

REVIEW OF POLICE OVERSIGHT

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31 August 2015

*A report to the New
South Wales
Government on
options for a single
civilian oversight
model for police*

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Review of Police Oversight

TABLE OF CONTENTS

1. EXECUTIVE SUMMARY	1
2. RECOMMENDATIONS	5
3. METHODOLOGY AND CONSULTATION	15
Introduction.....	15
Additional consultation	15
My approach to the review.....	16
4. EVOLUTION OF OVERSIGHT AND CORRUPTION INVESTIGATION IN NEW SOUTH WALES	19
Before the Wood Royal Commission.....	19
The early days.....	19
The Independent Commission Against Corruption.....	19
The Parliamentary Joint Committee	20
The legislative framework for the complaints process	20
The Wood Royal Commission	20
Interim reports: 1996.....	21
Police Integrity Commission	21
Final report: 1997	22
After the Wood Royal Commission	23
Reform to Part 8A of the Police Service Act 1990.....	23
Inspector’s report on PIC practices and procedures: 2003.....	24
Parliamentary Joint Committee’s Ten Year Review of the Police Oversight System: 2006	24
PIC Inspector’s Special Report to Parliament: 2009	25
PIC Inspector’s Special Report to Parliament: 2011	26
Ministerial Review of the PIC Act: 2011.....	26
McClelland Critical Incident Review: 2013.....	27
PIC and ICAC (Inspectors) Act 2013	28
Parliamentary Joint Committee’s General Meetings report: 2014.....	28
Operation Prospect.....	29
Prospect: Its origins.....	29
Ombudsman’s inquiry.....	30
Select committee inquiry	31
General Purpose Standing Committee No. 4 inquiry.....	31

5. THE CURRENT POLICE OVERSIGHT SYSTEM IN NEW SOUTH WALES	33
The legislative framework for the NSW complaints process	33
What constitutes a ‘complaint’ against police?	33
Complaints not covered by Part 8A	34
Overview of agency roles in the complaints and oversight process	35
The role of the Police Commissioner	35
The role of the Ombudsman	38
The role of the Police Integrity Commission	39
Accountability mechanisms for civilian oversight agencies	42
The role of the Inspector of the Police Integrity Commission	42
The Parliamentary Joint Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission.....	42
6. MODELS OF POLICE OVERSIGHT OUTSIDE NEW SOUTH WALES	45
Is there an existing ‘best practice’ system?	45
Major external agency models considered	46
England and Wales – Independent Police Complaints Commission	48
Northern Ireland – Office of the Police Ombudsman	51
New Zealand – Independent Police Conduct Authority.....	52
Victoria – Independent Broad-based Anti-corruption Commission	55
South Australia – Independent Commissioner Against Corruption	56
Queensland and Western Australia crime and corruption commissions	58
Commonwealth - Australian Commission for Law Enforcement Integrity	59
North America.....	60
7. GAPS AND OVERLAPS IN CURRENT POLICE OVERSIGHT	63
Gaps and overlaps that could be addressed within the current system	64
Inspector’s ability to audit certain material.....	64
Access to medical treatment	65
Response to recommendations of PIC Inspector.....	67
Response to recommendations of oversight bodies	67
Monitoring power.....	68
Provision of reasons not to investigate a complaint.....	70
Critical incidents oversight.....	72
Gaps and overlaps that can be addressed by the new system	74
Critical incidents oversight.....	74
Direct investigations by oversight bodies	74
Oversight of ‘everyday’ policing practices	77
Navigating the complaints system	79
One stop shop for making complaints	80
Oversight of the Police Division of the Ombudsman’s Office	82
Oversight of the NSW Crime Commission	83

Transparency of police oversight costs	84
8. SHOULD THERE BE A SINGLE CIVILIAN OVERSIGHT MODEL FOR NEW SOUTH WALES POLICE?	85
Division of responsibility under the current system	85
How to assess the pros and cons of a new oversight model?	86
Advantages of combining complaints oversight and corruption investigation	88
Cost-effectiveness.....	89
Preventing cases from ‘falling between the cracks’	90
Unifying a fragmented system.....	92
Enhancing intelligence collection and early identification of problems	95
Disadvantages of combining complaints oversight and corruption investigation	96
Internal tensions and operational risks	96
Responsibility of Police Force to address its problems.....	98
Impact on Ombudsman’s other functions	100
Conclusion	101
9. GUIDANCE ON PROPOSED NEW MODEL	103
A new entity or an existing one with extra responsibilities?	103
What should the new commission be called?	105
Legislative structure options.....	106
A new Act?	106
Objectives of the new commission	107
Governance of the new commission	109
Complaints system.....	113
Lodgement of complaints	113
Information about making complaints	115
Notification requirements	115
Powers of the new commission	118
Own motion investigations.....	118
Conduct of public hearings	119
Content of reports	123
Procedural fairness	123
Education role.....	124
Transitional arrangements for current work	126
Budget and staffing.....	126
Employment of serving or former NSW police	129

Accommodation	131
Accountability arrangements.....	132
Ombudsman’s other police-related functions.....	135
Maladministration	136
Auditing the use of covert powers.....	137
Adjudicating witness protection appeals.....	139
Monitoring the use of emergency anti-terrorism detention powers	140
Reporting on use of emergency powers relating to riots and public disorder	141
Legislative reviews	142
Impact on Ombudsman’s other functions	143
Interaction of the new commission with WorkCover	145
Responding to report recommendations	146
Access to medical treatment.....	148
10. OVERSIGHT OF CRITICAL INCIDENTS	149
Why has oversight of critical incidents proved to be a difficult policy issue?	150
What is a critical incident?.....	152
Current oversight of critical incident investigations in New South Wales	152
Concerns about oversight of critical incident investigations	154
Should there be an independent body to investigate critical incident investigations?	155
Approaches in other jurisdictions	157
England and Wales.....	158
Northern Ireland	160
New Zealand	161
Maintaining police responsibility to investigate critical incidents	161
A new framework for the oversight of critical incident investigations	162
Legislative definition.....	167
Concerns about dual roles of monitor and investigator	169
Complaints about oversight body failing to monitor properly	169
Complaints against investigating police about their investigation	170
Complaints against police involved in the death or serious injury of a person	170
Legislative ‘hierarchy’ for oversight of critical incident investigations	171
Privilege against self-incrimination	172

11. CRIME COMMISSION OVERSIGHT	175
History and powers of the NSW Crime Commission	175
Oversight and accountability of the Crime Commission	178
Management Committee.....	179
Inspector of the Crime Commission.....	179
Police Integrity Commission	180
Parliamentary Joint Committee	181
NSW Ombudsman.....	182
Analysis of current oversight system for the NSW Crime Commission	182
Options for future oversight of the Crime Commission	184
The status quo	185
Inspector Barr’s model.....	185
Single oversight body.....	186
Assessment of options for future oversight of the Crime Commission	186
APPENDIX 1 - SUBMISSIONS AND MEETINGS	189
APPENDIX 2 -TERMS OF REFERENCE	193

1. Executive summary

By Letters Patent dated 20 May 2015, I was commissioned to review police oversight in New South Wales. In undertaking this task, I have been mindful that policing is often very difficult and dangerous, requiring officers to step forward and to sometimes put their lives on the line, when ordinary members of the public can step back and call 000. Policing can also require officers to make split second life or death decisions, when those who later come to judge them in the oversight space have the multiple benefits of time, better information, and hindsight. Even so, the public expects that police who overstep the mark will be held accountable. It is the balancing of these sometimes competing interests which is at the heart of police oversight.

My terms of reference are set out in Appendix 2. They require me, in essence, to consider options for a single civilian oversight model and then to recommend one. In that regard, my starting point has been to ask two questions: What is meant by a single civilian oversight model? And should there be a single oversight body for NSW Police?

My answer to the first question is informed by my terms of reference. And so my focus has been on options for the vertical integration of the Police Integrity Commission (PIC) and the Police Division of the Ombudsman's Office (PDOO). In that regard, I have not considered a horizontal integration of the PIC with the Independent Commission Against Corruption (ICAC); nor have I considered transferring the NSW Police Force Professional Standards Command over to a new civilian oversight body.

In relation to the second question, I have revisited the first interim report of the Wood Royal Commission into the NSW Police Service published in 1996, examined gaps and overlaps in the current oversight system, and considered models from other jurisdictions.

With the exception of the Australian Commission for Law Enforcement Integrity, which is responsible for detecting and investigating law enforcement-related corruption issues, and the South Australian Police Ombudsman, whose office has been recommended for abolition in a recent report of the Independent Commissioner Against Corruption in that state, the civilian oversight of police elsewhere in Australia is carried out by so-called broad-based anti-corruption bodies. An example is the recently created Independent Broad-based Anti-corruption Commission, which covers the whole of the Victorian public sector, including police, following the horizontal integration of that state's Office of Police Integrity into the new commission. Although the consideration of such models for application in New South Wales falls outside my terms of reference, particular statutory provisions in their enabling

legislation can provide useful guidance. The only jurisdiction specifically mentioned in my terms of reference is the Independent Police Complaints Commission of England and Wales, which has come under severe criticism in the House of Commons,¹ among other places, and in my view it is of limited utility to this exercise. So while some interstate and overseas models contain useful elements that could be replicated in New South Wales, there is no so-called 'best practice model' from elsewhere which could be wholly adopted, or even adapted, to replace the current system here.

In relation to gaps and overlaps, there are two types: those that unless addressed, will continue to exist regardless of which oversight model is in place; and those that will only be ameliorated if the PIC and PDOO are combined. Examples of each type can be found in the oversight of critical incidents, usually involving the death of or serious injury to someone, arising from interaction with police. The potential for the doubling up of inquiries by the PIC and the PDOO which may occur in the oversight of a critical incident would be reduced if these two bodies were combined. But even if they are not, there remains an urgent need to ensure that all critical incidents are notified to the relevant civilian oversight authority as soon as practicable so that real time independent monitoring of the police investigation into the incident can take place.

In terms of answering the question of whether there should be a single civilian body overseeing the NSW Police Force, I have revisited Commissioner Wood's 1996 first interim report, where he set out the advantages and disadvantages of such a step. With the benefit of hindsight, it seems to me that among the advantages of moving to a single oversight model, three stand out even more than they did 19 years ago: better transparency and accountability; the more effective use of intelligence; and an improved external investigation capacity. The disadvantages listed by the Commissioner included tensions between the corruption fighting and complaint handling functions and the potential swamping of the former by the latter. However, with the benefit of 19 years' operational experience, the PIC submitted to this review that it would be feasible to combine the PIC with the PDOO. It seems to me that these disadvantages, such as Commissioner Wood saw them, can be addressed if a new single civilian oversight body is set up with a divisional structure, broadly along the lines of the one proposed by the Australian Law Reform Commission in 1996 when it recommended a single framework of accountability for the Australian Federal Police and National Crime Authority (as it was then).

With these things in mind, I recommend a new model of police oversight for New South Wales, being one which is headed up by a commissioner and one which combines the PIC and the PDOO into a single body with the following characteristics:

¹ Home Affairs Committee, House of Commons, *Independent Police Complaints Commission*, Eleventh Report of Session 2012-13, 1 February 2013, p 4.

- A structure that allows it to maintain a strong focus on its two key functions, being the detection and investigation of serious misconduct, and the oversight of complaints investigations by the NSW Police Force.
- This structure should comprise a discrete management division for each of these key functions, with (as far as is practical) distinct budgets and obligations to separately report on their respective divisional activities in the new body's annual report.
- The two divisions – to be called the Integrity Division and the Oversight Division – should each be headed by a Deputy Commissioner, who is to be a statutory appointee.
- The new body should have a Commissioner's Council – a governing council comprised of the Commissioner and two Deputy Commissioners. The Council should be chaired by the Commissioner, and should meet regularly to:
 - consider which matters are to be investigated;
 - consider which matters are to proceed to a private hearing;
 - consider which matters are to proceed to a public hearing;
 - consider which matters are to be transferred from the Oversight Division to the Integrity Division, and vice versa;
 - establish a triage system for the handling of complaints received;
 - consider the scope of referral arrangements to other bodies after consultation with the Police Commissioner;
 - settle class and kind agreements after consultation with the Police Commissioner;
 - consider trends in granular intelligence.
- While it is expected that this new council will be able to operate in a collegiate atmosphere, the Commissioner will have the final say in the event of any disagreement.

To explore whether my proposed single body civilian oversight model would be feasible, I tested my ideas with the Honourable James Wood AO QC in a meeting I had with him on 5 August 2015. That meeting with the former Commissioner gave me reassurance that a new external oversight model is now achievable in New South Wales, providing the core responsibility of the Police Force for managing its own conduct and performance is maintained.

As indicated earlier, regardless of whether or not a new single oversight agency is established, there remains a pressing need to provide an oversight body with the statutory power to monitor critical incident investigations in real time. However, the oversight body should not be empowered to direct police investigators in relation to the conduct of any such investigations.

Oversight of the NSW Crime Commission should become the responsibility of the new single oversight body and I believe the position of Inspector of the Crime Commission will then become redundant. This is because, among other things, only the new body will have the necessary equipment and personnel to conduct the sort of sophisticated covert surveillance and intelligence gathering required to investigate officers of the Crime Commission. Because this body will be overseeing Crime Commission officers as well as police, I recommend that it be called the Law Enforcement Integrity and Complaints Commission (LEIACC), a title which also signifies its dual responsibilities of proactively targeting serious officer misconduct as well as overseeing complaint handling.

2. Recommendations

Preferred model and guidance on implementation

1. To simplify and improve the police oversight system in New South Wales, a new single civilian police oversight commission, headed up by a commissioner, should be established to exercise the functions currently carried out by the Police Integrity Commission, the Police Division of the Office of the Ombudsman and the Inspector of the Crime Commission.
2. To help stakeholders understand the purposes of the new commission, its name should reflect both its integrity responsibilities and its complaints oversight responsibilities; for example, the 'Law Enforcement Integrity and Complaints Commission' or the 'Independent Police Integrity and Complaints Commission'.
3. To improve understanding about how the complaints process works, and make it more 'user-friendly', all functions and powers of the new commission should be found in the Act establishing the commission, including:
 - i. all the functions and powers of the Ombudsman currently set out in Part 8A of the *Police Act 1990*, such as the obligation to receive complaints, the obligation to keep the NSW Police Force complaints system under review, the right to monitor certain police investigations and the right to undertake direct investigations into complaints;
 - ii. all the functions and powers of the Police Integrity Commission, including in relation to preventing, detecting and investigating serious police misconduct; and
 - iii. the functions and powers of the Inspector of the Crime Commission to the extent these are different to those of the Police Integrity Commission.
4. To provide a clear basis for the new commission to embrace a variety of skill sets and work styles, the objects of the new Act should recognise that combining oversight and integrity functions in one organisation should not enable one function to take precedence over the other.
5. To establish an organisational structure that will support a smooth transition to a combined model, the new Act should create separate integrity and oversight divisions,

each headed by a Deputy Commissioner who is able to exercise powers and functions, and receive funding allocations, that reflect each division's distinct responsibilities.

