

Supplementary submission to the Review of Police Oversight in NSW

1. Creating a transparent and accessible system of civilian oversight

In reviewing the submissions to your review, we note that there is broad agreement with the view expressed in the Terms of Reference that the current system of police oversight in New South Wales can be complex and confusing, and that steps should be taken to reduce perceived overlap and duplication in the current oversight arrangements. There also appears to be broad support for your review to recommend action on:

- Making police complaints processes more accessible, especially when agencies deal with concerns raised by disadvantaged and vulnerable people.
- Increasing transparency in how complaints are assessed and investigated, and how the outcomes of inquiries are communicated to complainants, particularly by providing reasons for any decisions.
- Ensuring that findings and recommendations at the conclusion of complaint investigations result in appropriate action.
- With respect to critical incidents – ensuring that any proposed model will resolve concerns about determining how critical incidents are assessed and investigated.

Irrespective of any model you might recommend, we strongly support action to address these concerns. In particular, we agree that your review provides an opportunity to:

- clarify the roles and responsibilities of agencies involved in civilian oversight of police, and
- establish a coherent framework for ensuring that critical incidents involving deaths or serious injuries that occur in the context of policing operations are properly oversighted and, where necessary, independently investigated.

While we accept that the submissions are largely driven by a genuine desire to improve the quality of police oversight, some of the information provided to you about the current system could be misleading. For instance, the NSW Police Force claims that overlap and confusion in the current system starts at the point that complaints are referred between agencies. However, the process described in its submission is purely hypothetical. Rather than explaining the actual operation of the referral process, the submission describes a convoluted series of referrals that could possibly be made under the Police Act and notes the '*potential* for confusion, duplication and wasted public resources'. While the submission asserts that there would be confusion and frustration '*if* a complaint is split into parts and investigated by different bodies concurrently', this does not reflect the system in practice. In fact, we are not aware of any examples where these kinds of referrals have occurred in the past.

As set out in our earlier submission, the Police Act requires that all complaints about police ‘*must*’ be referred to the Commissioner, except in cases where there are exceptional ‘public interest’ reasons for departing from this approach. In practice, decisions not to refer complaints are very rare. While we strongly support moves to simplify and better explain the referral process, any changes in the law should only be made to remedy actual flaws in current processes, and informed by an accurate understanding of these processes.

A number of submissions contain innovative proposals that are worthy of consideration. For instance, on the issue of faster, more effective assessment and referral of complaints between agencies, there are suggestions to create a single portal for registering and facilitating the notification of all complaints about police. We have advocated a ‘one stop shop’ single portal for complaints about all government agencies for many years and continue to believe that this proposal has merit – provided that there continues to be appropriate flexibility in where and how complainants may raise concerns, and that the body responsible for providing external oversight can independently determine which matters are registered as complaints.

2. Gaps in the reform proposals

While the majority of submissions to your review indicate their support for a single civilian oversight agency, it is significant to note that:

- None of the submissions provide cogent evidence to support claims of widespread dysfunction in the established framework.
- None provide a coherent model that suggests how the demonstrated problems that have hampered the effectiveness of single oversight systems elsewhere can be avoided in NSW – only that we must learn from those mistakes, and take care not to replicate them.
- None recognise that removing police complaints from the broader system for overseeing public sector services is likely to diminish the scope to assess policing issues in the context of systemic issues affecting the human services and justice sectors.
- None acknowledge that establishing a new ‘single civilian agency’ for police will create duplication and complexity for the police-related roles that remain with the Ombudsman – thereby requiring the NSW Police Force to deal with an additional oversight body in critical areas such as child protection, family violence, and responding to the needs of Aboriginal communities.

After reviewing the submissions, it remains our view that the principles of the current model are sound, and that the least disruptive and most effective way to tackle the concerns raised in the submissions is to amend the complaint-handling provisions under the Police Act and to establish a new critical incident oversight function within the existing integrity framework. Attempts to manage such changes, while simultaneously trying to establish a new model of oversight, presents enormous risks and are much less likely to deliver improved outcomes.

The single agency model was rejected by the Wood Royal Commission because of concerns that combining complaints oversight and corruption investigation functions within a single agency would create undue complexity and diminish the strategic advantages of keeping these functions separate. These problems have not been addressed by the submissions calling for these functions to be combined.

