and Western Australia***

Two of the newest oversight agencies in Australia are Victoria's Independent Broad-based Anti-Corruption Commission, and the Corruption and Crime Commission in Western Australia.

#### Independent Broad-based Anti-Corruption Commission (IBAC)

IBAC was established in 2013 to replace the Office of Police Integrity, which began in 2004. In 2013-14, IBAC had total expenses of \$27.3 million and, as at 30 June 2014, employed 142 full-time equivalent staff. Like the CCC in Queensland, IBAC has responsibility for identifying and preventing corruption across the public sector.

Under section 57(2) of the *Independent Broad-based Anti-Corruption Commission Act 2011* and Part 9 of the *Victorian Police Act 2013*, Victorian Police must refer to IBAC all complaints about police misconduct, including customer service matters. IBAC assesses and reviews these complaints to determine whether to dismiss the complaint; make preliminary inquiries; investigate; or refer the matter back to police. Of the 4860 allegations (all agencies) assessed by IBAC in 2013-14, 3595 (74%) involved Victoria Police. In that year, IBAC also commenced 24 investigations and completed 15 investigations (all agencies), completed 79 reviews of police cases, and made 1427 referrals to Victoria Police.<sup>69</sup>

Consistent with its charter, IBAC only investigates complaints of serious corrupt conduct. However, IBAC can conduct coordinated investigations with police, monitor/review referred inquiries, and recall referred investigations to investigate itself.

In relation to critical incidents involving police, Victoria Police must notify IBAC of certain incidents and IBAC then determines whether to dismiss, investigate or refer. IBAC advised that most critical

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<sup>69</sup> Advice provided by IBAC 17 June 2015, ref CD/15/2210.



incidents are referred back to police but are subject to review by IBAC. There are no specific legislative requirements. Instead, IBAC advised that it has ‘a standing own motion investigation to review cases of death and/or serious injury associated with police contact’.<sup>70</sup> The purpose of these reviews is to independently assess the adequacy of the Victoria Police investigation and identify any issues to be remedied.

### Corruption and Crime Commission (CCC)

In Western Australia, section 28 of the *Corruption and Crime Commission Act 2003* requires WA Police to refer all complaints about police misconduct and any reviewable police action to the CCC for assessment. However, CCC also has administrative guidelines in place that allow police to disregard these requirements in relation to very minor complaints.

Upon receiving a complaint, the CCC assesses the matter in order to determine whether the matter should be dismissed, referred with no oversight, or referred but require a report from police. The CCC may also directly investigate, initiate a joint investigation, or refer it for a police investigation that is subject to CCC monitoring. It can also can reinvestigate poor police investigations.

The CCC advised us that they currently have 156 staff and a budget of \$32.4 million but, as a result of recent budget cuts, will need to reduce the number of staff by about 20. As its statutory obligation is to focus on corruption, we understand the cuts will mainly affect its complaint handling and oversight functions. Currently, 40% to 50% of complaints that are referred to the CCC are police complaints. In 2013-14, 365 complaints were finalised by the CCC. Of these, 168 related to police. The majority of police complaints are referred back to police by the CCC. The CCC currently oversees the most serious matters. However, it repeatedly emphasised that its provisions require it to focus on corruption, and that its limited resources are therefore focused on that issue.

## **7.2. The applicability and adaptability of single oversight models to NSW**

The experience of the IPCC single civilian oversight model and the broad-based complaints and anti-corruption bodies in other Australian jurisdictions provides important clues to what benefits might, or might not, be achieved as a result of adopting these models in NSW. In looking for any ‘best practice’ lessons to be learned from police oversight models elsewhere, one crucial lesson is that no oversight system can ever be entirely independent. Recent reviews of the IPCC and the CCC in Queensland

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<sup>70</sup> Email advice provided by IBAC 17 June 2015, ref CD/15/2210.

emphasise a number of concerns about both models. However, those agencies' own submissions provide valuable guidance on how those problems might be addressed. Where possible, we have endeavoured to include information provided by the agencies themselves in our examination of those models and their applicability to NSW.