6. To enhance transparency around the costs of performing the functions of the new commission, the new Act should create separate reporting obligations for each division, in addition to any corporate-level annual reporting obligations.
7. To recognise the status of the new commission as a body exercising royal commission type powers, the new commissioner should be a serving or retired superior court judge, appointed by the Governor for a term not exceeding five years.
8. To recognise the status of the new commission as a body exercising royal commission type powers, the new Deputy Commissioners should be appointed by the Governor, with the concurrence of the Commissioner, each for a period not exceeding five years, and be Australian legal practitioners of a minimum of seven years standing.
9. To develop a cohesive culture within the new commission and enable it to respond to the opportunity that a combined model presents for the efficient and effective allocation of work between divisions, the new Act should establish a deliberative Commissioner's Council, comprising the Commissioner and Deputy Commissioners.
10. To ensure the new commission can respond appropriately to changing circumstances during the course of an investigation or monitoring exercise, the new Act should provide that the management of a matter can be transferred between divisions, following deliberation by the Commissioner's Council.
11. To ensure certainty in decision-making, as well as reflect the status of the new body as one exercising royal commission type powers, the Commissioner should have the final say if any matter being deliberated upon by the Commissioner's Council cannot be resolved by consensus.
12. To reflect the reality that people will complain directly to the NSW Police Force no matter what legislation provides, as well as the long-standing principle that the Police Force must take responsibility for the management of its own conduct, the *Police Act 1990* should retain an option to complain directly to the Police Commissioner.
13. To enable stakeholders to navigate the new civilian oversight system easily, clear online information about the integrity and complaints process, including links between the new commission's website and the NSW Police Force website, should be available.

14. To ensure the new commission has access to the information required to perform its statutory functions, without creating an unreasonably high regulatory burden for the NSW Police Force, the new commission should be able to:
 - i. access information about all complaints received by the Police Force, not just cases involving serious police misconduct;
 - ii. have direct access to the Police Force's complaints registration system, c@ts.i.; and
 - iii. issue guidelines or protocols, as is the case now with the Police Integrity Commission and the Ombudsman, setting out classes or kinds of complaint that do not need to be notified to the commission.
15. To provide the new commission with the capability to detect and prevent serious police misconduct, as well as investigate other misconduct or concerns about complaints management, the new commission should have the power to conduct own motion investigations in the same way as the Police Integrity Commission and Ombudsman do now.
16. To ensure that covert investigative techniques continue to be used only for more serious police conduct investigations under a new single civilian oversight model, only the Integrity Division of the new commission may exercise such techniques.
17. To ensure that public hearings continue to be used only for more serious police conduct investigations in a new single civilian oversight model, only the Integrity Division of the new commission may conduct such hearings.
18. To ensure that a decision by the commission to hold a public hearing is informed by a diversity of views within the commission, a proposal to conduct a public hearing should be a matter for deliberation at a Commissioner's Council meeting.
19. To support fairness in the new commission's processes, without detracting from its corruption-fighting capacity, the Act establishing the commission should include a 'persons to be heard' provision along the lines of section 137A of the *Police Integrity Commission Act 1996*, as well as a provision similar to section 33(3A) of that Act setting out public interest factors to be considered in deciding whether a hearing should be in public.
20. To ensure the NSW Police Force maintains primary responsibility for managing poor conduct and performance of its members, while benefitting from the perspective offered by external civilian oversight, the new commission should have a recommendatory power in relation to police corruption education programs and

similar within the Police Force, as well as a right to make recommendations for improvements to complaints management systems.

21. To recognise that it would be impractical to impose an obligation to conclude a unique major operation on a new commission, Operation Prospect should remain with the Ombudsman's Office until its conclusion.
22. To ensure the new commission is properly resourced to perform all of its functions, while ensuring that the Ombudsman's Office can continue to perform the functions it retains, the budget for the new model should be developed with the following factors in mind:
 - i. the creation of a new oversight model is not designed to realise cost-savings in the immediate or short-term, although it is reasonable to expect that some efficiencies may be gained over time with greater sharing of skills and information across functional areas (such as investigations of complaints and audits);
 - ii. the existing budget for the Police Integrity Commission and the Police Division of the Ombudsman's Office, including any ad hoc funding for special projects in the Ombudsman's Office involving police, should be made available in full to the new commission for at least four years, adjusted for any additional functions conferred on the entity during that time as is required;
 - iii. additional allowance should be made at the time of establishing the new commission for the transitional costs associated with the transfer of staff, the establishment of new premises for the Oversight Division, and the movement or purchase of equipment and services from the Ombudsman's Office, particularly information technology costs;
 - iv. some additional employee-related costs may be incurred since the new commission will not be able to leverage off the work of staff in other divisions of the Ombudsman's Office, such as the Aboriginal Unit in the Strategic Projects Division;
 - v. some additional employee-related costs will need to be included to ensure there is sufficient capacity to monitor critical incident investigations by the NSW Police Force;
 - vi. additional resources will be needed for the Inspector of the new commission to exercise a much wider set of responsibilities; and
 - vii. all staff in the new commission should be employed under the same statutory regime, preferably the *Government Sector Employment Act 2013*, but the organisation should still be able to engage consultants on a short term basis, if required.

23. To ensure the Oversight Division has access to the skills it requires to exercise its responsibilities in the complaints handling area, former New South Wales police officers should not be prohibited from being engaged to perform work for that division (as they are not prohibited from working with the Ombudsman's Office now); however, the final decision on any particular proposal to engage a former officer should be made following deliberation by the Commissioner's Council.
24. To contain costs, the principal location of the new commission should be the current Police Integrity Commission premises.
25. To recognise the need for continued high levels of secrecy and security in relation to integrity work, the Oversight Division should not occupy the same floors on which the Integrity Division is conducting covert investigation work, and should preferably have a separate 'public facing' foyer on a separate floor.
26. To ensure that the new commission remains subject to external scrutiny, it should be accountable in relation to all its functions to an Inspector.
27. To recognise that the future workload of the Inspector of the new commission is likely to be much greater than the present workload of the Inspector of the Police Integrity Commission, the inspectorates of the Independent Commission Against Corruption and the new commission should be filled by different people.
28. To recognise that separating the inspector roles removes any potential concerns about incompatibility of office, the Inspector of the new commission should be subject to the jurisdiction of the Independent Commission Against Corruption in the same way the Inspector of the Police Integrity Commission was previously.
29. To recognise that maladministration involving the NSW Police Force (as a public authority) differs from individual misconduct in relation to policing duties, the Ombudsman should retain jurisdiction over maladministration involving the Police Force, subject to the following limitations:
 - i. any such matter must be referred to the new commission if it relates to conduct that could be the subject of a complaint under the Act establishing the new commission;
 - ii. all proposed investigations into maladministration issues must be notified to the new commission before they commence;
 - iii. the new commission must be advised of the status of investigations into maladministration issues on a regular basis; and

- iv. the new commission may elect at any time to take over the investigation of a maladministration issue if it is satisfied that it also involves officer conduct that could be the subject of a complaint and it is satisfied it is in the public interest to do so.
30. To recognise that the new commission could not perform statutory audits of the use of covert investigation techniques by all law enforcement agencies in New South Wales, given its own use of such techniques, this function will either need to remain with the Ombudsman (despite being a significant police oversight function) or be split between agencies, or other options for external scrutiny will need to be developed, such as resourcing the new Inspector to undertake such work.
31. To ensure the Inspector of the new commission can effectively carry out essential statutory audit functions, the NSW Government should write to the Commonwealth Government seeking an amendment to the *Telecommunications (Interception and Access) Act 1979* to allow the Inspector to access telephone intercept material for the purpose of auditing the new commission.
32. To recognise that an organisation with specialist police knowledge may be best placed to consider witness protection decisions of the Police Commissioner under the *Witness Protection Act 1995*, this function could be moved from the Ombudsman to the new commission.
33. To ensure that any change to the Ombudsman's responsibility to monitor and report on activities relating to preventative detention under the *Terrorism (Police Powers) Act 2002* is consistent with other government policy in this area, the question of which agency should undertake this monitoring work in the longer term should be considered further as part of the current statutory review of that Act and:
- i. the Ombudsman should continue to exercise those powers until the outcome of the statutory review is finalised; and
 - ii. as the Police Division of the Ombudsman's Office is to be absorbed into the new commission, the statutory review should take into account that expertise in relation to these matters is likely to move to the new commission.
34. To recognise that statutory monitoring and review functions related to common policing issues should generally be exercised by the new commission rather than the Ombudsman, the role of the Ombudsman under the *Law Enforcement (Powers and Responsibilities) Act 2002* should be conferred on the new commission.

35. To recognise that statutory monitoring and review functions directly related to common policing issues should generally be exercised by the new commission rather than the Ombudsman, the legislative review functions of the Ombudsman not otherwise specifically dealt with in these recommendations should be conferred on the new body.
36. To ensure that the new commission has the flexibility and resources to continue the work of the Ombudsman in improving the relationship between the Aboriginal community and the NSW Police Force, the commission should be able to enter into cooperative protocols with the Aboriginal Deputy Ombudsman.
37. To ensure that the distinct and important investigative functions of the NSW Police Force and the WorkCover Authority (soon to be SafeWork NSW in relation to its regulatory functions) do not adversely impact each other in relation to a particular incident, or in relation to witnesses who are interviewed about the same incident by both agencies, the Police Commissioner and the WorkCover Authority should enter into a cooperative arrangement about the management of investigations into police workplace incidents.
38. To ensure that investigating officers have a useful reference on how to perform their functions in a way that complements, rather than detracts, from the work of others at the scene of an incident, cooperative arrangements between the WorkCover Authority and the NSW Police Force should not seek to prioritise one investigative function over another.
39. To ensure that recommendations of the Inspector of the new commission are considered and responded to in a timely way, the new commission should provide a report stating whether or not it intends to accept a recommendation or take the requested action, and provide reasons if not.
40. To ensure that recommendations of the new commission are considered and responded to in a timely way, the Police Commissioner should provide a report stating whether the NSW Police Force intends to accept a recommendation or take the requested action, and provide reasons if not.
41. To ensure that individual police officers who are the subject of inquiries can access appropriate medical support, the NSW Government should give consideration to exempting disclosures in connection with oversight investigations to medical professionals in a similar way to the existing exemptions relating to legal advisers.

Critical incidents

42. To recognise that only the NSW Police Force has the appropriate investigative skills, and is the only agency that could maintain these skills at a sufficiently high level at a reasonable cost, the Police Force should retain responsibility for investigating critical incidents.
43. To ensure high levels of public confidence in the standard of investigation of critical incidents by the NSW Police Force, the new commission should be conferred with a 'real time' power to monitor these investigations.
44. To ensure that the new critical incident oversight function provides accountability and transparency without interfering with the conduct of police investigations, the commission should not have the power to control, supervise or interfere with the police investigation.
45. To establish a framework that strikes an appropriate balance between accountability, transparency and effective investigation, the Act establishing the new commission should reflect the features recommended by the NSW Bar Association in its submission to this review, including an obligation on the NSW Police Force to immediately notify the new commission of any critical incident as soon as it is declared, with enough information to allow the commission to determine whether or not to monitor the investigation.
46. To increase public confidence in critical incident investigations and deal with any concerns identified during monitoring by the new commission, when a police investigation has been finalised, the new commission should produce a critical incident report to the Police Commissioner, the Minister, and – where death has occurred – to the Coroner.
47. To ensure a consistent approach by the NSW Police Force, the Coroner and the new commission, statutory definitions of 'critical incident' and 'police operation' should be developed in consultation with the Coroner and the Police Commissioner, and included in the legislation governing the new oversight body and the *Coroners Act 2009*.
48. To promote transparency and public confidence in critical incident investigations, the Critical Incident Guidelines should be proactively released by the NSW Police Force as soon as a revised version is finalised.
49. To establish an efficient framework for responding to complaints about critical incidents and their investigation, complaints about such matters should be handled in the following way:

- i. complaints about how the new commission conducted itself while engaged in critical incident monitoring should be made to the Inspector;
- ii. complaints about how the Critical Incident Investigation Team conducted an investigation should be made to the new commission, with any conflict arising from a previous monitoring role being managed internally;
- iii. complaints about the conduct of police involved directly in a critical incident should be able to be made at any time, and notified to the oversight body, but there should be no obligation to progress the complaint while a monitored critical incident investigation is active.

Crime Commission

50. To reduce duplication of oversight of the NSW Crime Commission, the position of Inspector of the NSW Crime Commission should be abolished and the new commission should be given jurisdiction to oversight the Crime Commission.

3. Methodology and consultation

Introduction

My terms of reference directed me to consult with existing oversight and integrity agencies, law enforcement agencies and other community members. Accordingly, to inform the development of this report, I wrote to key stakeholders in New South Wales, as well as the Commonwealth, inviting them to make written submissions.

A list of those stakeholders is attached at Appendix 1

To address the requirement that I reach out to community members, I invited written submissions through advertisements which ran in the *Sydney Morning Herald* and the *Daily Telegraph* on 23 May 2015. These advertisements summarised my key terms of reference and invited people to view the full terms on the NSW Government's website www.haveyoursay.nsw.gov.au. It was also made clear that submissions received could be published and that any requests for submissions to remain confidential should be made at the time of submitting them. A deadline for receipt of submissions was fixed for 4pm on 24 June 2015. As it turned out, this deadline was extended on request, especially in relation to supplementary submissions. In response, I received over 25 submissions, nearly all of which are published on the website of the Department of Justice, which hosted the secretariat for the review.² A small number of submissions, which raised individual cases, were not published mainly because my terms of reference directed me not to consider individual investigations or complaints.

As well as calling for written submissions, I invited key stakeholders to meet with me to discuss their views on the terms of reference. A full list of those people who took up my invitation is attached at Appendix 1. There were other stakeholders who requested, and were granted, meetings to discuss their views on the terms of reference too. A list of these stakeholders is also included in Appendix 1. Everyone I met was informed that I would only publicly report on what they told me if they put it in writing in a form that could be published. That way the consultation process was conducted transparently, and all participants were aware of the views of others.