The push to create an oversight agency focused solely on police in NSW, while all of the rest of the public sector remains under the Ombudsman’s oversight, is occurring at a time when much of the

world is abandoning stand-alone models for police. Instead, the models recently established in jurisdictions such as Victoria and Western Australia situate the investigation of concerns about police in the broader context of oversight of public sector service delivery.

These issues are discussed in more detail below.

3. Diverging views about the model for a single oversight system

While most of the submissions endorse the view that NSW should consider a single agency model focused on the oversight of police, and while there is consensus about the kinds of concerns that this model must address, there is a considerable divergence of views about what the principal functions and powers of the new agency should be and how the new agency should work.

Greater police autonomy for managing misconduct and corruption issues

One group of submissions, including those from the NSW Police Force and the Police Association of NSW, point to the success of the 'internal and external investigation' managerial model introduced by the Wood Royal Commission, which gave police commanders much greater responsibility for managing misconduct and corruption issues, while strengthening independent civilian oversight of commanders' decisions. As this reform has considerably enhanced the professionalism and integrity of the NSW Police Force, they advocate giving commanders even greater autonomy – mainly by reducing the number of complaints that are subject to external oversight, limiting the ability of external agencies to voice concerns about decisions made at key stages, and ending what they claim to be the 'duplication, delay and waste' which they attribute to placing corruption fighting and complaint oversight functions in separate agencies.

The proposals vary, but include recommendations to:

- Create statutory provisions to remove or limit the Ombudsman's current powers to monitor police investigations in 'real time'.
- Limit the number of complaints that are subject to direct oversight, so that the system is more narrowly focused on serious misconduct and corruption.
- Restrict the external oversight of any managerial action taken – or not taken – by commanders.
- Suspend the oversight of police investigations into critical incidents until after any coronial inquiry has concluded.
- Limit the use of coercive powers and/or public hearings, in order to strengthen procedural fairness for police officers who may be the subject of investigation.

These submissions argue that the government's investment in the process of reforming the NSW Police Force has been a success – there are now robust systems in place to ensure that police can manage misconduct and corruption issues without the same degree of external oversight. The evidence cited includes Ombudsman data showing that 82% complaints are now handled by the NSW Police Force in a timely and effective manner; the falling numbers of complaint investigations affected by undue delay; and the high proportion of complaint investigations that now lead to some form of management action.

Those seeking to enhance police autonomy are quite flexible in how a single agency model could be established. The NSW Police Force concludes that it 'could be a new agency, an existing agency, a combination of existing agencies, or some other model'. The Police Association recommends creating

a police division within the Independent Commission Against Corruption, or establishing a new stand-alone agency – but adds that ‘it would be completely unacceptable to employ any Police Integrity Commission staff in any newly created oversight structure’.

In broad terms, the proponents of greater police autonomy argue that police are currently subject to ‘too much oversight’. Creating a single external agency is seen as an opportunity to reduce the level of external oversight, and enhance the capacity of police commanders to manage misconduct and performance issues. Significantly, there is agreement among the supporters of this model that the police management of complaints should remain a primary feature of any new framework. All agree that any reduction in the internal capacity of the NSW Police Force to address misconduct and corruption would be detrimental to the professionalism and integrity of the NSW Police Force.

Enhancing civilian control

The main alternative to submissions favouring a single oversight agency model that strengthens police autonomy for managing police conduct, are submissions advocating the creation of a single oversight model to substantially enhance civilian control of the police oversight system.

Again, the proposed models vary, particularly in relation to the specific roles and functions that should be incorporated into the proposed civilian agency. However, in broad terms, the proponents of the civilian control approach argue that:

- As a matter of principle, any model that relies on police to investigate police is flawed, mainly because there are unavoidable conflicts of interest between officers’ obligations to their colleagues and to the public.
- The current system has failed to deliver appropriate outcomes, largely as a result of insufficient numbers of civilian investigations, and police commanders having too much say over the management of complaints and too little accountability for decisions on disciplinary and management actions. To remedy perceived defects in the current system and restore confidence in the NSW Police Force, there must be a sharp increase in the proportion of ‘genuinely independent’ investigations into allegations of police misconduct.
- To the extent that resource constraints might necessitate ongoing police involvement in investigating allegations of police misconduct, such investigations should be the exception rather than the norm.
- For many, independence from police involvement means that the external agency should not engage seconded or recently retired NSW Police Force officers.