In assessing whether NSW should replace its existing complaints oversight and police corruption framework with a single civilian oversight model for police such as that established in the UK, or perhaps incorporate various police oversight functions within an anti-corruption body such as the models established in Queensland, Victoria and Western Australia, consideration should also be given to the following issues:

### **7.2.1. *A fully independent police complaints and anti-corruption agency***

One of the reasons the Select Committee on the Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect' recommended that consideration be given to establishing a single civilian oversight body in NSW was that:

It is also problematic when police have to investigate their own, particularly given the conflict of interest between officers' obligations to their colleagues and the public. Most police complaints are indeed managed internally and the committee believes that this conflict of interest is both inappropriate and counterproductive.<sup>71</sup>

The experience in other jurisdictions indicates that no police integrity system can ever be fully independent of the police it is responsible for investigating and overseeing. Even the IPCC, regarded by some as a potential best practice model because of its formal powers to independently investigate complaints, relies heavily on police forces to handle the majority of complaints. In 2013-14, police forces across England and Wales recorded a total of 34,863 complaints, and dealt with more than 90% with no input or oversight by the IPCC. Of the 3176 complaints (9%) that were referred for IPCC assessment, most were referred back to police for investigation or resolution, often with little oversight.

For members of the public, the main option for seeking an independent review by the IPCC of the way police handled a particular complaint is to endure a frustrating series of reinvestigations and appeals. In 2013-14, of the 4079 appeals to the IPCC about the police handling of a complaint, 1503 (37%)

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<sup>71</sup> Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", *The conduct and progress of the Ombudsman's inquiry "Operation Prospect"*, 25 February 2015, at [7.50].

were about the police decision not to record the matter as a complaint.<sup>72</sup> About half of these appeals were upheld by the IPCC and then referred back to police to handle, usually with no further IPCC involvement, unless the complainant's dissatisfaction with the subsequent police inquiry prompted them to seek a further appeal.

As the data on the number of complaints directly investigated or oversighted in the Queensland, Victoria and Western Australia shows, these broad-based anti-corruption agencies are similarly reliant on police to investigate the majority of complaints about police. However, their complaint oversight responsibilities should be distinguished from their corruption investigation functions which are, because of the covert nature of that work, typically much more independent of police.

The notion of an external oversight body having complete independence is unrealistic – not only because of the enormous costs and specialist investigative resources involved, but also because an integral part of the complaint oversight role is to seek to influence positive changes within the agency that is subject to oversight. This includes police commanders taking responsibility for managing complaints about their staff and services, and holding them to account for their decisions.

#### **7.2.2. *Combining complaint oversight with corruption fighting and critical incident functions***

Not only do the IPCC and the oversight bodies in Australia rely on police to investigate the majority of complaints about police, in most cases, the police complaint investigations are conducted without oversight by these bodies, and with little or no monitoring of the systems used by police. The case data for all of the models in other jurisdictions indicates that there is substantially less oversight of police complaint investigations and complaint handling systems than in NSW.

Only Queensland's Crime and Corruption Commission has effective auditing arrangements in place to check the quality of the systems used by police to respond to complaints. Despite this, recent reviews have recommended – and the Newman government accepted – that there should be far fewer complaints referred to the CCC for assessment, because the CCC's complaint oversight and service improvement functions '*act as a distraction*' to the performance of its anti-corruption responsibilities. Accordingly, measures were introduced to restrict the number of complaints and reports being referred to the CCC for assessment.<sup>73</sup> In our view, there are immense risks associated with removing or diminishing the discretion of an oversight body to determine what complaints it should be advised of.

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<sup>72</sup> Independent Police Complaints Commission, *Annual Report 2013-14*.

<sup>73</sup> 'Queensland Government Response to the Parliamentary Crime and Misconduct Committee Report No. 90 and the Independent Advisory Panel report', <http://www.cabinet.qld.gov.au>. Accessed 16 June 2015.

In Victoria, IBAC acknowledges the importance of providing some degree of oversight of the police handling of matters that are referred back to Victoria Police to investigate or resolve, and has committed to developing an audit tool to assess the quality of ‘Victoria Police complaint handling processes at the local level’.<sup>74</sup>

In Western Australia, the Corruption and Crime Commission has accepted that its legislative functions require it to focus on corruption fighting. Although its powers enable it to oversight police investigations into complaints and critical incidents, the CCC has advised that recent budget cuts will diminish its ability to perform these functions.