Additional consultation

In addition to the consultations outlined above, I was invited to attend a public forum on 'The Future of Police Accountability', hosted by the University of NSW and the Redfern Legal

² http://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/review-police-oversight-submissions.aspx.

Centre on 30 July 2015. The forum was chaired by the Honourable Bob Debus AM, Professorial Fellow UNSW Law and former Attorney-General of NSW.

The participants for the forum's Q&A panel were:

- Dr Vicki Sentas, Senior Lecturer, UNSW Law
- Mr David Porter, Senior Solicitor, UNSW Policing Practice at Redfern Legal Centre
- The Honourable Trevor Khan MLC, Deputy President and Chair of Committees, Parliament of NSW
- Mr David Shoebridge MLC, Parliament of NSW
- Assistant Commissioner Peter Gallagher APM, Commander, Professional Standards Command, NSW Police Force
- Mr Alan Beckley, Adjunct Research Fellow, University of Western Sydney and former senior police officer, West Mercia Constabulary, England.

At the outset, I was invited to make some introductory remarks to the forum. Then panel participants were asked a series of questions from the Chair, and from the audience, about problems with the current system of police oversight in New South Wales and about possible solutions. In this way, I heard a number of diverse perspectives on a range of the complex issues bearing on my terms of reference. And I thank the Redfern Legal Centre and the University of NSW for giving me this opportunity.

My approach to the review

My starting point for this review was to read and consider a number of volumes of material relating to the current oversight system in New South Wales, as well as to systems that operate interstate and in relevant jurisdictions overseas. I then studied the reports of the Wood Royal Commission. Although written almost 20 years ago, I strongly believe that Commissioner Wood's reports remain central to any consideration of the oversight of New South Wales police today. As the former Ombudsman put it in his submission to me:

The Review 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.³

As I discuss throughout this report, I agree with Commissioner Wood's fundamental principles:

³ NSW Ombudsman submission, p 12.

- a) That there should be an independent body with royal commission type powers to detect, investigate and prevent police corruption and other serious misconduct;
- b) That the Police Force itself should continue to have management of the assessment and investigation of complaints, with the Police Commissioner having responsibility for disciplinary decisions and performance management;
- c) That there should be an independent body to oversight the management by police of their assessment and investigation of complaints.

What Commissioner Wood recommended almost 20 years ago to achieve this, was that there should be a stand-alone agency to investigate serious corruption and misconduct, with the Ombudsman's Office focussing on the oversight of the way the Police Force manages the assessment and investigation of complaints.

But what my terms of reference direct me to do is to consider options for combining Commissioner Wood's stand-alone agency with the part of the Ombudsman's Office that oversees the Police Force's handling of complaints against its members: that is to say, for combining into a single body the functions outlined in paragraphs (a) and (c) above. I am then to come up with a recommended model. To that end, I am required among other things, to consider gaps and overlaps in the current system and best practice models from other jurisdictions.

Nearly all of the submissions I received outlined the current complexity of the system including its gaps and overlaps. But a number of these matters, such as the need to more effectively monitor critical incident investigations, can be rectified at least in part, without changing the system recommended by Commissioner Wood.

So a key question I have posed for myself in this review is: 'Should there be a single oversight body for police in New South Wales?' To answer this, I returned to Commissioner Wood's first interim report and to the list of arguments he outlined for and against a single oversight body versus the current model in New South Wales. And I then reassessed those arguments for and against, with the benefit of 19 years' hindsight. I also reviewed the very comprehensive 1996 report of the Australian Law Reform Commission (ALRC) into complaints against Federal law enforcement agencies in which the ALRC concluded that a single oversight model was both feasible and to be recommended.

Having weighed all those matters up, with the benefit of written submissions and meetings with those people listed in Appendix 1, I came to the provisional view that a new single model was both achievable and desirable, and would address a number of the gaps and overlaps identified in the submissions I received. I then had the opportunity to outline a proposed model, based broadly on the ALRC model, to Mr Wood. My meeting with the former Royal Commissioner gave me reassurance that a new external oversight model is now achievable in New South Wales, providing the core responsibility of the Police Force for management of its own conduct and performance is maintained.

Along the way, I considered a number of interstate and overseas models of police oversight before concluding that there is no 'best practice model' for New South Wales to be found anywhere else. Although various elements of other models are useful, as confirmed during my meetings with the head of the Australian Commission for Law Enforcement Integrity, Mr Michael Griffin AM, the Victorian Ombudsman and former Deputy Chair of England's Independent Police Complaints Commission, Ms Deborah Glass OBE, the Victorian Broad-based Anti-corruption Commissioner, Mr Stephen O'Bryan QC, and during a teleconference with the Chair of the New Zealand Independent Police Complaints Authority, Judge Sir David Carruthers KNZM, there is no model operating in any other jurisdiction that can be taken 'off the shelf' and applied in this state. The system of police oversight here has its own unique history which necessarily results in a different model to those applied elsewhere in Australia. With the exception of the Commonwealth and South Australia, the other Australian jurisdictions have so called broad-based anti-corruption bodies, if they have them at all. In New South Wales, however, it was Commissioner Wood who emphatically demonstrated that the broad-based Independent Commission Against Corruption had failed to come to grips with police corruption during the five years or so it had that responsibility.

During the course of this review, I have received wonderful assistance from the review secretariat, which was a small, cross-agency team, seconded to the Department of Justice. I would like to thank the team for their help in the preparation of this report.

4. Evolution of oversight and corruption investigation in New South Wales

Before the Wood Royal Commission

The early days

Three years after the appointment of the first Ombudsman in 1975 as an independent statutory officer to investigate citizens' complaints about public authorities, the NSW Parliament passed the *Police Regulation (Allegations of Misconduct) Act 1978*. Pursuant to this legislation and subsequent amendments, the Ombudsman was empowered to oversee the handling and investigation by the Police Commissioner of complaints against police.⁴

However, the Ombudsman's powers to directly investigate matters himself was limited. His jurisdiction to launch a direct investigation under the *Ombudsman Act 1974* was not triggered until the Police Commissioner had inquired into and reported on a complaint, the Ombudsman had reviewed it and reported dissatisfaction with the Commissioner's inquiry, and the Commissioner was then given a further opportunity to investigate in light of the Ombudsman's concerns. The Ombudsman could only conduct a direct investigation into the matter if dissatisfied with this further inquiry.⁵

The Independent Commission Against Corruption

In 1988 the NSW Parliament passed legislation to establish the Independent Commission Against Corruption (ICAC) which, among other things, was given standing royal commission type powers to investigate and report on allegations of corrupt conduct within the New South Wales public sector, including the NSW Police. A parliamentary committee was set up to monitor and review the ICAC.⁶

Following its establishment, the ICAC conducted a number of investigations into allegations of police misconduct which resulted in reports on matters as diverse as the Sutherland Licensing Police, police and truck repairers, and police and paedophiles.⁷ In the year the Wood Royal Commission was established, approximately 30 per cent of complaints made to the ICAC by members of the public concerned police.⁸

⁴ The Hon Justice JRT Wood, *Royal Commission into the New South Wales Police Service: Interim Report*, February 1996 ('Wood Royal Commission, first interim report'), pp 8-9.

⁵ Joint Committee on the Office of the Ombudsman, NSW Parliament, *Report of the Inquiry Upon the Role of the Office of the Ombudsman in Investigating Complaints Against Police*, April 1992, p 10.

⁶ *Independent Commission Against Corruption Act 1988*, s 63.

⁷ Wood Royal Commission, first interim report, p 12.

⁸ Wood Royal Commission, first interim report, p 11.

The Parliamentary Joint Committee

In 1990, the NSW Parliament resolved to establish a bipartisan committee comprising members of both Houses to, among other things, monitor and review the performance of the Ombudsman's Office. Not long after its establishment, the committee, which I chaired, resolved to inquire into the Ombudsman's role in investigating complaints against police.

What emerged from the subsequent inquiry and roundtable discussions between the committee, the Ombudsman and the Police Commissioner, was a revised system whereby the Ombudsman agreed to delegate to the police responsibility for conciliating minor complaints. In return, the police accepted that the Ombudsman should have the power, having regard to the public interest, to conduct direct investigations into complaints.⁹

A revised system incorporating these changes became law under a new Part 8A of the *Police Act 1990* (discussed below) inserted by the *Police (Complaints, Discipline and Appeals) Amendment Act 1993*.¹⁰

The legislative framework for the complaints process

A process for managing, monitoring and investigating certain complaints against police is set out in Part 8A of the *Police Act*, first introduced in 1993.¹¹ Prior to that, the statutory framework for the making and investigation of complaints against police was included in the *Police Regulation (Allegations of Misconduct) Act 1978*. The objective of Part 8A was 'to improve the existing scheme of complaint management to eliminate shortcomings, deficiencies and problems'¹² in the processes for dealing with complaints against police. The amendments were introduced following the abovementioned 1992 report of the Parliamentary Joint Committee which 'focused on the need to rid the current complaint system of procedures that are cumbersome, time-consuming and wasteful of resources.'¹³

Part 8A was further amended in 1998 following the recommendations of the Wood Royal Commission. These reforms are described in further detail later in this chapter.

The Wood Royal Commission

Notwithstanding the ICAC's jurisdiction over the NSW Police Service (as it was then known), concerns about the handling of allegations of police corruption continued to grow.

⁹ Joint Committee on the Office of the Ombudsman, NSW Parliament, Report of the Inquiry Upon the Role of the Office of the Ombudsman in Investigating Complaints Against Police, April 1992, pp viii, 142 and 146.

¹⁰ For debate on the Police Service (Complaints, Discipline and Appeals) Amendment Bill 1993, see the NSW Parliamentary Hansard for 20 May 1993.

¹¹ *Police Service (Complaints, Discipline and Appeals) Amendment Act 1993*.

¹² The Hon Terry Griffiths, Second reading speech: Police Service (Complaints, Discipline and Appeals) Amendment Bill, 11 May 1993.

¹³ The Hon Terry Griffiths, Second reading speech: Police Service (Complaints, Discipline and Appeals) Amendment Bill, 11 May 1993.

Following a resolution of the NSW Legislative Assembly, Letters Patent were granted to the Honourable Justice James Wood on 13 May 1994 to inquire into:

- the nature and extent of corruption within the Police Service, particularly of an entrenched and systemic kind
- the capacity of the Professional Responsibility Command, and the civilian agencies, to investigate and deal with corruption and with complaints of serious misconduct.¹⁴

Interim reports: 1996

Commissioner Wood released two interim reports, dated February 1996 and November 1996. In his first interim report he described the existing system of shared responsibility between the NSW Police Service, the Ombudsman and the ICAC for investigating police misconduct and corruption as follows:

No formalised relationship exists which is aimed at a comprehensive approach to, and attack on, police misconduct and corruption. Further, the number of ‘watchdog’ agencies involved presents immediate cause for concern, in terms of effective use of resources, fragmentation of supervision and direction, and an increased risk of sensitive information being leaked.¹⁵

After comparing the New South Wales police complaints system with interstate and overseas models, Commissioner Wood concluded that the preferred option would be a ‘combination of police investigation with external oversight for most matters and external investigation of serious police misconduct and corruption.’¹⁶

Noting that one of the reasons his inquiry had been established was due to a ‘public perception that the ICAC had failed to tackle police corruption or use its coercive powers with sufficient determination and initiative’,¹⁷ Commissioner Wood recommended the creation of a stand-alone body, armed with the ICAC’s coercive powers, to focus in on police corruption. This body he proposed to call the Police Corruption Commission (PCC), which would be oversighted by an Inspector that might be chosen from the ranks of serving or former Supreme Court judges. He also proposed an ongoing complaints oversight role for the Ombudsman.

Police Integrity Commission

Following Commissioner Wood’s recommendation to create a ‘Police Corruption Commission’, on 1 July 1996 the Government established the Police Integrity Commission (PIC) through the *Police Integrity Commission Act 1996* (the *PIC Act*). Explaining the

¹⁴ Wood Royal Commission, first interim report, p 1.

¹⁵ Wood Royal Commission, first interim report, p 4.

¹⁶ Wood Royal Commission, first interim report, p 85.

¹⁷ Wood Royal Commission, first interim report, p 91.

difference in name, Police Minister Paul Whelan said, ‘the shift in emphasis will reflect the future rather than the past’.¹⁸

The principal role of the PIC is to detect, investigate and prevent serious police misconduct.

In regard to oversight of the PIC, the *PIC Act* implemented Commissioner Wood’s recommendation to create a PIC Inspector,¹⁹ and also bestowed a parliamentary oversight role on to the Joint Committee on the Office of the Ombudsman.²⁰

Final report: 1997

On 1 May 1997 Commissioner Wood released his final report, comprising six volumes and containing 174 recommendations.

After emphasising that the existing complaints and discipline system, which was based on a punitive approach, was too legalistic and insufficiently focused on managerial improvement of the performance of staff,²¹ Commissioner Wood recommended a more managerial approach which empowered local commanders with responsibility for the behaviour of subordinates.²² He was of the view that reform could only be achieved through substantial cultural and system change, stating ‘it is necessary that the Service repair itself’.²³

However, to tackle more serious corruption, Commissioner Wood argued that the PIC and Police Internal Affairs needed a capacity for sophisticated, covert and broad based inquiries which would result in criminal convictions and/or dismissal.

Finally, he proposed that the supervisory role of the Ombudsman would continue in the same way that it had under the old system. ‘The Ombudsman should play a vital role in the proposed model’, the Commissioner said, noting that the 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’.²⁴

Commissioner Wood expected that the Ombudsman would do this by:

- ensuring Local Commanders’ decisions were appropriate
- conducting random checks on the progress of non-reportable matters

¹⁸ The Hon Paul Whelan, Second reading speech: Police Integrity Commission Bill and Police Legislation Amendment Bill, 4 June 1996.

¹⁹ *Police Integrity Commission Act 1996*, s 88.

²⁰ *Police Integrity Commission Act 1996*, ss 94 and 95.

²¹ The Hon Justice JRT Wood, *Royal Commission into the New South Wales Police Service: Final Report* (‘Wood Royal Commission, final report’), Volume II, May 1997, pp 308 and 309.

²² Wood Royal Commission, final report, Volume II, p 314.

²³ Wood Royal Commission, final report, Volume II, p 211.

²⁴ Wood Royal Commission, final report, Volume II, p 327.