As many of the submissions favouring greater civilian control argue that substantial increases in independent investigations into police misconduct are needed to improve outcomes for complainants and police, these models often include features that purport to strengthen the investigative powers of the external agency, and boost the resources allocated to investigating police misconduct and critical incidents.

For many in this group, the creation of a single external agency model for police provides an opportunity to establish a body that, when dealing with complaints about serious police misconduct and concerns about police involved in critical incidents, will have ready access to broader powers and much greater investigative resources – notably the coercive powers, specialist expertise, and dedicated funding currently allocated to investigating and preventing police corruption.

What those supporting this model and those supporting greater police autonomy often have in common is a view that scarce oversight resources should be more clearly focused on serious misconduct and corruption. For the most part, both groups also argue that the external oversight of police is best managed by an agency that has specialist responsibility for overseeing police and policing issues, principally because police have unique powers and functions, and face operational challenges that are unlike those facing other public sector agencies and employees.

In our view, there are significant flaws in both the 'greater police autonomy' and the 'civilian control' single oversight agency models. We submit that neither can be implemented in the NSW context without significantly compromising the quality of civilian oversight of police and/or reducing the extent of oversight. Also, at a time when the NSW Government is investing heavily in programs to dismantle 'silos' that have long impeded the effective provision of government services, especially in the human services and justice sectors, the view that policing services must be treated differently is, in effect, seeking to erect a new silo.

4. Assessing the civilian control model

While we understand the reasons behind arguments favouring an extension of civilian control over the system for overseeing police in NSW, we do not support proposals that all or even most critical incidents should be independently investigated by an external agency and/or that a substantial proportion of the 1900 or more police complaint investigations that are currently directly overseen by the Ombudsman each year should instead be investigated by an agency other than the NSW Police Force.

Establishing a civilian agency with the objective of conducting a large number of independent investigations into critical incidents and complaints of serious misconduct would require a huge budget. Its investigators would need to be on-call 24 hours a day, seven days a week, and be able to be deployed anywhere in NSW. They would need ready access to an array of specialist equipment and expertise, including highly trained investigators and forensic technicians. In many ways, such an agency would take on some of the features of a small police force – and would need to be resourced accordingly.

Although increased funding is clearly needed to establish a framework to ensure that critical incidents are properly investigated, it is unrealistic to expect sufficient funding to properly establish and maintain an independent 'civilian control' model for complaints and critical incidents. More importantly, for the reasons detailed in our previous submission, we believe this approach is highly unlikely to deliver better outcomes.

There is certainly scope to strengthen the current arrangements. However, while there might continue to be instances of officers who, for various reasons, are not criminally charged and/or dismissed despite evidence indicating that they engaged in serious misconduct, such exceptions do not mean that the whole oversight framework is 'inept' at detecting and/or ensuring action is taken to address serious misconduct.

Table 1 shows complaints investigated by the NSW Police Force in the past five years that resulted in officers being criminally charged, and how many of those investigations were initiated as a result of concerns reported by other officers. The table also notes the proportion of complaints overseen by the Ombudsman that led to some form of police management action.

Table 1: Officers charged following complaint investigation between 1 July 2010 and 30 June 2015

Number	10/11	11/12	12/13	13/14	14/15
Police complaint investigations oversights by Ombudsman	1,981	2,158	1,878	1,742	1,915
% of all oversights cases resulting in management action	56%	55%	55%	56%	57%
Complaints leading to charges	68	67	62	56	63
Officers charged	64	66	61	59	63
Total charges	215	149	150	123	139
Officers charged following complaints by other officers	49	52	43	54	49
% of officers charged as result of complaints by other officers	77%	79%	70%	92%	78%

Source: NSW Ombudsman Resolve data on charges linked to 'notifiable' complaints finalised between 1 July 2010 and 30 June 2015.

Table 1 shows that between 2010-11 and 2014-15, a total of 313 NSW police officers were charged with 776 criminal offences as a result of complaints that were investigated by the NSW Police Force and oversights by the Ombudsman. Significantly, 247 of these officers (79% of those charged) were charged as a result of concerns reported by other officers.

More than half of all police complaint investigations oversights by the Ombudsman result in the NSW Police Force taking some form of management action. Of the 1,915 complaint investigations that we oversights in 2014-15, management action was taken in 1,091 (57%) cases. The proportion of oversights investigations resulting in management action was similarly high in previous years.