Regardless of the oversight model used, it is essential that there be mechanisms in place to ensure commanders are accountable for their decisions in relation to complaints and any action taken to manage their staff. Putting the onus on police commanders to take responsibility for complaints is integral to the complaints oversight role.

Moreover, we believe that best practice in complaints oversight requires mechanisms that enable the external oversight agency to determine what complaints should be notified. It should also provide a capacity for the oversight agency to audit and inspect records relating to complaints that have not been notified to ensure that police are complying with notification requirements, and that these have otherwise been handled appropriately by police.

### **7.2.3. *Factoring in the costs of independent investigations***

Another argument for replacing NSW’s ‘*current system of multiple agencies with overlapping responsibilities*’ with ‘*a single well-resourced oversight body*’ was that the latter would be faster, fairer and more independent of police, government and complainants, and that a single oversight body would be more likely to conduct its own direct investigations. However, as the information about the single civilian oversight model in the UK and the broad-based anti-corruption models in Australia demonstrates, the extent to which any oversight body can directly investigate alleged misconduct by police and make recommendations to improve policing services largely depends on:

- the adequacy of its statutory powers
- the extent to which the agency’s legislative functions require priority to be given to corruption fighting ahead of other statutory functions, and
- whether there are sufficient resources available to undertake this work.

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<sup>74</sup> Advice provided by IBAC 17 June 2015, ref CD/15/2210.

In the case of the IPCC, there are comprehensive arrangements in place requiring the mandatory notification of certain critical incidents involving police in England and Wales, especially deaths following contact with police. In 2013-14, the IPCC was notified of 130 fatalities.<sup>75</sup> However, the IPCC's ability to respond to critical incidents – and its capacity to directly investigate police conduct generally – is heavily constrained by a lack of resources. As the former Commissioner of the IPCC, Deborah Glass, explained, there has always been a significant 'mismatch' between the IPCC's formal powers to directly investigate police, and the resources provided for the commission to perform its statutory functions.

Although it was said that the new body would investigate 1,000 complaints in its first year, when it came to writing out the cheque, the IPCC was funded to carry out 30, the vast majority of which involved deaths, rather than complaints. The number of investigations increased slowly from 31 in 2004 to 130 in 2012, but the vast majority of independent investigations are into deaths and other non-complaint cases.<sup>76</sup>

With recent increases in its total annual funding – from £33.2 million in 2013-14 to £77.8 million for 2015-16<sup>77</sup> – the IPCC has been able to increase its investigative case load from 150 direct investigations a year. In 2014-15 it opened 241 independent investigations and closed 120 investigations (more than in any previous year).<sup>78</sup> Many, though not all, of the IPCC's direct investigations relate to critical incidents.

Although models that promote the use of independent investigations might look attractive in principle, in practice it is crucial to factor in the costs of such investigations. Even though the IPCC's annual budget allocation has more than doubled in recent years, the overwhelming majority of matters still continue to be dealt with by the police themselves – often with little or no external oversight.

#### **7.2.4. *Balancing investigative priorities***

The lack of necessary resources and expertise is even more evident in relation to the IPCC's role in investigating police corruption, where the need for independent investigations is arguably most important. Although the IPCC has responsibility for investigating police corruption and specialist

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<sup>75</sup> Figures provided by IPCC, 12 June 2015.

<sup>76</sup> Glass, D. *Towards greater public confidence – A personal review of the current police complaints system for England and Wales*, March 2014.

<sup>77</sup> Figures provided by IPCC, 12 June 2015.

<sup>78</sup> Figures provided by IPCC, 12 June 2015.

powers to conduct surveillance and other activities, it often lacks the specialist resources and technical support needed to carry out this work. The additional funds will help, but significant gaps persist.

Of the broad-based anti-corruption oversight bodies in Australia, Queensland's Crime and Corruption Commission has been more successful than most in ensuring that it maintains a distinct focus on complaint handling and overseeing the systems used by police to manage complaints about their officers and services. However, as previously noted, the CCC has recently experienced increased pressure to reduce its complaint oversight functions – described by the Newman government as a 'distraction' that tends to 'divert' the commission's limited resources away from its primary responsibility to investigate and prevent corruption.<sup>79</sup>

As previously noted, in addition to their corruption fighting and complaint oversight roles, these agencies also have responsibility in relation to critical incident investigations. In Western Australia, the Corruption and Crime Commission must be notified of all serious incidents involving police and may directly investigate critical incidents or monitor the police investigation. However, consistent with the CCC's legislative provisions requiring it to focus on serious corruption, it has made an operational decision to take no active interest in critical incident investigations unless there are also issues of alleged corruption that should be examined.