- reporting to the complainant on the outcome of any managerial action in reportable matters
- reacting 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 as necessary
- maintaining close liaison with the PIC
- reporting to Parliament in relation to matters concerning the complaint system.²⁵

Commissioner Wood's final report proposed that under the new system:

- three classes of complaints would be established:
 - Category 1, more serious matters involving criminality or misconduct capable of leading to dismissal, requiring investigation by the PIC or the Office of Internal Affairs
 - Category 2, less serious matters reportable to the Ombudsman and suitable for disposition by the Police Service under the proposed scheme
 - Category 3, lesser matters of internal management, not reportable to the Ombudsman, but subject to discretionary or random audit by its office.
- the Police Service, the PIC and Ombudsman would, as under the existing system, agree on the class or kind of matters falling within each category and reportable to the Ombudsman and/or the PIC
- matters within category 1 would be entrusted to the PIC, or the Office of Internal Affairs (subject to PIC oversight, or joint management) for investigation
- matters within category 2 would be entrusted to the Local Commander for investigation and resolution along managerial lines
- matters within category 3 would also be dealt with by the Local Commander according to existing practice.²⁶

After the Wood Royal Commission

Reform to Part 8A of the Police Service Act 1990

Following the Wood Royal Commission, in October 1998 the Government introduced a bill to amend the *Police Service Act 1990* – the Police Service Amendment (Complaints and Management Reform) Bill 1998.

The bill implemented ten key Royal Commission recommendations, including most of the major recommendations for legislative change. The amendments addressed the Commission's recommendations regarding the police complaints system by overhauling the complaints and discipline provisions in Part 8A of the Act.

²⁵ Wood Royal Commission, final report, Volume II, p 327.

²⁶ Wood Royal Commission, final report, Volume II, p 312.

The amendments also implemented joint proposals from the PIC Commissioner, the Ombudsman and the Commissioner of Police to streamline the complaints system and to support the philosophy of the Police Service dealing with complaints managerially.²⁷

Inspector's report on PIC practices and procedures: 2003

In June 2003, the PIC Inspector produced a report on the practices and procedures of the PIC, with particular reference to the conduct of its hearings. The comprehensive report was triggered in part by the PIC's Operation Malta inquiry,²⁸ and contained 24 recommendations for improvements. After referring to precedents such as *Balog v ICAC (1990) 169 CLR 625*²⁹ and *ICAC v Chaffey (1992) 30 NSWLR 21*,³⁰ the Inspector was at pains to point out, amongst other things, that:

- The PIC has a broad mandate to investigate police misconduct. Provided that the PIC acts within the scope of its mandate the PIC should conduct its investigations in such a manner as it considers fit, free from interference from external influences.
- There should be no interference with the way in which the PIC elects to convene public or private hearings.³¹

Parliamentary Joint Committee's Ten Year Review of the Police Oversight System: 2006

The Committee on the Office of the Ombudsman and the PIC conducted an inquiry into the police oversight system ten years after the Wood Royal Commission and the establishment of the PIC.³²

A key focus of the committee's report was a submission by the Police Force and Police Association that, to reduce duplication in the oversight system, the PIC and the Ombudsman's Office (in so far as it dealt with police complaints) be amalgamated.

²⁷ The Hon Paul Whelan, Second reading speech: Police Service Amendment (Complaints and Management Reform) Bill, 21 October 1998.

²⁸ Operation Malta was an investigation commenced by the PIC in October 2000 into a number of serious allegations that senior police officers had deliberately obstructed police anticorruption reform processes. The details of Operation Malta are discussed in the Inspector of the PIC, *Report on the Practices and Procedures of the Police Integrity Commission*, June 2003, chapter 5.

²⁹ The High Court in *Balog* considered the nature and function of bodies equivalent to the PIC, and held that a finding by the ICAC is not a finding of guilt and that the ICAC does not have power to recommend prosecution.

³⁰ The NSW Court of Appeal in *Chaffey* considered the ability of ICAC to hold public hearings and their impact on the reputations of individuals. Gleeson CJ held that there needs to be a 'conscious weighing of the public interest and openness of proceedings against the harm to reputation that can result.'

³¹ Inspector of the Police Integrity Commission, *Report on the Practices and Procedures of the Police Integrity Commission*, June 2003, pp i, 46, 8-49 and 56.

³² Committee on the Office of the Ombudsman and the Police Integrity Commission, NSW Parliament, *Ten year review of the police oversight system in New South Wales* ('Ombudsman and PIC Committee, Ten year review'), Report No. 16/53, November 2006.

After considering the evidence before it, including the evidence of the PIC Inspector, the Honourable James Wood, who amongst other things argued that ‘there is a risk of the critical (corruption fighting) function now assigned to the PIC being swamped by that currently assigned to the Ombudsman’,³³ the committee recommended ‘[t]he preservation of the status quo in respect of the role and functions of the Ombudsman and the Police Integrity Commission within the police oversight system in New South Wales.’³⁴

The committee further recommended that statutory recognition be given within the *Police Act 1990* to:

- the Ombudsman’s Office as the primary body for oversight of NSW Police
- the NSW Police to handle and investigate the majority of complaints against police, subject to the Ombudsman’s oversight
- the PIC as the independent body with an investigative focus targeted at serious police misconduct and police corruption.³⁵

PIC Inspector’s Special Report to Parliament: 2009

In April 2009 the PIC Inspector made a Special Report to Parliament arising out of four reports that had been made by him in relation to three of the PIC’s operations: Whistler, Mallard and Rani. The Special Report considered whether the four complaint reports, taken together, might suggest a pattern of failure by the Commission to accord procedural fairness and whether the impasse on publishing complaint reports would mean that such matters could not therefore be brought to the attention of Parliament.³⁶

The Inspector found that the Commission’s reports on the three operations contained inaccuracies concerning the complainants, lacked clarity and precision, in some cases failed to refer to exculpatory material, failed to refer to relevant evidence or explore relevant issues, and failed to present a fair and balanced account of the evidence. The Inspector concluded that there had been ‘a clear and significant failure to accord procedural fairness’.³⁷

The Inspector noted that the PIC had agreed to accept recommendations made in his reports intended to limit the damage done to reputations caused by the publication of the adverse opinions in respect of the persons involved, and that it would be seeking advice

³³ Ombudsman and PIC Committee, Ten year review, p ix.

³⁴ Ombudsman and PIC Committee, Ten year review, pp ix and 138.

³⁵ Ombudsman and PIC Committee, Ten year review, pp ix, 31, 133-135 and 138.

³⁶ Inspector of the Police Integrity Commission, *Special Report to Parliament* (‘PIC Inspector 2009 Special Report to Parliament’), 2 April 2009, p 2.

³⁷ PIC Inspector 2009 Special Report to Parliament, p 4.

from Senior Counsel as to the appropriateness of its relevant practices and procedures in the light of his complaint report regarding Operation Rani.³⁸

PIC Inspector's Special Report to Parliament: 2011

In October 2011 the Inspector made another Special Report to Parliament, this time arising out of concerns raised by a police officer regarding the PIC's 2007 report into Operation Rani.

The Inspector noted that 'this is not the first occasion on which I have found it necessary to prepare and make a Report pursuant to section 101 [of the *PIC Act*]³⁹ dealing with systemic abuses of power, impropriety and misconduct on the part of the PIC',⁴⁰ referring to his 2009 Special Report to Parliament.

The Inspector requested that his 2011 report be read in conjunction with his 2009 report, commenting that the concerns and opinions that led to the 2009 report were 'just as relevant and valid if applied to the serious and systemic misconduct of the Commission'.⁴¹

Ministerial Review of the PIC Act: 2011

In a November 2011 Ministerial Review of the *PIC Act*, the Government acknowledged that the PIC had been the subject of a number of adverse findings by the PIC Inspector, especially in relation to a lack procedural of fairness. However, the review stated that 'it cannot be concluded that recent issues necessarily suggest a structural problem or call for a structural solution'.⁴²

The Government considered it more important to 'bring about an end to the speculation concerning the future of the PIC and to provide stability of leadership to bring about any necessary changes'.⁴³ Soon afterwards the Honourable Bruce James QC was appointed PIC Commissioner, and the Honourable David Levine AO RFD QC was appointed PIC Inspector. In introducing a consequential amending bill, the Government noted that any amalgamation of the PIC and ICAC would itself involve further instability and upheaval:

The review concluded that a role clearly remained for a body, separate from government and reporting to the Parliament, to oversee the integrity of the NSW Police Force and Crime

³⁸ PIC Inspector 2009 Special Report to Parliament, pp 4-5.

³⁹ Section 101 of the *Police Integrity Commission Act 1996* sets out the circumstances in which the Inspector may make a special report to Parliament.

⁴⁰ PIC Inspector 2009 Special Report to Parliament, p 2.

⁴¹ PIC Inspector 2009 Special Report to Parliament, pp 2-3.

⁴² NSW Government, *Review by the Minister of the Police Integrity Commission Act 1996*, November 2011, p 12.

⁴³ NSW Government, *Review by the Minister of the Police Integrity Commission Act 1996*, November 2011, p 12.

Commission because corruption and misconduct risks inherently coexist with the discretionary exercise of significant coercive powers.⁴⁴

The Government determined that the PIC was the most appropriate body to undertake that role.⁴⁵

Following the review, the Government amended the *PIC Act* to, among other things, specify criteria that the PIC is to consider when determining whether to conduct a hearing wholly or partly in public, assist in providing procedural fairness to persons named adversely in PIC reports by allowing them an opportunity to respond, and empower the PIC Inspector to make a report on any matter relating to his functions at any time.⁴⁶

McClelland Critical Incident Review: 2013

In 2013 the Honourable Robert McClelland conducted a review of the investigation and oversight of police critical incidents.

Mr McClelland made nine recommendations, including that:

- as much information concerning the outcome of a critical incident investigation as can reasonably be provided be made publicly available, as soon as practicable
- the Commissioner of Police, the oversight agencies, the State Coroner and WorkCover convene a forum to discuss developing a Framework for Cooperation to promote regular dialogue and enhance cooperation between the agencies
- the Government consider proposing legislative amendments to the *Police Act 1990* to provide for the oversight of critical incident investigations by the Ombudsman.⁴⁷

Mr McClelland also endorsed a recently announced decision by the Government to make the NSW Police Force's Critical Incident Guidelines publicly available.

Although the consideration of a merger between the PIC and ICAC was not within the terms of reference of his review, extracts of a Police Association submission addressing that point were included at the end of Mr McClelland's report, along with the following recommendation:

That the Government give consideration to requesting the Police Integrity Commission and the Independent Commission Against Corruption confer with a view to examining the

⁴⁴ The Hon Barry O'Farrell, Agreement in principle speech: Police Integrity Commission Amendment Bill, 7 March 2012, pp 1-2.

⁴⁵ The Hon Barry O'Farrell, Agreement in principle speech: Police Integrity Commission Amendment Bill, 7 March 2012.

⁴⁶ The Hon Barry O'Farrell, Agreement in principle speech: Police Integrity Commission Amendment Bill, 7 March 2012.

⁴⁷ The Hon Robert McClelland, *Oversight of Police Critical incidents* ('McClelland report'), 29 November 2013, pp xv- xxi.

feasibility of those Agencies entering a Memorandum of Understanding to facilitate the sharing of staff, resources, expertise and capabilities.⁴⁸

The Government has not provided a response to the McClelland review.

PIC and ICAC (Inspectors) Act 2013

This Act allows for the two positions of the Inspector of the ICAC and the Inspector of the PIC to be held by the same person, and provides for the appointment of an Assistant Inspector of the ICAC and PIC. This was done to allow one person to 'take on both highly specialised roles.'⁴⁹

To avoid potential conflict of interest, however, the Act also amended the *PIC Act* and the *Public Interest Disclosures Act 1994* to ensure that the Ombudsman, instead of the ICAC, is responsible for dealing with complaints and carrying out investigations about the conduct of the PIC Inspector or the Inspector's officers.

Parliamentary Joint Committee's General Meetings report: 2014

In August 2014 the Committee on the Ombudsman, the PIC and the Crime Commission produced a General Meetings report which focused on oversight of police critical incidents, changes to agencies' jurisdiction, proposals for legislative change and cooperation between agencies.

In relation to the McClelland report, the committee said it was not convinced of any duplication in the oversight of police critical incidents, noting: 'Each agency involved performs distinct and valuable oversight roles.'⁵⁰

The committee found that the proposition arising from the McClelland report that the PIC and ICAC be amalgamated was not supported by the bodies concerned and had not been subject to a thorough consultation process.⁵¹ It stated: 'Significantly altering the existing oversight system for police misconduct and corruption would warrant a more comprehensive review.'⁵²

The committee recommended that, in the implementation of any reforms to the oversight of police critical incidents, the Ombudsman's and PIC's current functions and powers to

⁴⁸ McClelland report, p 95.

⁴⁹ The Hon Barry O'Farrell, Second reading speech: Police Integrity Commission and Independent Commission Against Corruption Legislation Amendment (Inspectors) Bill, 12 September 2013.

⁵⁰ Committee on the Ombudsman, the PIC and the Crime Commission, NSW Parliament, *General meetings report* ('General Meetings report'), Report 8/55, August 2014, p 7.

⁵¹ General Meetings report, p 8.

⁵² General Meetings report, p 8.

independently investigate and monitor critical incident investigations should remain unchanged.⁵³

Operation Prospect

The following summary of Operation Prospect was derived by me from the report of the Select Committee on the Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect', dated 25 February 2015. I include it here for historical context, but for a full chronology, reference should be made to the select committee's report.

Prospect: Its origins

Operation Prospect arose following a series of investigations concerning allegations of large scale and longstanding police corruption, the consequences of which continue to enmesh police oversight bodies to this day.

In December 1998 a police officer (codenamed M5) came forward with allegations of police corruption and criminal activity involving himself and a number of serving and former New South Wales police officers.⁵⁴ In February 1999 the NSW Crime Commission was given a reference, codenamed 'Mascot', to investigate the allegations,⁵⁵ with the assistance of Special Crime – a unit of the NSW Police Force that had been established to investigate organised crime and related police corruption.⁵⁶

M5 was wired to record incriminating discussions with current and former police. In July 2000, pursuant to a Memorandum of Understanding with the Police and Crime Commissioners, the PIC joined the Mascot investigation, which was soon widened via another reference to the Crime Commission, dubbed 'Mascot II'.⁵⁷

On 8 October 2001, the investigations entered a lengthy public hearings stage, with the PIC conducting hearings into 29 of 418 allegations of corrupt conduct by police.⁵⁸ This stage of the investigation became known as 'Operation Florida'. Following the PIC's report to Parliament in June 2004, six targets who were prosecuted received custodial sentences. Of the remaining allegations, 199 were dealt with as medium to low risk, by a taskforce known as 'Volta'.⁵⁹

⁵³ General Meetings report, p 8.