Management action can include the exercise of the Commissioner's discretion to dismiss an officer under section 181D of the Police Act if the Commissioner no longer has confidence in the officer's suitability to remain in the NSW Police Force. In total, eight police officers were removed under this provision in 2014-15, 13 in 2013-14 and eight in 2012-13. In cases where there are findings of serious misconduct but there are not sufficient grounds to remove the officer, management action might include a 'reviewable' action¹ under section 173 of the Police Act. The data shows that reviewable action was taken against 22 officers in 2014-15, 18 officers in 2013-14, and 62 officers in 2012-13.

As detailed in our previous submission, it is our view that the principles underpinning the 'managerial model' introduced following the Wood Royal Commission remain sound. Changing to a civilian control model would mark a radical departure from the current system in which commanders are responsible – and accountable – for managing the conduct of their staff. Removing or impeding the responsibility of police commanders to manage misconduct issues will, over time, diminish their capacity to minimise the incidence of corruption and serious misconduct.

In our view, shifting to a model that incurs substantially higher costs, subverts the NSW Police Force's capacity to investigate alleged misconduct by its members, and delivers no demonstrable improvements, would seriously damage public confidence in police. We therefore submit that any proposed model of police oversight in NSW must involve police having the primary role of investigating complaints and critical incidents.

5. Assessing the greater police autonomy model

The data in Table 1 (above) demonstrates that the managerial model established by the Wood Royal Commission is effective. In the past five years, between 55% and 60% of all complaints investigated

¹ 'Reviewable' actions under Part 9 of the Police Act include a reduction of the officer's rank or grade, a reduction of seniority, or a deferral of salary increment. Such actions are described as 'reviewable' because the officer may seek a review by the Industrial Relations Commission in relation to any actions deemed too harsh, unreasonable or unjust.

by police and oversights by the Ombudsman currently result in some form of management action. Moreover, 79% of all officers who were criminally charged in recent years were charged as a result of concerns reported by their fellow officers. These are healthy indicators. They suggest the current system has been largely successful in encouraging the NSW Police Force to take responsibility for identifying, investigating and acting on misconduct by its officers. Moreover, it is our view that commanders have been willing to apply appropriate standards in these cases because of the role of civilian agencies in oversighting complaints and holding them to account for their decisions.

Conversely, the submissions calling for greater police autonomy all rely on claims that are not supported by the available evidence. As noted in our previous submission, these include assertions that the current scheme is inefficient, that police are the subject of 'too much oversight', and that external oversight functions are not sufficiently focused on serious complaints and/or issues requiring a management response.

We have strong concerns about proposals to further reduce the already limited external scrutiny of critical incident investigations, especially the proposals to remove the power to monitor such investigations and to defer any external scrutiny until after any coronial proceedings. We also take issue with those who view the establishment of a single external oversight model as an opportunity to reduce the level of external oversight of misconduct investigations generally. These concerns are accentuated by claims that a single agency model will 'immediately' remove a major source of 'duplication, delay and waste'. As detailed in our previous submission, the data shows that there is minimal overlap and duplication under the current arrangements. Also, no consideration seems to have been given to the duplication and complexity associated with severing the police complaints functions from broader public sector complaint oversight. These issues are discussed further below.

The NSW Police Force model for investigating critical incidents

Included in the NSW Police Force's submission are a number of broad principles that are intended to inform the development of a new system for oversighting critical incident investigations. For the most part, we support these principles. In particular, we note the Police Force's support for:

... a model that allows [the NSW Police Force] find its own solutions to problems while providing for assistance and guidance from the oversight agency where imperative. Such an approach entails the NSW Police Force maintaining responsibility for the investigation of complaints and critical incidents rather than ceding this to an independent agency.

And we agree that:

... critical incident investigations must be conducted in the most professional way... [and that] there needs to be agreement among judicial authorities, oversight agencies and the NSW Police Force on the priority to be accorded the various interests.

We also agree that 'there would be potentially significant resource implications' if all investigations were to be undertaken or even directed by an independent agency, and that care is needed to ensure appropriate investigative standards are applied.

On the other hand, for the reasons detailed in our first submission, we strongly disagree with the NSW Police Force's proposals to:

- Create a 'Framework for Cooperation' to establish an agreed 'order of precedence' for involvement in critical incident investigations, particularly those involving the NSW Coroner.