Until recently, Queensland's Crime and Corruption Commission had a broad remit in relation to investigating critical incidents and/or monitoring the police investigations of such incidents. While it appears that continues to be notified of critical incidents and often attends the initial investigation of all police-related deaths and provides independent oversight regarding the probity and sufficiency of the investigation, the recent changes to its legislative provisions and cuts to its funding raise questions about whether its role in relation to critical incidents can continue in its current form.

#### **7.2.5. *Other factors that can impede effectiveness***

The costs of independent investigations are not the only constraint on an integrity agency's effectiveness. In the case of the IPCC, there are numerous factors that limit its capacity to independently investigate critical incidents and other police conduct – not least the location of IPCC offices and the small number of IPCC investigators available to investigate. If an incident occurs close to an IPCC office, its investigators can sometimes respond quickly. But for incidents involving forces

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<sup>79</sup> 'Queensland Government Response to the Parliamentary Crime and Misconduct Committee Report No. 90 and the Independent Advisory Panel report', <http://www.cabinet.qld.gov.au>. Accessed 16 June 2015.

some distance from an IPCC office, there can be considerable delays, potentially compromising the investigative response. Another issue is that the IPCC must rely on specialists provided by police forces themselves. For instance, crash investigations – which make up a significant number of death or serious injury referrals – rely heavily on the use of police examiners.

These factors are relevant to determining how best to manage the investigation of critical incidents in NSW, and the likely costs and other challenges associated with trying to implement an IPCC-type model that provides for the independent investigation of critical incidents involving police. The McClelland review of critical incident processes gave detailed consideration to how critical incident investigation teams could access specialist expertise and resources in the immediate aftermath of an incident. While acknowledging that the independence of such investigations was a factor in promoting public confidence, Mr McClelland said it was no less important for teams to be able to gather and secure evidence in a form that could later be admitted in criminal and/or coronial proceedings:

Police services are provided on a 24/7 basis and have at their disposal a range of technology and other resources to undertake an investigation including, for example, specialists and scientists, accident reconstructionists and engineers. The NSW Police Force is literally the only body in NSW with the ability to readily deploy experts with law enforcement experience who can physically and lawfully secure the scene of an incident, analyse evidence and plan and undertake a comprehensive investigation utilising modern forensic skills.<sup>80</sup>

To be effective, the experience of the IPCC suggests that critical incident investigators in NSW will need access to the forensic skills, ballistics experts, motor accident investigators, photographic/video analysts and the other expertise and resources that only the NSWPF can provide. In the UK, where the IPCC has been provided with substantial funding to directly investigate critical incidents, most of its independent investigations continue to require specialist support and assistance from police. Even if NSW was to invest the substantial sums needed to enable independent investigations of some or all critical incidents, the IPCC model suggests that at least some incidents will continue to be investigated by police and most will require specialist police support. In those circumstances, the model in NSW should enable civilian oversight of the police investigations as they occur to ensure that all critical incidents are properly investigated.

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<sup>80</sup> *Oversight of Police Critical Incidents*, Report to the Hon Barry O'Farrell Premier of NSW by the Hon Robert McClelland 29 November 2013, at p43.

### 7.2.6. *Applicability of the IPCC model to NSW*

In circumstances where the IPCC itself has expressed concerns that the police complaints system that it is required to administer is complex and difficult for complainants to understand and navigate, where there is often little or no effective oversight of police investigations into complaints, where the IPCC must rely on police to record and refer matters, where complainants must often endure a frustrating series of reinvestigations and appeals to have matters properly considered, and where there are acute constraints on the ability of the IPCC to recommend remedies on the substance of matters, it is unclear why the Terms of Reference regard this model as international ‘best practice’.