⁵⁴ Police Integrity Commission, *Report to Parliament: Operation Florida*, Volume 1, June 2004, p 2.

⁵⁵ NSW Crime Commission, *Annual Report 2000-01*, p 15; NSW Crime Commission, *Annual Report 2002-03*, p 12.

⁵⁶ Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", NSW Legislative Council, *Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect"* ("Select Committee 'Prospect'"), 25 February 2015, pp 10-11.

⁵⁷ Select Committee 'Prospect', p 11.

⁵⁸ Select Committee 'Prospect', p 12.

⁵⁹ Select Committee 'Prospect', p 12.

Meanwhile, in response to a Sydney Morning Herald article that a listening device warrant connected to the Mascot /Florida investigation had named 114 people, the Police Commissioner requested the PIC Inspector to examine the propriety of the warrant. On 29 April 2002, the PIC Inspector concluded that the warrant, which had been granted by Justice Bell on 14 September 2000, had been 'justifiably sought, complied with the legislation' and 'did not warrant further investigation'.⁶⁰

However, it later emerged that within months of the creation of the Special Crime Unit back in 1999, the unit had itself been internally investigated in connection with – among other things – the 'efficacy of warrants and supporting affidavits'.⁶¹ Following a major review instigated by the then unit commander, Andrew Scipione, the unit was ultimately disbanded and amalgamated in 2003 with other commands to become the Professional Standards Command.⁶²

Ombudsman's inquiry

As a result of concerns about the Special Crime Unit's role in obtaining the Bell warrant, Strike Force Emblems was established by the NSW Police Force to undertake an internal investigation. However, it was frustrated when the Crime Commission refused to release the affidavit which had supported the warrant application by claiming it was bound by statutory secrecy provisions.⁶³ During this time the Ombudsman was approached by the Police Commissioner to oversight Emblems; however, this would have involved oversighting the PIC and Crime Commission and the Ombudsman advised that he had no jurisdiction over those bodies.⁶⁴

All the while, concern about the Bell warrant had continued to grow. In 2012, the Police Minister asked the PIC Inspector whether a report prepared by Strike Force Emblems could be released. The Inspector responded that the report and its recommendations 'were not of a high enough standard'⁶⁵ for publication.

In the face of an ongoing stream of complaints to the Inspector and the Ombudsman about the Bell warrant and related matters, on 7 October 2012 the then Premier announced that the Ombudsman would conduct an independent inquiry into Strike Force Emblems and any relevant matters leading up to it.⁶⁶ This triggered the passage of legislation clarifying the

⁶⁰ Select Committee 'Prospect', pp 12-15.

⁶¹ Select Committee 'Prospect', p 15.

⁶² Select Committee 'Prospect', pp 15-16.

⁶³ Select Committee 'Prospect', p 16.

⁶⁴ Select Committee 'Prospect', pp 16-17.

⁶⁵ Select Committee 'Prospect', p 18.

⁶⁶ Select Committee 'Prospect', pp 18-19.

Ombudsman's jurisdiction in relation to the Crime Commission, its Inspector and the PIC Inspector, as well as extending the Ombudsman's coercive powers.⁶⁷

So it came about that the Ombudsman commenced an inquiry – Operation Prospect – into allegations of misconduct by police, the PIC and the Crime Commission in relation to certain investigations between 1998 and 2004. This inquiry also includes an investigation of the leaking of documents in connection with the Mascot/Florida investigation, the Bell warrant and Strike Force Emblems.⁶⁸ At the time of writing, Operation Prospect is ongoing.

Select committee inquiry

On 12 November 2014, the NSW Legislative Council voted to establish a select committee to inquire into and report on 'the conduct and progress of the Ombudsman's inquiry "Operation Prospect"'. The committee held five public hearings involving 20 witnesses. The committee considered many issues, including the oversight of police, and in particular, the shortcomings of a multiple agency approach, calls for a single agency approach, and the efficacy of an Independent Police Complaints Commission.⁶⁹

The committee tabled its report on 25 February 2015. Among the committee's six recommendations was the following: 'That the NSW Government establish a single, well-resourced police oversight body that deals with complaints quickly, fairly and independently.'⁷⁰

General Purpose Standing Committee No. 4 inquiry

On 2 June 2015, the General Purpose Standing Committee No. 4 self-referred an inquiry into the progress of the Ombudsman's investigation 'Operation Prospect'. The committee report, released on 25 August 2015, stated:

To date, some of the select committee's recommendations have been actioned, albeit in ways perhaps not contemplated by the committee. For example, the NSW Government has commissioned Mr Andrew Tink, former Shadow Leader of the House and former Shadow Attorney General, to conduct a review of police oversight, whereas the select committee recommended the Standing Committee on Law and Justice inquire into the most appropriate structure for a single well-resourced police oversight body. Other recommendations from the previous select committee's inquiry appear to have not been implemented at all.⁷¹

⁶⁷ Select Committee 'Prospect', p 22.

⁶⁸ Select Committee 'Prospect', pp 22-23.

⁶⁹ Select Committee 'Prospect', pp iv, 1 and 114-119.

⁷⁰ Select Committee 'Prospect', p xiii and 119.

⁷¹ General Purpose Standing Committee No. 4, NSW Legislative Council, *Progress of the Ombudsman's investigation "Operation Prospect"*, 25 August 2015, p 7.

5. The current police oversight system in New South Wales

There are several purposes of police oversight: to prevent, detect and investigate corruption and misconduct by police officers; to provide accountability for the exercise of police powers; and to ensure complaints against police are appropriately managed and investigated.

In this chapter, I provide an overview of the current framework for police oversight in New South Wales, including the roles of the NSW Police Force, the Ombudsman and the Police Integrity Commission (PIC) in the complaints process, the detection of serious police misconduct and general oversight of police powers.

The legislative framework for the NSW complaints process

The process for managing, monitoring and investigating complaints against police is set out in Part 8A of the *Police Act 1990*. Part 8A establishes a statutory scheme for management of certain complaints about the conduct of police officers, as well as providing an oversight framework for the Ombudsman and the PIC in relation to that complaint handling. It also sets out the Ombudsman's powers in relation to direct investigations.

As discussed in the previous chapter, Part 8A, which had superseded the *Police Regulation (Allegations of Misconduct) Act 1978*, was significantly amended following the Wood Royal Commission to ensure the Police Commissioner and front line managers take appropriate responsibility for complaints management, and that they have '... the tools they need to, among other things, properly manage and correct non-dismissible instances of misconduct or poor performance by officers'.⁷²

What constitutes a 'complaint' against police?

Part 8A only applies to complaints that allege or indicate certain kinds of conduct by New South Wales police officers, rather than all complaints. The types of conduct are:

- conduct of a police officer that constitutes an offence
- conduct of a police officer that constitutes corrupt conduct (including, but not limited to, corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988*)
- conduct of a police officer that constitutes unlawful conduct (not being an offence or corrupt conduct)

⁷² The Hon Paul Whelan, Second reading speech: Police Service Amendment (Complaints and Management Reform) Act Bill, 21 October 1998.

- conduct of a police officer that, although not unlawful:
 - is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or
 - arises, wholly or in part, from improper motives, or
 - arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or
 - arises, wholly or in part, from a mistake of law or fact, or
 - is conduct of a kind for which reasons should have (but have not) been given; or
- conduct of a police officer that is engaged in in accordance with a law or established practice, being a law or practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect.

The *Police Act* also specifies that a complaint under Part 8A must:

- be in writing (noting that the PIC or the Ombudsman may, in exceptional circumstances, accept a complaint that is not in writing)⁷³
- be made to an investigative authority (that is, the NSW Police Force, PIC or the Ombudsman).⁷⁴

The *Police Act* requires that all complaints against police received by the NSW Police Force, the PIC or the Ombudsman must be registered in a complaints information system.⁷⁵ The Customer Assistance Tracking System (known as 'c@ts.i') was developed in partnership with the Ombudsman and the PIC and introduced in 2002.⁷⁶ C@ts.i is a computerised database owned and managed by the NSW Police Force, the primary purpose of which is to record the details of a complaint against a police officer from the time the complaint is received to the completion of the investigation and any subsequent action.

Complaints not covered by Part 8A

Section 122 of the *Police Act* provides a mechanism for excluding particular classes or kinds of complaints from the scheme set out in Part 8A, by way of guidelines agreed between the PIC and the Ombudsman after consultation with the Commissioner. Complaints that do not meet the statutory criteria or are excluded under such guidelines are not required to be dealt with in accordance with Part 8A, and can be managed internally by the NSW Police Force.⁷⁷

⁷³ *Police Act 1990*, s 127(5).

⁷⁴ *Police Act 1990*, s 127(1).

⁷⁵ *Police Act 1990*, s 129(1).

⁷⁶ NSW Police, Annual Report 2002-2003, p 60.

⁷⁷ *Police Act 1990*, s 122(2).

The *Police Act* also provides that only ‘notifiable complaints’ received by the NSW Police Force must be forwarded to the Ombudsman.⁷⁸ ‘Notifiable complaints’ are defined as ‘any complaint that (in accordance with guidelines agreed between the PIC and the Ombudsman after consultation with the Police Commissioner) is required to be notified to the Ombudsman’.⁷⁹ The mechanism for making only certain complaints ‘notifiable’ is intended to ensure that allegations of conduct that are more serious are subject to higher levels of external oversight.

The Guidelines agreed between the Police Integrity Commission and the Ombudsman after consultation with the Commissioner of Police under the *Police Act 1990*⁸⁰ set out the kinds of matters to which Part 8A does not apply and complaints that are not ‘notifiable’. These are one and the same and are generally minor matters, such as service complaints. The guidelines provide that:

In general terms the guidelines require the NSWPF to notify complaints that suggest serious misconduct by police to ensure that these matters receive rigorous civilian oversight. At the same time the guidelines allow the NSWPF to manage complaints that do not suggest serious misconduct (for example, complaints about poor customer service or rudeness) without formal oversight.⁸¹

These matters still require the NSW Police Force to take appropriate action including ‘... any investigation, conciliation and such managerial action as may be necessary in all the circumstances of the matter’.⁸² The NSW Police Force *Complaint Handling Guidelines* provide that such complaints should be ‘appropriately dealt with and filed. Contact should be made with the author and relevant issues dealt with’.⁸³

Overview of agency roles in the complaints and oversight process

The role of the Police Commissioner

Complaints against police can be made directly to the NSW Police Force, the Ombudsman or the PIC. Complaints can also be lodged at a local court or may, with the consent of the complainant, be made on the complainant’s behalf by a Member of Parliament.⁸⁴

⁷⁸ *Police Act 1990*, s 130.

⁷⁹ *Police Act 1990*, s 121.

⁸⁰ Police Integrity Commission and NSW Ombudsman, Guidelines agreed between the Police Integrity Commission and the Ombudsman after consultation with the Commissioner of Police under the *Police Act 1990* (‘PIC and Ombudsman guidelines’), 1 February 2014, https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0003/16149/MoU-Police-Integrity-Commission-and-consultation-with-the-NSW-Police-Force-Commissioner-16-December-2013.PDF.

⁸¹ PIC and Ombudsman guidelines, p 3.

⁸² PIC and Ombudsman guidelines, p 8.

⁸³ NSW Police Force, Professional Standards Command, *Complaint Handling Guidelines* (‘Complaint handling guidelines’), March 2012, p 13.

⁸⁴ *Police Act 1990*, s 127.

The majority of complaints against police in New South Wales are investigated by police. In 2013-14, 3,390 notifiable complaints were made against police in New South Wales.⁸⁵ During 2013-14 the PIC oversighted 24 police investigations,⁸⁶ and the Ombudsman completed a detailed review of 1,742 of the complaints that had been investigated by the NSW Police Force.⁸⁷

Under Part 8A of the *Police Act*, the role of the Police Commissioner is to:

- receive and assess complaints
- take appropriate action on complaints in a timely and effective manner
- provide information to complainants, police officers the subject of the complaint and the Ombudsman.

By virtue of an instrument of delegation made in December 2010, the Commissioner has delegated his powers and responsibilities under Part 8A to commanders to enable localised management and administration of complaints.⁸⁸ As such, each of the 76 local area commands in New South Wales has a Complaint Management Team and a Professional Standards Duty Officer to assist with this process.⁸⁹

The *Complaint Handling Guidelines* outline the various steps and alternatives for handling complaints within the Police Force as follows:

- **Part 1: Complaint Assessment** – determining whether a document should be received and managed as a complaint under Part 8A;
- **Part 2: Triage** – decision about whether to decline the investigation of the complaint or refer the matter for investigation. If the complaint is notifiable it is referred to the Ombudsman and must be notified through c@ts.i. Triage is usually undertaken by the relevant Local Area Command’s professional standards duty officer;
- **Part 3: Resolution** – an alternative investigative process developed to allow for a less formal investigation of complaints about police conduct. Matters referred for resolution do not typically warrant the formality, complexity and authoritative decision making associated with evidence based investigations;
- **Part 4: Evidence based investigation** – is required wherever it is necessary to ensure admissibility of information in criminal court proceedings or other tribunals where reviewable action is likely to be taken against a NSW Police officer. Such

⁸⁵ Police Integrity Commission submission, p 3.

⁸⁶ Police Integrity Commission submission, p 3.

⁸⁷ NSW Ombudsman, *Annual Report 2013-2014*, p 42.

⁸⁸ Complaint handling guidelines, p 2.