- Remove the Ombudsman’s power under section 146 of the Police Act to monitor the progress of police misconduct investigations as they occur.
- Defer investigation of misconduct alleged to have occurred in the context of a critical incident until after any coronial proceedings have concluded. This can often be a considerable time after the critical incident.
- Remove any other external oversight of police critical incident investigations on the basis that ‘the coroner is appropriately and ideally placed to monitor the progress of’ such inquiries.

The NSW Police Force submission concedes that there are problems with the current arrangements. However, it then asserts that these can be largely resolved by giving the State Coroner primary responsibility for overseeing police critical incident inquiries – but only in cases involving fatalities, and only where there are no criminal issues under investigation (the submission implies that there should be no change to the Coroner’s current practice of suspending the inquest pending the outcome of any criminal proceedings).

It remains our view that there should be independent civilian oversight, in real time, of police investigations into possible criminal conduct by police involved in critical incidents. To enable this, any future scheme needs to include a power similar to the current section 146 monitoring provision that enables the Ombudsman to independently determine whether to monitor a police investigation, and for monitoring to take place while the matter is being investigated.

The State Coroner’s submission to your review emphasises the need for an agency external to the NSW Police Force to be given responsibility for independently testing the findings and substance of the police investigation, ‘notwithstanding those issues will be further considered during the inquest’. The submission also says that ‘real time monitoring of the investigation by an independent agency is essential’ in order to ‘mitigate the risk of evidence being lost or degraded’ and makes a detailed recommendation for such monitoring and oversight.

Monitoring of critical incident investigations in real time

In relation to the use of monitoring powers in this context, we are concerned about the accuracy of the information provided by the NSW Police Force about the Ombudsman’s role in monitoring the police critical incident investigation into the death of Roberto Laudisio-Curti. Whether deliberate or inadvertent, we are concerned that information the NSW Police Force has provided has the potential to mislead your review.

The NSW Police Force submission claims that our Principal Investigator impeded the police critical incident inquiry by attempting to provide directions to the investigation team at critical stages. The submission claims that, as a result of these directions, there was a risk that critical lines of inquiry might not have been considered or, on other occasions, the investigators wasted time by having to respond to directions provided by the Ombudsman. These claims are wrong.

The then Ombudsman wrote to the Commissioner of Police on 26 February 2013 to address the most serious issues: a claim that this office allegedly opposed a plan by critical incident investigators to visit Taser International on the basis that Taser International had ‘some apprehended bias’ (p.13, police submission); a claim that we tried to dissuade investigators from obtaining critical evidence from Taser International (p.14); and a claim that our Principal Investigator supposedly conducted his own inquiries (p.15). I am disappointed that the NSW Police Force’s decision to revive these ill-informed and baseless concerns makes no reference to the Ombudsman’s previous response. I have

therefore attached relevant excerpts of the Ombudsman’s letter of 23 February 2013 for your information – see **Attachment 1**.

It is our view that real time monitoring of police investigations into critical incidents should be the subject of appropriate protocols. To assist your review in considering what these might include, we have attached a copy of the agreement between this office and the NSW Police Force – see *‘Arrangements for the monitoring of Part 8A Investigations by the NSW Ombudsman’*, **Attachment 2**. This document envisages that the Ombudsman may confer with and bring matters to the attention of police investigators. While investigators ‘are required to take matters raised by the Ombudsman into account’, the agreement also makes it very clear that the Ombudsman has no power to provide directions to investigators.

Need for ongoing oversight of investigations into complaints about serious misconduct

We agree that the current complaint oversight system has worked well. Most complaints are investigated to an appropriate level. In our view, this is because of – not despite – our role in overseeing police decisions and holding commanders to account for decisions.

Our concern about the need for the system for overseeing critical incidents to include an external monitoring power, also applies to overseeing police investigations into complaints of serious misconduct. Our monitoring power is used sparingly. Our uses of this provision are focused on matters that require an additional level of scrutiny. We believe it is crucial that this power be maintained. Independent monitoring of serious complaint investigations can be useful where there may be concerns about the diligence or adequacy of the police investigation process, or where the complaint involves vulnerable complainants and/or witnesses who may need additional support.

We also believe it is essential that any external oversight agency has the ability to independently determine which complaints it oversees. There is a major risk that any system that limits the matters to be overseen may lead to a significant diminution in the scope and quality of oversight.

Resourcing the oversight of police complaints

In relation to concerns in some submissions about the Ombudsman’s efficiency, it is important to note we have continued to provide effective oversight of police complaints at a time when complaints about police have risen, while the number of Ombudsman staff available to assess and oversee these matters has steadily declined. As with other public sector agencies, factors such as annual efficiency dividends and staff pay increases have led to a decrease in staffing. Table 2 shows recent decreases in the total number of staff employed in the Ombudsman’s Police Team.