In March 2015, the UK Government foreshadowed a number of changes to remedy deficiencies in the functions, efficiency and governance of the IPCC, including proposals to:

- End the option of undertaking managed and supervised investigations.
- Give the IPCC the power to conduct ‘own motion’ investigations.
- Clarify the IPCC’s powers to ‘uphold’ complaints following investigations or appeals so that it is able to make findings in relation to broader or systemic concerns.
- Provide the IPCC with powers to recommend a wider range of actions to address the merits and substance of the issues raised in complaint appeals and possibly investigations.
- Give the IPCC a power to present cases at disciplinary hearings.<sup>81</sup>

However, even after these changes are introduced, it is apparent that the IPCC model has only limited application to the oversight of policing in NSW. Similarly, caution is required in applying oversight models developed elsewhere in Australia to the NSW context.

### 7.3. **Considering ‘best practice’ from NSW**

While this chapter has – as suggested by the Terms of Reference – focused on ‘best practice models from around the world’, it is also important to consider information relating to best practice in NSW.

In his comprehensive 2015 survey of the available literature on corruption, *Literature review – Police integrity and corruption*,<sup>82</sup> Professor Tim Newburn indicates that any assessment of best practice must

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<sup>81</sup> Home Office, *Improving police integrity: reforming the police complaints and disciplinary systems - Summary of consultation responses and next steps*, March 2015, Ch5, as summarised in Roth, L, *External oversight of police conduct*, Briefing paper No 6/2015, June 2015.

<sup>82</sup> Prof Tim Newburn, *Literature review – Police integrity and corruption*, London School of Economics & Political Science, HMIC 2015.



take account of the police integrity models implemented in NSW, Queensland and New York City after major commissions of inquiry in each of these jurisdictions.

... much of the extant literature on corruption emanates from jurisdictions that have (a) considerable experience of police corruption, and (b) have initiated major inquiries and reform programs in response to such experiences. The main reports from the major commissions are generally of great value in that, despite the fact that the majority are rather dated, they offer significant insight into the problem of corruption ...<sup>83</sup>

Professor Newburn has said the Wood Royal Commission's 1997 final reports, and those of the Fitzgerald Inquiry (Queensland, 1989), the Mollen Commission (New York City, 1994) and the Knapp Commission (New York City, 1972), remain the '*main reports worthy of significant scrutiny*'. As such, any modelling of world best practice should take account of the reforms introduced in NSW and consider the principles articulated by Justice Wood – notably those summarised in Chapter 2 of this submission.

With reference to the Terms of Reference for this review, there is no dispute that any police oversight models should strive to:

- Eliminate unnecessary duplication, overlap and complexity
- Increase the transparency, efficiency and effectiveness of police oversight
- Promote public confidence in policing, police oversight, and the criminal justice system
- Provide accountability for the powers and discretion exercised by police, and
- Create a user-friendly system for complainants, police officers, and other affected parties.

As we discuss in the next chapter, all police integrity systems should be focused on achieving these kinds of qualitative outcomes, irrespective of whether the functions relating to corruption fighting, overseeing complaints, and monitoring critical incidents involving police are contained in a single agency or allocated to different bodies.

Of more immediate concern is *how* these standards can be achieved, and the need for tools to monitor whether external investigation and oversight strategies are leading to demonstrable improvements over time. From our experience, and as noted in our discussion of oversight models in other jurisdictions,

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<sup>83</sup> Prof Tim Newburn, *Literature review – Police integrity and corruption*, London School of Economics & Political Science, HMIC 2015, chapter 3.

the range of ‘best practice’ elements that should form part of any complaint oversight component of a police integrity framework must include:

- Mechanisms that enable the agency responsible for oversight of police complaint handling to determine what complaints must be notified.
- Legislative provisions that establish clear minimum standards that police complaint handlers must apply to their handling of all notifiable and non-notifiable complaints, including:
  - Requirements that police consult with complainants about the concerns raised, and provide reasons for any decisions made in response to the complaint.
  - Requirements that police obtain and record information from complainants about whether they are satisfied with the way police handled their concerns, and whether they are satisfied with the outcome, so that police can use that information to inform their complaint handling practices and implement service improvements over time.
- Legislative provisions that enable the external agency responsible for overseeing the handling of complaints by police to:
  - Audit the police handling of complaints that do not need to be notified.
  - Audit the systems and processes established by police for handling complaints, especially the systems used for managing complaints that are not subject to external oversight.
  - Monitor individual police investigations in ‘real time’.
  - Directly investigate police and police systems, including powers to initiate ‘own motion’ investigations into police conduct.
  - Directly access police information and records systems, including police complaints records, and criminal and investigative databases.