⁸⁹ NSW Ombudsman submission, p 19.

investigations are subject to instruction and guidance from a complaint management team, made up of senior officers from within the relevant Local Area Command.⁹⁰

Following the completion of an investigation, the NSW Police Commissioner is required to, if practicable, consult with the complainant before making a decision concerning any action to be taken as a result of the complaint. The Commissioner must also provide a copy of the final report to the Ombudsman and advise the Ombudsman of any action taken in relation to the complaint, including any 'advice as to whether or not the complainant is satisfied with the action taken, or to be taken, as a result of the complaint.'⁹¹

In addition to the complaints process, the NSW Police Force also has an ongoing responsibility to detect and investigate officer misconduct, even if no complaint has been made. All New South Wales police officers have an obligation to report misconduct of another officer if they 'sincerely believe' the officer has been involved in criminal conduct or misconduct.⁹² The Professional Standards Command (PSC) is a specialist command that reports to the Deputy Commissioner Specialist Operations. The PSC reports its core business aims as:

- promoting professional standards
- investigating serious criminal allegations, corruption, and high-risk matters where police officers may be involved
- identifying and responding to high-risk behaviour in people, places and systems where misconduct is a factor
- promoting and supporting fair, consistent and effective management of all staff.⁹³

To achieve these aims, the PSC provides advice and specialist support to local area commanders with respect to 'investigations, critical incidents, complaint management and employee management'.⁹⁴ The PSC also develops reference materials, standard operating procedures, and policies and guidelines, such as the *Complaint Handling Guidelines*, to ensure consistent approaches across the NSW Police Force. The PSC is responsible as well for drug and alcohol testing of police officers, who are subject to alcohol testing when on duty, and drug testing, both on and off duty.⁹⁵

⁹⁰ Complaint handling guidelines, p 4.

⁹¹ *Police Act 1990*, s 150.

⁹² Police Regulation 2008, cl 49 (note this will be cl 50 in the new Police Regulation 2015 which will come into force on 1 September 2015); NSW Police Force, *Code of Conduct and Ethics*, http://www.police.nsw.gov.au/_data/assets/file/0015/4326/Code_of_Conduct_and_Ethics.pdf.

⁹³ NSW Police Force, *Professional Standards Command*, http://www.police.nsw.gov.au/about_us/structure/corporate_services/professional_standards_command.

⁹⁴ NSW Police Force, *Professional Standards Command*, http://www.police.nsw.gov.au/about_us/structure/corporate_services/professional_standards_command.

⁹⁵ *Police Act 1990*, s 211A.

The role of the Ombudsman

Established in 1974, the central role of the Office of the Ombudsman is to 'keep government agencies and some non-government organisations accountable by promoting good administrative conduct, fair decision making and high standards of service delivery'.⁹⁶

Among those authorities that come under the Ombudsman's scrutiny are several hundred New South Wales public sector agencies including departments, statutory authorities, boards, correctional centres, universities and area health centres, over 160 local and county councils, and certain private sector organisations and individuals delivering government-funded services.⁹⁷

The Ombudsman's role in the complaints process is outlined in Part 8A of the *Police Act*, under which the Ombudsman is required to:

- consider the adequacy of the police handling of all notifiable complaints
- keep under scrutiny the systems for handling complaints involving police to ensure the maintenance of standards of integrity and fair dealing.⁹⁸

The Ombudsman can receive complaints about police directly from public, and is required under the *Police Act* to refer these complaints to the NSW Police Force with advice as to whether the complaint must be investigated by the police.

In overseeing the investigation of complaints by the NSW Police Force, the Ombudsman may monitor the progress of an investigation, if of the opinion that it is in the public interest to do so. The *Police Act* specifies that in monitoring the investigation, the 'Ombudsman may be present as an observer during interviews conducted by police officers for the purposes of an investigation, and may confer with those police officers about the conduct and progress of the investigation'.⁹⁹

To scrutinise the systems for handling complaints involving police, the Ombudsman is required to inspect the records of the NSW Police Force at least once a year, and may inspect the records of the Police Force at any time for the purposes of ensuring the requirements of Part 8A are being complied with. This includes auditing how well the Force is managing complaints about less serious conduct, such as customer service issues, which are dealt with internally by the NSW Police Force without the Ombudsman's oversight.¹⁰⁰

⁹⁶ NSW Ombudsman, *Annual Report 2013-2014*, p 5.

⁹⁷ NSW Ombudsman, *Annual Report 2013-2014*, p 5.

⁹⁸ NSW Ombudsman submission, pp 21-22.

⁹⁹ *Police Act 1990*, s 146(2).

¹⁰⁰ NSW Ombudsman, *Annual Report 2013-2014*, p 41.

In addition to overseeing police investigations of complaints, the Ombudsman is also empowered, pursuant to Division 7 of Part 8A of the *Police Act*, to undertake direct investigations in two circumstances:

- if of the opinion that it is in the public interest to do so, the Ombudsman may make a complaint, together with any investigation of the complaint and any related issues, the subject of an investigation under the *Ombudsman Act 1974*¹⁰¹
- if it appears to the Ombudsman that any conduct of a police officer could be, but is not, the subject of a complaint, the Ombudsman may make the conduct the subject of an investigation under the *Ombudsman Act*.¹⁰²

This allows the Ombudsman to conduct a direct own motion investigation, even if no complaint has been made. As I discuss in more detail in chapter 7, the Ombudsman does not appear to use this power often.

In circumstances in which the Ombudsman makes the decision to directly investigate the complaint, the Police Commissioner must be notified and must discontinue any police investigation.¹⁰³ The Ombudsman cannot make decisions that are binding on the Police Commissioner about police officers or complaint findings. However, the Ombudsman can make recommendations, and where these are not accepted, can report to the Police Minister, the Police Commissioner, and where circumstances warrant it, to the Parliament.¹⁰⁴

In addition to the complaints process role, the Ombudsman also has a wider role in overseeing the NSW Police Force, including:

- conducting investigations into issues of maladministration by the NSW Police Force
- auditing the use of covert powers by the Police Force, the Crime Commission, the ICAC and the PIC
- managing appeals from people refused entry by the NSW Police Force to, or removed from, the witness police program
- monitoring the use of terrorism powers
- conducting legislative reviews on the use of new police powers.¹⁰⁵

The role of the Police Integrity Commission

The role of the PIC is to detect, investigate and prevent police corruption and other serious officer misconduct.¹⁰⁶ Section 13(1) of the *PIC Act* provides that the PIC's principal functions

¹⁰¹ *Police Act 1990*, s 156.

¹⁰² *Police Act 1990*, s 159.

¹⁰³ *Police Act 1990*, s 156.

¹⁰⁴ NSW Ombudsman, *Annual Report 2013-2014*, p 41.

¹⁰⁵ NSW Ombudsman submission, p 39.

are (a) to prevent officer misconduct, and (b) to detect or investigate, or manage or oversee other agencies in the detection or investigation of, officer misconduct. Section 13(2) of the *PIC Act* provides, however, that:

The Commission is, as far as practicable, required to turn its attention principally to serious officer misconduct.

In relation to police, 'misconduct' includes, among other things, corruption and criminal offences, as well as 'any other matters about which a complaint can be made under the *Police Act 1990*'.¹⁰⁷ The PIC may also receive complaints or reports under the *PIC Act* about:

- corrupt conduct of administrative officers of the NSW Police¹⁰⁸
- misconduct of a NSW Crime Commission officer.¹⁰⁹

Under Part 8A of the *Police Act*, the PIC must, as soon as practicable after receiving a complaint about a police officer, refer it to the Police Commissioner, unless it is of the opinion that it is not in the public interest to do so.¹¹⁰ Under the *PIC Act*, however, the PIC may decide to investigate or take over the investigation of any complaint or refer it to the Ombudsman or the NSW Police Force (or both) to be dealt with in accordance with Part 8A.¹¹¹ The PIC advises, however, that it is 'highly selective in the matters it chooses to investigate and, as a consequence, its focus may be regarded as narrow in scope'.¹¹²

The PIC has unrestricted remote access to c@ts.i, which it uses to examine 'all new complaints registered on c@ts.i on a regular basis to identify new matters that could possibly merit a Commission investigation'.¹¹³ The PIC can request regular status reports and review material available on c@ts.i as an investigation proceeds. The PIC can also review complaint investigation reports to collect data about specific types of misconduct, commands or police officer duty types.¹¹⁴

The PIC is authorised to conduct investigations even though no complaint has been made.¹¹⁵ In order to support its functions of detecting, investigating and preventing police corruption and other serious officer serious officer misconduct, the PIC has extensive evidence-gathering powers, including the power to:

¹⁰⁶ *Police Integrity Commission Act 1996* ('*PIC Act*'), s 3(a).

¹⁰⁷ *PIC Act*, ss 5 and 5(2)(d).

¹⁰⁸ *PIC Act*, s 75A

¹⁰⁹ *PIC Act*, s 75C.

¹¹⁰ *Police Act 1990*, s 131.

¹¹¹ *PIC Act*, s 70.

¹¹² Police Integrity Commission submission, p 3.

¹¹³ Police Integrity Commission submission, p 5.

¹¹⁴ Police Integrity Commission, *Annual Report 2013-2014*, p 15.

¹¹⁵ *PIC Act*, s 23.

- summon witnesses and require the production of documents in relation to an investigation¹¹⁶
- issue a warrant for the arrest of a witness if they fail to appear before the Commission when summoned¹¹⁷
- compel a witness to give evidence even if the evidence may incriminate themselves (noting the witnesses evidence cannot be used against them in criminal proceedings, but can be used for disciplinary proceedings, or in proceedings for contempt against the *PIC Act*)¹¹⁸
- issue search warrants to search and seize property¹¹⁹
- utilise intrusive investigative methods (such as telecommunications interceptions).¹²⁰

The PIC may conduct private and public hearings,¹²¹ and is also well resourced with physical and technical surveillance capabilities.¹²²

The PIC can assemble evidence that may be admissible in the prosecution of a person for a criminal offence and furnish any such evidence to the Director of Public Prosecutions.¹²³ Following an investigation, the PIC can also make assessments and form opinions as to whether police misconduct or other misconduct has or may have occurred or is likely to occur, and can make recommendations as to whether consideration should or should not be given to the prosecution of, or the taking of disciplinary action under Part 9 of the *Police Act* or other disciplinary action against particular persons.¹²⁴ The PIC must prepare a report to Parliament if public hearings have been held, and has the discretion to choose whether to prepare a report following investigations that have not resulted in public hearings.¹²⁵

In a report, the PIC is authorised to make statements as to any of its assessments, opinions and recommendations, and reasons for any of its assessments, opinions and recommendations. In relation to ‘affected’ people, the report must include a statement as to whether or not the PIC is of the opinion that consideration should be given to the prosecution of a person for a specified criminal offence or the taking of disciplinary action under Part 9 of the *Police Act*.¹²⁶

¹¹⁶ *PIC Act*, s 38.

¹¹⁷ *PIC Act*, s 39.

¹¹⁸ *PIC Act*, s 40.

¹¹⁹ *PIC Act*, ss 45 and 47.

¹²⁰ Police Integrity Commission submission, p 3.

¹²¹ *PIC Act*, s 33.

¹²² Police Integrity Commission submission, p 3.

¹²³ *PIC Act*, s 15(1)(a).

¹²⁴ *PIC Act*, s 16.

¹²⁵ *PIC Act*, s 96.

¹²⁶ *PIC Act*, s 97.

The role of the Inspector of the Police Integrity Commission

The principal functions of the PIC Inspector are to audit the PIC's operations for the purposes of monitoring compliance with the law, to deal with complaints of abuse of power, impropriety and other forms of misconduct, and to deal with conduct amounting to maladministration. The Inspector can exercise these functions either on his or her own initiative, after receiving a complaint, or in response to a reference from other statutory bodies or the Police Minister.¹²⁷

In exercising these functions, the Inspector is entitled to full access to the PIC's records and may require PIC officers to supply information, produce documents or other things, and appear in person to answer questions. After investigating and assessing a complaint, the Inspector may recommend disciplinary action or criminal prosecution of PIC officers. Section 89(3) of the *PIC Act* makes it clear that the Inspector is not subject to the PIC in any respect which is a 'provision of paramount importance'.

Pursuant to section 91 of the PIC Act, the Inspector is empowered to make or hold inquiries with all the powers, authorities, protections and immunities conferred on a commissioner by the *Royal Commission Act of 1923*.

The Ombudsman's Office is not currently oversighted by an Inspector, which is an issue of concern for the Police Association.¹²⁸ I will consider this issue further in chapter 7 when I outline the gaps in the current system.

The Parliamentary Joint Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission

Established on 4 December 1990, the parliamentary committee's main functions in relation to both the Office of the Ombudsman and the PIC involve:

- monitoring and reviewing the exercise of their respective functions
- examining their respective annual and other reports
- reporting to the NSW Parliament on matters relating to their respective functions and annual and other reports
- inquiring into matters referred to the committee by the NSW Parliament.

However, the committee is not permitted to do any of the following in relation to either the Office of the Ombudsman or the PIC:

¹²⁷ Inspector of the Police Integrity Commission, *Annual Report for the year ended 30 June 2014*, p 3.

¹²⁸ Police Association of NSW submission, p 20.

- investigate matters relating to particular conduct
- reconsider decisions to investigate, not to investigate, or to discontinue investigation of a particular complaint
- reconsider findings, recommendations, determinations or other decisions in relation to a particular investigation or complaint.¹²⁹

¹²⁹ *PIC Act*, s 95(2).

6. Models of police oversight outside New South Wales

As my terms of reference require me to consider options for a stand-alone police oversight model which includes both a police misconduct investigation function and an oversight function in one body, the relevance of police oversight systems in jurisdictions with governmental systems similar to ours is limited.

Of the other Australian jurisdictions, Queensland, Victoria, Western Australia and South Australia either have or are moving towards broad-based anti-corruption models which cover the whole of the public sector including police, while the Commonwealth has a hybrid system which maintains its police misconduct investigation and oversight functions in separate organisations.

In relation to overseas systems, the Independent Police Complaints Commission in England and Wales has been subject to severe criticism in the House of Commons, while the long-standing civil divisions in Northern Ireland have created a unique context for the independent oversight of police there, which is not relevant to New South Wales. As for North America, policing tends to be localised rather than state-based, and so is of limited relevance here.

New Zealand is the only comparable policing jurisdiction to New South Wales, which combines a police misconduct investigation function and an oversight function in one body. Accordingly, it is an instructive model and as such it is referred to several times throughout this report, as are specific legislative provisions in other models which would improve particular parts of the New South Wales system.

Is there an existing 'best practice' system?

My terms of reference direct me to consider and report on best practice police oversight models from around the world and their applicability and adaptability to this jurisdiction.

Throughout this report, I refer to examples of police oversight found in other jurisdictions in regard to specific matters and explore whether these could or should be adopted in New South Wales. The most significant examples are found in public accountability measures for critical incident investigations in other jurisdictions, which I consider in detail later in this report.

To set the scene in more general terms, however, in this chapter I briefly describe what I consider to be important ‘single’ oversight examples outside New South Wales. I do not consider models that are hybrid in structure (that is, models that divide external oversight responsibilities between anti-misconduct/corruption bodies on one hand and ombudsman agencies on the other, as is currently the case in New South Wales), other than the Commonwealth model. It is important to note, however, that hybrid models do exist elsewhere and there is strong support from the NSW Ombudsman for the continuation of such a model in this state. As the Ombudsman sees it, there is a policy argument to be made for the oversight and resolution of less serious complaints involving all public sector services being dealt with in a single organisation. I acknowledge the Ombudsman’s argument that there are synergies between his other important oversight and review functions and his police oversight responsibilities.