Table 2: Ombudsman Police Team staff allocation

	June 2005	June 2010	June 2015
Total Ombudsman Police Team staff (FTE)	35	31	29

Source: Ombudsman staff establishment records – full-time equivalent staff employed as at 30 June 2005, 2010 and 2015.

As at 30 June 2015, the Ombudsman’s Police Team had 29 staff (full-time equivalent) – including a Deputy Ombudsman, senior managers, a policy and legal officer, officers who conduct assessments, investigations, intelligence and inquiries, and administration and records staff. This stands in contrast to the position in mid-2010, when the team had 31 staff, and in mid-2005, when there were 35 staff.

Although our Police Team has managed to oversight greater numbers of complaints with less staff, this squeeze on resources reduced our capacity to provide proactive support to vulnerable groups. In part, this has meant we have had to:

- reduce its discretionary uses of our power to monitor police investigations involving complaints by young people, Aboriginal people and other vulnerable complainants, and
- cut back on the use of direct investigations into systemic concerns raised by these groups.

These resourcing restrictions have also unfortunately reduced our capacity to engage with community groups and advocates on policing issues generally.

To some extent, the cuts to our capacity to reach out to groups in the community on policing issues has been partly offset by investing heavily in community engagement on ‘whole of government’ issues. In particular, our Human Services Branch and Strategic Projects Division both allocate substantial resources to community and stakeholder consultations to identify significant issues of concern across the government and community sectors. For instance, our recently appointed Aboriginal Deputy Ombudsman relies heavily on outreach conducted by our Strategic Projects Division – which includes our Aboriginal Unit – to monitor and assess Aboriginal programs. Our new functions under Part 3B of the Ombudsman Act, which commenced in July 2014, have increased the numbers of Aboriginal community members and leaders turning to us to help facilitate collaborative responses to tackle the underlying causes of disadvantage in their communities. While we have a strong track record in bringing Aboriginal people and police together to facilitate positive outcomes, removing our police oversight function is likely to detract from this work. If the concerns raised by Aboriginal people during our community visits include policing issues, a single police oversight agency approach would require the Ombudsman to refer those issues elsewhere, rather than helping the community deal with their concerns holistically.

Several submissions to your review have also noted the increased constraints on our capacity to engage with disadvantaged and vulnerable groups on policing issues, and have strongly argued that any new agency must be better resourced to ensure a quality policing response to vulnerable groups, including Aboriginal communities, victims of family violence and sexual abuse, and diverting young people from crime. Irrespective of the model recommended by your review, we agree that additional resources are needed to enhance this essential work.

6. Risk of a single civilian agency resulting in less oversight, and less effective oversight

In assessing what needs to change, we strongly urge you to recommend an oversight model with functions and powers that are comparable to, and not less than, the combined functions and powers of the Police Integrity Commission and the Ombudsman’s police complaints role. Having had an opportunity to consider the array of single agency proposals, we are principally concerned that combining the police complaints oversight, critical investigation and corruption-fighting roles into a single agency will:

1. Diminish the scope and quality of civilian oversight over the NSW Police Force, and
2. Introduce unnecessary complexity and inefficiency by severing the police complaints oversight function from the Ombudsman’s broader public sector oversight functions that continue to involve the NSW Police Force.

Risk of less effective oversight

Irrespective of whether the model used to establish a single civilian agency relies on greater police autonomy or greater civilian control, we are concerned that either model would lead to a reduction in oversight and, over time, reduced public confidence in the NSW Police Force.

The submissions calling for greater police autonomy and, to a lesser extent, those urging greater civilian control, both emphasise that scarce oversight resources should be more clearly focused on investigating individual instances of serious misconduct. While this is a crucial aspect of the oversight system, neither model appears to recognise the need to accommodate the Ombudsman's broader responsibilities to oversight and recommend improvements to systems and services.

The greater police autonomy proposals highlight the reforms achieved by giving commanders greater responsibility for managing complaints and corruption issues under the current arrangements, but fail to acknowledge that oversight agencies play a key role in holding commanders to account and ensuring they apply appropriate standards. Those supporting greater civilian control propose an array of models, many of which are aimed at delivering better outcomes for marginalised and vulnerable people who often have disproportionately high rates of contact with police. However, many of these proposals fail to acknowledge the risks associated with winding back elements of the current system that give police 'ownership' of their decisions.