In addition, there are many other factors that directly and indirectly contribute to ‘best practice’ in the effective oversight of complaint handling by police. For instance, in requiring police to record information about their complaint handling practices, including complainants’ views about how their matters were handled and any action taken or proposed to be taken, both police complaint handlers and oversight bodies must be able to monitor information about any trends in the data over time, and whether certain key performance indicators are being achieved across the police force.

While much of the information in this chapter has sought to identify how issues relating to the independent oversight of police complaints are managed in agencies that also have responsibility for investigating and preventing corruption and, to some extent, investigating or overseeing the police

investigations of critical incidents, it is no less important that any new model proposed as a result of this review also consider 'best practice' in relation to those various functions. The challenges associated with incorporating these functions into a single civilian oversight body focused on police are discussed further in the next chapter.

## 8. A recommended model for police oversight

The Terms of Reference require the review to provide advice about:

A recommended model for police oversight including advice on its design, structure, cost and establishment. Consideration should be given to:

- a. Eliminating unnecessary duplication, overlap and complexity.
- b. Increasing transparency, efficiency and effectiveness of police oversight.
- c. Promoting public confidence in policing, police oversight, and the criminal justice system.
- d. Providing accountability for the powers and discretion exercised by police.
- e. Creating a user friendly system for complainants, police officers, and other affected parties.
- f. The interaction of disciplinary decisions and performance management mechanisms (ie Part 9 of the *Police Act 1990*) with the recommended police oversight model, while ensuring the Commissioner of Police maintains responsibility and accountability for disciplinary decisions and performance management.
- g. Ensuring the police oversight system does not create processes that would prejudice criminal or coronial processes.

In this final chapter we discuss the above considerations to assist in determining a recommended model for civilian oversight of police in NSW.

Most of these considerations are interrelated. We agree that there is need to improve the system for civilian oversight of police and that this should be directed towards the objectives listed above as items 'a' to 'g'. The discussion in this chapter is provided to assist in determining which model is most likely to succeed in delivering these objectives.

The most urgent reform required to strengthen civilian oversight of police is the need for legislation to provide for the oversight of police investigations of critical incidents. If the recommendation to create a statutory scheme is supported, it will provide an opportunity to clarify the obligations of police and enable consistent, more effective and more transparent civilian oversight in relation to these incidents.

A threshold criteria for determining whether a particular model is more or less likely to deliver the objectives ('a' to 'g') is whether the agency is given appropriate functions and powers that are required for effective oversight. As discussed in Chapter 2, the recommended model should provide the civilian oversight agency with at least the same powers and functions than those currently performed by the Ombudsman and the PIC. In our view any model that seeks to reduce the level or scope of civilian oversight will reduce police accountability and, over time, this will inevitably reduce public confidence in the police oversight, the NSWPF and the criminal justice system. As previously noted, effective civilian oversight of police complaint handling should continue to focus on holding

police commanders to account for their decisions in relation to complaints, which includes making appropriate decisions about the need for action under Part 9 of the Act. We note item 'f' and caution against any reduction in the scope of civilian oversight on the basis that complaints can be resolved as 'performance issues' rather than conduct.

To the extent that civilian oversight of police incorporates both corruption investigation and complaint oversight functions some functional overlap is necessary. A key issue for this review is whether these functions can be more effectively managed in a single agency or in separate agencies – as is currently the case. The answer to this question will ultimately determine whether a single agency model is more effective and improves public confidence.

Chapter 3 outlines how our office and the PIC have successfully implemented arrangements to avoid any duplication between the agencies in performing oversight of complaints. There is little evidence to support claims that overlapping functions of the PIC and Ombudsman have resulted in general dysfunction in the police complaints system. Nonetheless, for some time we have advocated reform of the *Police Act 1990* to improve the effectiveness of civilian oversight of police and to make the system much more user friendly. As outlined in Chapter 4, our submission to the current statutory review of the Police Act made 25 recommendations for amendments to the Act, including new provisions to clarify the roles of oversight agencies and to improve the mechanism for managing the oversight of complaints.