As I considered the models on offer in other jurisdictions, it quickly became apparent that there was no existing system that could be applied or adapted to New South Wales as a ‘package’. Indeed, I came to a firm view that it would be imprudent to do so. There are too many historical and cultural differences between jurisdictions – both within Australia and overseas – for an off-the-shelf approach to be taken to future reform in police oversight in this state. What works in Northern Ireland or England or the Commonwealth, for example, cannot simply be transplanted to New South Wales, as there are too many peculiarities in the relationship between the residents of a province/state/country and its law enforcement agencies that arise from historical and political circumstances unique to that place.

Although reform in this area must recognise that one size does not fit all, there is still much to learn from other systems, both in approaches to embrace and in approaches to avoid. To be credible precedents for New South Wales, I have limited my consideration to models with a legal system similar to this state, as well as a comparable level of economic development and maturity of democratic institutions. While there are likely to be many interesting examples of successes (or potential successes) in jurisdictions that do not meet all of these threshold criteria, I believe it would be irresponsible to consider these examples as potential ‘best practice’ for New South Wales.

Major external agency models considered

For the reasons outlined above, this part of the report concentrates on external police accountability arrangements in the following jurisdictions:

- England and Wales
- Northern Ireland
- New Zealand
- Victoria
- South Australia
- Western Australia and Queensland

- Commonwealth
- North America.

I also commend to readers of this report the recent publication of the NSW Parliamentary Research Service *'External Oversight of Police Conduct'*, which was released shortly after I commenced this review. The paper provides a useful summary of some other jurisdictions' models.¹³⁰

I note that no submission I received during the review raised any jurisdiction, other than those listed above, as a possible model for adoption or adaptation in New South Wales.

As I have mentioned previously, the 'single' and 'oversight' descriptions are potentially confusing. Most police forces in jurisdictions comparable to New South Wales are subject to accountability arrangements that involve numerous external bodies. I have assumed in this review, therefore, that I have not been asked to consider accountability mechanisms in general for the Police Force, but rather only those watchdog functions associated with the ethical and lawful delivery of policing services and the misuse of police powers or status. To do that, I need to consider a model of police oversight that (at least) brings together into one agency the roles of complaints monitoring, more serious complaints investigation and corruption-fighting activities. The models operating in many other jurisdictions also confer a role in relation to the investigation of 'critical incidents', being death and serious injury arising in connection with a policing activity. The area of critical incident oversight is the area most identified as a continuing gap in the current New South Wales system and therefore forms the basis of a full chapter of this report (see chapter 10).

I am also aware of another function that may be considered oversight but which does not have prominence in the terms of reference for this review because it is not necessarily corruption or complaints-based. I am referring to external agencies that are independent of police forces and are responsible for inspecting the delivery of policing services and reporting to parliaments or executive governments about systemic matters. Such bodies, which include Her Majesty's Inspectorate of Police Services in the United Kingdom, the Office of the Inspector General for the New York Police Department, or even the NSW Ombudsman or Inspector of the Crime Commission to the extent they look at systemic issues, are relevant to consider. Although such work is not usually driven by complaints or reports/suspicions of corruption, its impact on the culture of policing may in turn impact on complaints. It must also be recognised that working with oversight agencies in this context must inevitably place a regulatory burden on the police force under review. The perceived benefits of tasking external agencies with policy and practice review functions and powers must also be weighed against that impact to ensure that police forces are able to perform their principal functions of protecting the community.

¹³⁰ Lenny Roth, NSW Parliamentary Research Service, *External Oversight of Police Conduct*, Briefing Paper no. 6/2015.

England and Wales – Independent Police Complaints Commission

The review terms of reference specifically require me to consider the Independent Police Complaints Commission (IPCC) model from England and Wales as a potential approach for New South Wales. However, the structure of policing in Britain is so different to New South Wales that it is hard to see how British oversight mechanisms might apply here. At its heart, the difference can be seen in the number of policing bureaucracies operating in Britain – there are 43 police forces covered by the IPCC.¹³¹

The IPCC is a statutory entity, governed by a membership body of commissioners, established in 2004. It appears to have had a long gestation period, starting with the inquiry into the Brixton riots in 1981.¹³² A study released in April 2000 by the human rights organisation 'Liberty' recommended the creation of an independent organisation to investigate complaints against police. It proposed that this organisation be named the Independent Police Complaints Commission.¹³³ Then, in May 2000 the British Government commissioned a private sector study, *'Feasibility of an independent system for investigating complaints against the police'*, before issuing its own consultation paper for change, *'Complaints Against the Police: A Consultation Document'*. Following this consultation process, the *Police Reform Act 2002* (UK) was introduced and passed to establish the IPCC and the new body commenced operation in April 2004.¹³⁴ In that legislation, the IPCC was conferred with the following functions:

- to investigate the most serious complaints and incidents recorded by police. Serious complaints include those where there has been a death or serious injury, or allegations of serious assault or a serious sexual offence;
- to supervise investigations carried out by police by providing the terms of reference for the investigation and receiving the investigation report;
- to manage an investigation by police where the allegation is of such significance and probable public concern that its investigation requires an independent element;
- to consider appeals from people who are dissatisfied with the way the police force has dealt with their complaints;
- to investigate some criminal allegations against police and Crime Commissioners and their deputies.

The IPCC is also responsible for dealing with serious complaints and conduct matters relating to staff at the National Crime Agency, Her Majesty's Revenue and Customs and

¹³¹ Home Affairs Committee, House of Commons, *Independent Police Complaints Commission*, Eleventh Report of Session 2012-13, 1 February 2013, p 4.

¹³² Independent Police Complaints Commission, <https://www.ipcc.gov.uk/page/history>.

¹³³ Liberty, *An independent Police complaints Commission*, April 2000, p ix.

¹³⁴ Independent Police Complaints Commission, 'History', <https://www.ipcc.gov.uk/page/history>.

Home Office immigration and enforcement staff.¹³⁵ Police deal with the majority of complaints against police officers and police staff. About 94 per cent of complaints received by the IPCC are referred back to police for investigation, some with IPCC oversight, including critical incidents.¹³⁶ Unlike in New South Wales, there is a right of review to the IPCC from the decisions of local forces. In 2013-14, the IPCC upheld 46 per cent of appeals from police force decisions.¹³⁷ Under Part 3 of Schedule 3 to the *Police Reform Act* an officer serving in a force other than that being complained about may be appointed to investigate a complaint, which seems to be at odds with the local managerial approach favoured in New South Wales.

According to former Deputy Chair of the Commission and now Victorian Ombudsman, Deborah Glass, the IPCC was not given the money or legislative powers to do what it was established to do.¹³⁸ She is not alone in this view – it was also a major criticism in a recent review of the IPCC by the House of Commons Home Affairs Committee that it was not established with sufficient powers or resources to do its statutory roles. This mismatch between policy goal and structure/resourcing was described by the committee in the following terms:

[W]e conclude that the Independent Police Complaints Commission is not yet capable of delivering the kind of powerful, objective scrutiny that is needed to inspire that confidence.¹³⁹

[T]he IPCC is woefully underequipped 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.¹⁴⁰

Since the Home Affairs Committee's review, the UK Government has conducted further public consultation and has determined that the IPCC should be conferred with a new 'power of initiative'¹⁴¹ and should no longer conduct managed and supervised investigations with police. The first proposal is an acknowledgement that an external oversight body that relies entirely on complaints is ineffective in detecting and preventing serious misconduct. The second proposal recognises that public confidence in an external oversight body depends on separation from, to the greatest extent feasible, the police force that it

¹³⁵ Independent Police Complaints Commission, 'About us', <https://www.ipcc.gov.uk/page/about-us>.

¹³⁶ Deborah Glass, *Towards Greater Public Confidence - A personal View of the Current Police Complaints System for England and Wales*, March 2014, p 8.

¹³⁷ Independent Police Complaints Commission, *Police Complaints - Statistics for England and Wales 2013/14 and 2012/13*, February 2015, p 9.

¹³⁸ Deborah Glass, *Towards Greater Public Confidence - A personal View of the Current Police Complaints System for England and Wales*, March 2014, pp 8 and 10.

¹³⁹ Home Affairs Committee, House of Commons, *Independent Police Complaints Commission*, Eleventh Report of Session 2012-13, 1 February 2013, p 4.

¹⁴⁰ Home Affairs Committee, House of Commons, *Independent Police Complaints Commission*, Eleventh Report of Session 2012-13, 1 February 2013, p 4.

¹⁴¹ UK Home Office, *Improving police integrity: reforming the police complaints and disciplinary systems - Summary of consultation responses and next steps* ('UK Home Office, *Improving police integrity*'), March 2015, p 44.

oversights. In this respect the UK Government's response to the committee's review notes that:

... responses to the consultation largely support the Government's basic position – which is that, where possible, police involvement in IPCC investigations should be kept to an absolute minimum. The Government will, therefore, seek to legislate to end the option of undertaking managed and supervised investigations.¹⁴²

In a speech given on 23 July 2015, the Home Secretary indicated that '[l]ater this year we will introduce a new Policing and Criminal Justice Bill' to further reform the police complaints and oversight system.¹⁴³

It also appears that there will be changes to the structure of the IPCC itself, with the Government noting that such reforms should take into account the following principles:

- Good governance – the governance of the IPCC should adhere to the Cabinet Office's guidelines for good corporate governance. This will mean changes to the composition of the IPCC's board.
- Visible independence – the IPCC should consider how a future model can ensure that, as now, key decisions are made or can be influenced by individuals who have never worked for the police.
- Clear lines of accountability – a future model needs to ensure clear accountability for decision making. The IPCC will need to consider what structure can best deliver effective and consistent decision making.
- Scalability – the IPCC should make sure that its organisational structure is responsive to increasing the number of investigations it takes on, allowing it to take on all serious and sensitive cases.
- Relevance to wider system – the IPCC needs to ensure that it is organised in a way that allows it to secure public confidence in a reformed police complaints system.¹⁴⁴

Although the IPCC is the only external complaints agency, Her Majesty's Inspectorate of Constabulary also has a standard-setting role for police, through independently assessing police forces and policing activity. The Inspectorate has statutory powers to inspect and report on the efficiency and effectiveness of UK police forces, as set out in section 54(2) of the *Police Act 1996* (UK). Whereas the IPCC serves a watchdog function to investigate specific incidents and regulate the handling of particular complaints, Her Majesty's Inspectorate of Constabulary oversees police conduct in a broader sense by monitoring and reporting on their overall performance.

¹⁴² UK Home Office, *Improving police integrity*, at 5.18, p 43.

¹⁴³ Speech by Home Office Secretary, The Rt Hon Theresa May MP, 23 July 2015, <https://www.gov.uk/government/news/policing-by-consent-is-a-principle-we-must-all-fight-for>.

¹⁴⁴ UK Home Office, *Improving police integrity*, at 5.42, pp 47-48.

In regard to the applicability of the IPCC to New South Wales, the Commission presents as a model that may – with further reform – work in a policing system that is divided into numerous city and regional forces. It may provide useful linkages across those forces that promote national consistency in decision making and higher standards of policing. If properly resourced, it may engender public confidence that deaths involving police will be investigated to the highest levels of professionalism and without bias. If properly empowered under legislation, as well as resourced, it may be able to detect and prevent corruption and serious misconduct that has not been the subject of a complaint. There are, however, too many ‘mays’ and ‘ifs’ for the IPCC to be a serious prospect for adoption or even adaptation now in this jurisdiction.

Northern Ireland – Office of the Police Ombudsman

The Office of the Police Ombudsman for Northern Ireland (OPONI) was established in November 2000 following a review in 1997 of the police complaints system, which recommended the establishment of an independent body to investigate complaints against police.¹⁴⁵ The review coincided with ‘The Good Friday Agreement’ which followed 30 years of sectarian conflict in Northern Ireland known as ‘the troubles’.

The agreement was ratified in a referendum in May 1998 and set up a power-sharing assembly to govern Northern Ireland. It was within this political context that OPONI was established to rebuild the community’s trust in the police force. It was set up to deal with current complaints against police, as well as historical complaints about police misconduct during ‘the troubles’ in Northern Ireland. The OPONI has a dual mandate: to investigate day-to-day complaints, as well as act as a ‘surrogate truth recovery vehicle by investigating historic cases involving complaints against the police.’¹⁴⁶

While many of the submissions supported the replication of the Northern Ireland model in New South Wales, I do not agree. The history of Northern Ireland has resulted in a ‘post-conflict society that is still deeply divided’.¹⁴⁷ Therefore independence and impartiality are seen as being ‘crucial to the credibility and legitimacy of policing generally and specifically to the Police Ombudsman’s Office.’¹⁴⁸

The conflict in Northern Ireland and its mistrust of police has a long history. Since its establishment in 1836:

¹⁴⁵ Dr Maurice Hayes, A Police Ombudsman for Northern Ireland? A review of the police complaints system in Northern Ireland, January 1997.

¹⁴⁶ Committee on the Administration of Justice, *Human Rights and Dealing with Historic Cases - A Review of the Office of the Police Ombudsman for Northern Ireland* (‘Review of the Office of the Police Ombudsman for Northern Ireland’) June 2011, p 13.

¹⁴⁷ Review of the Office of the Police Ombudsman for Northern Ireland, p 16.

¹⁴⁸ Review of the Office of the Police Ombudsman for Northern Ireland, p 16.

The Constabulary of Ireland carried out a full range of policing tasks, but its most important task was that of security, due to the ever-present threat of nationalist insurrection. Due to this it was organised as a colonial constabulary and as an armed, quasi-military force, rather than along the lines of other conventional police forces in the British Isles.¹⁴⁹

In 1922, following the partition of Ireland, Northern Ireland established its own police force, known as the Royal Ulster Constabulary (RUC) which retained its quasi-military nature. Then, '[f]rom 1922 to 1970 control of the RUC was vested in the Minister of Home Affairs, de facto a Unionist politician, a situation which was to create serious difficulties in the perceived impartiality of the RUC in later years.'¹⁵⁰

This mistrust and division in Northern Ireland has created a unique context whereby the completely independent investigation of all complaints against police was required, not only to ensure complaints were independently investigated, but to restore the community's faith in the police force. This is a very different context to New South Wales, where Commissioner Wood recommended 19 years ago that what is now the NSW Police Force must as far as possible 'repair itself'.¹⁵¹ This would be achieved, Commissioner Wood said then, by a new emphasis on professionalism, openness and honesty, among other things, by the Force taking management responsibility for its members' mistakes.¹⁵²

In my view, an emphasis on openness, honesty and management responsibility is still of central importance in New South Wales today. Accordingly, I do not see the Northern Irish experience as having much useful application to this state.