Even if these issues can be addressed, there are inherent difficulties in combining the complaints oversight role of an Ombudsman with the specialist corruption-fighting role of an agency such as the Police Integrity Commission. In broad terms, we deal with complaints about a wide range of issues, and use more open investigative techniques and informal procedures – enabling us to conduct large numbers of small-scale inquiries. We encourage agencies such as the NSW Police Force to see the concerns raised by individuals as an opportunity to identify problems, including the need for improvements to systems and services. In relation to policing, our work often emphasises the need to address systemic issues affecting vulnerable people.

This contrasts markedly with the approach needed to expose officers engaging in serious misconduct and corruption. Corruption-fighting tends to involve a small number of large-scale, resource-intensive investigations, often using covert techniques and resources. Whereas investigating corruption requires strict secrecy, ensuring that complaints are properly assessed and investigated involves actively engaging with both complainants and the agency that is the subject of complaint.

In relation to policing, the strength of our approach lies with our understanding of operational policing and examining policing in the context of how it intersects with the delivery of human services and justice initiatives, rather than in isolation. Removing this connection is likely to diminish the quality of the police contribution to improving critical areas of government service delivery.

Risk of increased complexity

A number of the submissions supporting a single agency approach argue that change is needed to reduce complexity in the system, to strengthen its efficiency and effectiveness, and to improve transparency and access, especially for marginalised groups. Ironically, in seeking to reduce complexity, it is likely that these proposals will actually increase the complexity of the system. This is because moving the police complaints oversight function to an agency that specialises only in policing issues will sever the strong link between our policing oversight and the Ombudsman's broader oversight functions.

A substantial – and increasingly important – part of the Ombudsman’s work includes responsibility for monitoring and reporting on the effectiveness of multiagency programs, many of which involve police. For some functions – such as our role in convening the Child Death Review Team; investigating and reporting on plans that require agencies to cooperate in protecting children and other vulnerable people from abuse; and monitoring ‘place-based’ multiagency service programs to deliver improved services to high-need communities – creating a stand-alone police oversight body is likely to add an additional agency to those that police and other government and non-government agencies already report to. This means that the NSW Police Force would have to answer to two oversight bodies – rather than just the Ombudsman – in critical areas such as child protection, family violence and responding to the needs of Aboriginal communities. These are areas where interagency collaboration is essential and where our office has a strong track record of delivering results.

For other functions, such as the oversight of complaints about Joint Investigation Response Teams which enable police and other agencies to tackle child abuse in the context of broader child welfare and health concerns, there would need to be clear rules about whether the new police oversight agency or the Ombudsman has responsibility for investigating, and in what circumstances. Without a clear delineation of responsibilities, we are concerned that high-risk cases may fall between the gaps.

In relation to broader systems reform, it is now widely accepted that addressing the needs of the most vulnerable in NSW requires government agencies to work collaboratively and in partnership with the non-government sector, peak bodies and community leaders. It is also widely accepted that identifying and effectively responding to those most vulnerable in high-need communities requires a ‘place-based’ response. Police have been among the strongest advocates for this integrated approach, since they are very much aware of the long-term consequences of not reaching vulnerable children and young people, and helping to turn their lives around before they become caught up in the criminal justice system.

As overall responsibility for overseeing the systems improvement work must remain with the Ombudsman, any new model of police oversight must incorporate transparent mechanisms for minimising the gaps, overlap and potential confusion likely to undermine the effectiveness of the Ombudsman’s other statutory responsibilities. It would be ironic – though not unprecedented – if reforms intended to close gaps and minimise duplication simply relocate or even amplify these problems, rather than resolve them.

7. Recommendations

In summary, we are concerned that the many risks associated with creating a single agency model for overseeing the NSW Police Force are not adequately addressed by the submissions to your review. Furthermore, despite the significant costs and likely disruption associated with establishing a new model of oversight, we believe there is a high risk that it will be much less likely to deliver better outcomes than the current arrangements.

We therefore recommend that:

1. Any proposed model of police oversight in NSW must:
 - Involve police having the primary role in investigating complaints and critical incidents.
 - Provide an external agency with functions and powers that are comparable to, and not less than, the functions and powers provided under the existing arrangements.
2. Consideration be given to amending the current complaints provisions to address the issues identified in our submission to the statutory review of the *Police Act 1990*, with a particular

emphasis on amendments such as the need to clarify the roles of agencies involved in complaint handling, providing complainants with reasons for decisions made about their complaints, and measures to improve the transparency and accessibility of the police oversight system.