Establishing a single civilian oversight agency for police to perform a range of corruption investigation and complaint oversight functions, may provide opportunities to streamline the collection and management of complaint information and, if implemented properly, provide a single point of contact for complainants. However, these potential benefits need to be carefully weighed against the challenges of successful implementation. These include the risks identified by Justice Wood, outlined in Chapter 2, that suggest that a single agency model may be less effective than the current arrangements. Any anticipated benefits should also be weighed against the loss of synergies that have been realised by the Ombudsman in performing a broad range of functions relating to police, not just the oversight of complaints.

Another key risk of establishing a single oversight agency for police is that the majority of resources are spent on the corruption investigation function and that, over time, the distinct focus and priority of the complaint oversight function is diminished. For this reason we submit that the design and structure of a single agency needs to ensure it is accountable for delivering both of these functions and that its strategic focus provides adequate support to its complaint oversight functions. As discussed in Chapter 7, we are not aware of any single civilian oversight agencies or broad-based corruption bodies

in other jurisdictions that have successfully combined these roles. Moreover, there is strong pressure on some of these agencies to reduce their oversight of complaints.

Consideration should also be given to the disruption that is likely to be experienced when developing and establishing a single civilian oversight agency for police. During any transition from the current system to a new model there is a high risk that the expectations of the public for support from a civilian complaint oversight agency will not be adequately met. This is likely to diminish rather than enhance public confidence.

A separate but an important consideration for effective civilian complaint oversight is the need for the oversight body to develop and maintain a collaborative relationship with the agencies within its jurisdiction. In our view, this is considerably less likely to be achieved in a single civilian agency that is also responsible for corruption investigations where the relationship is more likely to be adversarial.

In Chapter 3, we explained the broad range of statutory functions performed by the Ombudsman that relate to police. Consideration of moving the Ombudsman's Police Act functions to a stand-alone police oversight agency should give due weight to the loss of expertise currently brought to this function by the NSW Ombudsman, given its broad complaint handling and administrative oversight functions across the government and non-government sectors. At the same time, consideration should also be given to the negative impact on the quality and effectiveness of the Ombudsman's other statutory functions by diminishing his capacity to deliver whole of government reforms across agencies including police.

The current legislative framework provides the minimum requirements for best practice in civilian oversight and the scope of its functions should not be reduced. However, we recognise that the legislation is complex and difficult for members of the public (and some police), to understand and that it is important to clarify and better explain the roles of oversight agencies. As outlined in Chapter 4, we have made recommendations to amend the Police Act. Importantly, significant improvements to the current system can be achieved without establishing a single oversight agency. We submit that this will be cheaper, easier and more effective to manage these changes within an established framework than to establish a new model that expects agencies to start from scratch.

Public confidence in police is enhanced by effective civilian oversight. The public rightly expects the NSWPF to investigate and remove officers who are corrupt and that there will be a satisfactory avenue for redress of complaints about police and policing services more generally. In our view there are significant risks that a single civilian agency model will be less successful than the current system in ensuring that police fulfil the expectations of the public. Ultimately, a single agency model may reduce rather than strengthen public confidence in civilian oversight and police. In 1996 and 1997 the

reports of the Wood Royal Commission provided a clear justification for reform of the system for civilian oversight of police. In our view the case has not been made to justify a radical reorganisation of the system to establish a single oversight agency.

We trust that the information in this submission assists in the important task of forming a recommendation to the Minister about the best model for civilian oversight of police and that appropriate consideration is given to the option of retaining the structural separation of complaint oversight and corruption investigation functions – but that there be appropriate amendments to the Police Act to strengthen the effectiveness of the system.





## **9. Annexures**

**A - Ombudsman Submission to the Review of the *Police Act 1990*, 6 February 2014**

**B - Ombudsman Special Report into monitoring of the police investigation into the death of Roberto Laudisio-Curti, February 2013**

**C - NSW Ombudsman submission to the Hon Robert McClelland Review of the investigation and oversight of police critical incidents, 15 October 2013**

**D - NSW Ombudsman response to the report by the Hon Robert McClelland on the Oversight of Police Critical Incidents, January 2014**

**E - Legislative Reviews by the Ombudsman of new powers conferred on police**

**F - State Coroner's response to report by the Hon Robert Mr McClelland on the oversight of police critical incidents**