3. Following any amendments to the Act, that consideration be given to the feasibility of creating a single portal for lodging complaints about police.
4. Consideration be given to inserting a new Part in the Police Act that provides for critical incidents involving police to be properly oversighted and, where necessary, independently investigated. This new Part should provide the external agency with powers comparable to the Ombudsman's current powers for oversighting complaints under Part 8A, and the body charged with these additional functions would need to be resourced accordingly.

It is essential that any significant changes to the existing arrangements are effective in addressing the concerns highlighted in the submissions to your review. In order to maximise support for changes to improve civilian oversight and, over time, strengthen public confidence in the NSW Police Force, we would therefore support a process for consultation as part of implementing any recommendations arising from your review.



Chris Wheeler
Acting Ombudsman

31 July 2015

Attachment 1

The following addresses specific concerns raised by the NSW Police Force in relation to the Ombudsman's alleged role in monitoring the police critical incident investigation into the death of Roberto Laudisio-Curti.

NSW Police Force concern:

That we opposed the plan to visit Taser International on the basis that Taser International had 'some apprehended bias' (p.13) and that we tried to dissuade investigators from obtaining critical evidence from Taser International (p.14)

These issues were addressed in the Special Report (at pages 25 and 33) and in the Ombudsman's letter to Commissioner on 26 February 2013. Our view was that seeking advice from Taser International regarding the Taser firing data issue should only occur if absolutely necessary because of the potential for a conflict of interest, given that Taser International was likely to (and in fact did) seek leave to be represented at the coronial inquest.

We had reservations about the proposal to seek advice from Taser International prior to the investigators completing the crime scene analysis and attempting to clarify the Taser firing issue with the police officer who deployed the Taser. Our view was that the visit to Taser International should not have occurred prior to completing those steps in the investigation. The report prepared by Taser International did not assist in resolving the Taser firing issue.

NSW Police Force concern:

That the Ombudsman Principal Investigator conducted his own inquiries (p.15)

The Ombudsman's letter to the Commissioner on 26 February 2013 included the following observations about this issue:

The police response [to the draft special report] appears to suggest that the Ombudsman Principal Investigator conducted 'crime scene investigations'... This suggestion appears to again demonstrate the failure of the investigators to appreciate the role of this office in overseeing and monitoring investigations and the provision in clause 26 of the Monitor Agreement which states '... the Ombudsman can identify matters as needing to be examined or taken into consideration by the investigation.'

The letter details how this issue arose, why the Principal Investigator considered the information he provided might be of possible relevance, and how the issue was clarified during the civilian walk-through interviews. The Principal Investigator did not conduct any crime scene investigations; he merely identified a matter that may have required consideration by the investigators.

NSW Police Force concern:

The Ombudsman continued to monitor the critical incident investigation into the death of Roberto Laudisio-Curti despite police having 'suspended' the complaint investigation (p.13)

This issue was addressed at page 5 of the Ombudsman's response to the McClelland report [Annexure D of our previous submission], which states:

... the unilateral decision of the Commissioner of Police to suspend or defer the Part 8A complaint investigation, does not and cannot preclude me from exercising my oversight powers ...

It would be odd if the Commissioner of Police could effectively stymie my powers under Part 8A of the Police Act by unilaterally declaring that a complaint investigation had been suspended or deferred and that it would be investigated without Ombudsman oversight outside of Part 8A. It would appear that the Minister for Police and the Commissioner of Police agreed with my interpretation of the oversight powers as both referred to me having a role in the oversight of the investigation.

NSW Police Force concern:

That critical incident investigations are conducted on behalf of the Coroner (p.11) and the Coroner is appropriately and ideally placed to monitor the progress of the investigation and direct further investigative steps if necessary (p.17)

In addition to our reports and submission on this issue, we note that several submissions to your review – including the submission of the State Coroner – explicitly reject these characterisations of the Coroner’s role and the inquiries conducted by police in preparing a report for the Coroner.

Attachment 2

Copy of the agreement between the NSW Ombudsman and the NSW Police Force relating to the use of section 146 of the *Police Act 1990* to monitor investigations under Part 8A of the Police Act.