New Zealand – Independent Police Conduct Authority

The New Zealand Independent Police Conduct Authority (IPCA) has both a complaints oversight function and an investigative function within the one agency.

The IPCA was established in 2007 in the wake of concerns that its predecessor – the Police Complaints Authority – lacked independence. Prior to its creation, a review of the Police Complaints Authority was conducted in 2000 by Sir Rodney Gallen, who noted there was criticism of the Authority's reliance on police investigating their own members, and stated that this had 'undermined public confidence in the Authority and discouraged people from making complaints'.¹⁵³ The Gallen review made several recommendations, including:

¹⁴⁹ Police Service of Northern Ireland, *A History of Policing in Northern Ireland*, http://www.psnl.police.uk/index/about-us/police_museum/history_of_policing.htm.

¹⁵⁰ Police Service of Northern Ireland, *A History of Policing in Northern Ireland*, http://www.psnl.police.uk/index/about-us/police_museum/history_of_policing.htm.

¹⁵¹ The Hon Justice JRT Wood, *Royal Commission into the New South Wales Police Service: Final Report* ('Wood Royal Commission, final report'), Volume II, May 1997, p 211.

¹⁵² Wood Royal Commission, final report, Volume II, May 1997, pp 211-217.

¹⁵³ Independent Police Conduct Authority *History: Gallen review*, <http://www.ipca.govt.nz/Site/about/History/History-Gallen-Review.aspx>.

- the appointment of independent investigators
- that the Authority be changed from a single person to a three-person Board
- that the Authority's independence should be reflected by making it an Officer of Parliament
- that less serious complaints be resolved by conciliation where possible
- that the Authority retain discretion over which matters are made public in order to protect the privacy of complainants, protect police officers from malicious complaints, and allow the Authority to manage other circumstances in which confidentiality is appropriate.¹⁵⁴

In 2002 the New Zealand Government introduced the Independent Police Complaints Authority Amendment Bill to implement the recommendations of the Gallen review. Consideration of the bill, however, was deferred when allegations arose in 2004 that police officers might have deliberately undermined or mishandled investigations into complaints of sexual assault made against other officers. A Commission of Inquiry into Police Conduct was established to consider how the police had handled those allegations.¹⁵⁵

In 2005, the Government came to the view that the amendments made by the Independent Police Complaints Authority Amendment Bill were too important to defer any longer, so it re-introduced the bill to Parliament. In his second reading speech, the Minister for Justice noted: 'The major decision that resulted from the [Gallen] review was to provide the authority with an enhanced investigative capacity of its own, independent from the police.'¹⁵⁶

The Commission of Inquiry subsequently reported in March 2007, and found that there were systemic flaws undermining confidence in the integrity and professionalism of New Zealand policing. It made 60 recommendations, 12 of which related directly to the then Police Complaints Authority. The recommendations included enhancing the Authority's powers and improving communication with complainants. The then Commissioner of Police fully accepted the Commission's findings, and committed to implementing its recommendations.¹⁵⁷

The Independent Police Complaints Authority Amendment Bill was finally passed by the Parliament in September 2007. In addition to implementing the recommendations of the

¹⁵⁴ Independent Police Conduct Authority, *History: Gallen review*, <http://www.ipca.govt.nz/Site/about/History/History-Gallen-Review.aspx>.

¹⁵⁵ New Zealand Police, *Commission of Inquiry into Police Conduct*, <http://www.police.govt.nz/about-us/nz-police/commission-inquiry>.

¹⁵⁶ The Hon Phil Goff, Second reading speech: Independent Police Complaints Authority Amendment Bill, 4 May 2005.

¹⁵⁷ New Zealand Police, *Commission of Inquiry into Police Conduct*, <http://www.police.govt.nz/about-us/nz-police/commission-inquiry>.

Gallen review, the bill also implemented the recommendations made by the Commission of Inquiry that required legislative change to the Police Complaints Authority.¹⁵⁸

In November 2007 the *Independent Police Complaints Authority Act* (NZ) came into effect. The Act:

- replaced the Police Complaints Authority with the IPCA
- changed the Authority from a single person to a Board of up to five people
- gave the Authority power to refer complaints to police for investigation (subject to the Authority's oversight), and to take no action on minor complaints for which there is another remedy
- gave the Authority the same powers as Commissions of Inquiry in relation to conduct of inquiries (including powers to receive evidence, examine documents, and summon witnesses).¹⁵⁹

The focus of the Authority's work has since shifted from reviewing police investigations, to routinely conducting its own independent investigations, including crime scene examinations and interviews of witnesses. For some incidents, the IPCA is the sole investigating body.¹⁶⁰

The IPCA, therefore, has strong powers and can summon witnesses and gather evidence, including by way of compulsory and public examination. However, it has limited own motion investigation powers. The Authority makes recommendations to police which may include that disciplinary or criminal proceedings be considered or instituted.¹⁶¹

There is no formal oversight of the IPCA; however accountability is provided through:

- an annual Statement of Intent to Parliament, which sets out the Authority's budget and the performance measures against which its operations is made
- an Annual Report to Parliament, which sets out how the Authority has performed against its budget and performance measures.¹⁶²

While the IPCA is useful in so far as it has both a complaints oversight function and an investigation function within the one agency, as well as investigations into critical incidents, it was not established in response to concerns about police corruption so does not provide a strong precedent in the area of integrity functions.

¹⁵⁸ The Hon Mark Burton, Third reading speech: Independent Police Complaints Authority Amendment Bill, 6 September 2007.

¹⁵⁹ Independent Police Conduct Authority, *History: A period of change*, <http://www.ipca.govt.nz/Site/about/History/History-A-period-of-change.aspx>.

¹⁶⁰ Independent Police Conduct Authority, *History: A period of change*, <http://www.ipca.govt.nz/Site/about/History/History-A-period-of-change.aspx>.

¹⁶¹ Independent Police Conduct Authority Act 1988 (NZ), s 27.

¹⁶² Independent Police Conduct Authority, *Accountability*, <http://www.ipca.govt.nz/Site/about/Accountability.aspx>.

Victoria – Independent Broad-based Anti-corruption Commission

The Independent Broad-based Anti-corruption Commission (IBAC) is the only police oversight body in Victoria. Its role is to prevent and expose public sector corruption and police misconduct.¹⁶³

The IBAC was established in 2013 after a long debate on reform of that state's integrity system, including debate on whether to hold a Royal Commission into the Victoria Police. There was no Royal Commission but a *Review of Victoria's Integrity and Anti-Corruption System* was completed on 31 May 2010 and its recommendations, which did not include the establishment of an entity like the IBAC, were accepted by the then Government. According to the Victorian Parliament's research paper on the bill to establish the IBAC, the review found that structural reform was desirable:

[T]he way Victoria's integrity infrastructure has evolved over time, with the creation of new integrity bodies (each undertaking valuable but disparate functions), has resulted in some fragmentation, overlap, and gaps in jurisdiction. It determined that the main gaps in the jurisdictions of Victoria's integrity bodies relates to scrutiny of the judiciary, Members of Parliament, and publicly funded employees of Members of Parliament.¹⁶⁴

The outcome of the reform debate in Victoria, after an election and change of government, was to no longer keep oversight of police misconduct complaints and police anti-corruption investigations separated from other public sector services. The new Government's policy position was that broad-based anti-corruption bodies were preferable to specialised bodies, noting this was the trend elsewhere in Australia, including in Queensland and in Western Australia. The Office of Police Integrity (OPI), which had started life within the Office of the Victorian Ombudsman but later became a police-specialised 'single civilian' oversight body, was consequently merged into the IBAC.

The evolution of police oversight in Victoria is interesting as it seems that the OPI never received general political support after it was established in 2004. Some of its investigations were themselves controversially investigated by the Ombudsman, which performed a role similar to the Inspector of the PIC in New South Wales.¹⁶⁵ It is not clear whether these concerns about specialised police oversight bodies would have been so strong had there been an existing broad-based anti-corruption commission such as the ICAC in New South Wales:

¹⁶³ Independent Broad-based Anti-Corruption Commission, 'About us', <http://www.ibac.vic.gov.au/about-us>.

¹⁶⁴ Dr Catriona Ross, Bronwen Merner, Adam Delacorn, Library Research Service, Parliament of Victoria, *Independent Broad-based Anti-corruption Commission Bill 2011*, November 2011, p 7.

¹⁶⁵ Victorian Ombudsman, *Investigation into the Office of Police Integrity's handling of a complaint*, <https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/Investigation-into-the-Office-of-Police-Integrity>.

The OPI was established in November 2004 by amendments to the *Police Regulation Act 1958* with a mandate to detect, investigate and prevent corruption and serious misconduct by sworn members of Victoria Police. It was granted coercive powers and the ability to initiate investigations without having to receive a complaint or allegation. The OPI was headed by the Director, Police Integrity whose dual role was also that of the Ombudsman, and oversight of the OPI was charged to the newly created Special Investigations Monitor (SIM). Later the offices of the Ombudsman and the Director, Police Integrity were separated under the *Police Regulation Amendment Act 2007*. Then, the *Police Integrity Act 2008* established stand-alone legislation to govern the OPI. Since its inception, the performance of the OPI has come under criticism from the (then) Liberal Opposition who continued to advocate for an independent anti-corruption commission. The Victorian Greens argued that the OPI should be accompanied by a standing anti-corruption commission.¹⁶⁶

As a result of these reforms, the Victorian Ombudsman does not have jurisdiction to receive complaints about police corrupt conduct or police personnel conduct. The IBAC is also not accountable to the Ombudsman but rather to inspectorate and parliamentary bodies that have counterparts in New South Wales:

- the Victorian Inspectorate, which is responsible for enhancing the compliance of IBAC and its personnel; assisting in improving the capacity of the IBAC and its personnel with regards to their duties, functions and powers; providing for the independent oversight of the Victorian Auditor-General's Office; and providing for the independent oversight of the Ombudsman, its officers, chief examiner and examiners.¹⁶⁷
- the IBAC Committee, which is a joint investigatory committee of the Parliament of Victoria that monitors and reviews the performance of the duties and functions of the IBAC.

My terms of reference clearly require me to present options for a single civilian police oversight model. By this, I have assumed that the option of re-integrating police anti-corruption functions into the ICAC, a model abandoned after the Wood Royal Commission for good reason, was not within the scope of this review. While I can appreciate that it may have been appropriate for Victoria to take a broad-based approach to police accountability reform when it did, given the absence of any general public sector anti-corruption body, I do not consider its model to be suitable for New South Wales.

South Australia – Independent Commissioner Against Corruption

There are currently three oversight bodies in South Australia: the Office of the Police Ombudsman; the Office for Public Integrity; and the Independent Commissioner Against

¹⁶⁶ Dr Catriona Ross, Bronwen Merner, Adam Delacorn, Library Research Service, Parliament of Victoria, *Independent Broad-based Anti-corruption Commission Bill 2011*, November 2011, p 7.

¹⁶⁷ Victorian Inspectorate, *Welcome to the Victorian Inspectorate*, <http://www.vicinspectorate.vic.gov.au/>.

Corruption. The Office for Public Integrity and Independent Commissioner Against Corruption were established in 2003, and form two parts of a single organisation.¹⁶⁸

The Office for Public Integrity's primary role is to receive and assess complaints and reports about public officers, including police, in order to refer them to the appropriate organisation for resolution or investigation. The office can receive complaints from the public about public administrations, or reports from internal bodies such as enquiring agencies or public officers about corruption and misconduct.¹⁶⁹ Such complaints and reports are received and assessed by the office which determines whether it raises an issue of corruption, misconduct, maladministration or an alternative issue, and makes recommendations to the Independent Commissioner Against Corruption as to what action should be taken and by whom.¹⁷⁰ The Office for Public Integrity does not have investigatory powers, but it may make enquiries in the process of assessing a report.

The Independent Commissioner Against Corruption considers the recommendations of the office and makes the final decision as to what action should be taken. The Commissioner has a responsibility to identify, investigate and refer for prosecution instances of corruption in public administration.¹⁷¹ The Commissioner also assists other agencies in identifying and addressing misconduct and maladministration in public administration.¹⁷²

The Independent Commissioner Against Corruption recently completed a legislative review of the South Australian police oversight system. A focus of that review was whether the management and oversight of the complaints and reporting process could be consolidated into one office.¹⁷³

The Commissioner's report, released on 30 June 2015, recommended a structural change that would produce a model similar to the Victorian IBAC. It found that there were currently too many agencies involved in police oversight, and recommended that the Office of the Police Ombudsman be abolished.¹⁷⁴ It also recommended that South Australia Police have primary responsibility for the assessment, investigation and resolution of complaints and reports about police,¹⁷⁵ and that the power to manage and oversee police complaints and reports go to the Office for Public Integrity.¹⁷⁶ In line with these new powers it was proposed that the Office for Public Integrity would also be able to audit and review South

¹⁶⁸ Lenny Roth, NSW Parliamentary Research Service, *External Oversight of Police Conduct*, Briefing Paper no. 6/2015, p 25.

¹⁶⁹ Independent Commissioner Against Corruption Act 2012 (SA), s 17.

¹⁷⁰ Independent Commissioner Against Corruption Act 2012 (SA), s 23.

¹⁷¹ Independent Commissioner Against Corruption Act 2012 (SA), s 7(1).

¹⁷² Independent Commissioner Against Corruption Act 2012 (SA), s 7(1).

¹⁷³ Independent Commissioner Against Corruption, *Review of Legislative Schemes – Report* ('Review of Legislative Schemes'), 30 June 2015, pp 3 and 5.

¹⁷⁴ Review of Legislative Schemes, pp 3 and 35; Recommendation #2.

¹⁷⁵ Review of Legislative Schemes, p 3; Recommendations #4 and #10.

¹⁷⁶ Review of Legislative Schemes, p 3; Recommendation #3.

Australia Police's complaints handling;¹⁷⁷ and that the office should be given complete access to the police complaints management system (similar to the situation in New South Wales) to support this role.¹⁷⁸

Given the significant changes being proposed, the existing South Australian model is clearly not an appropriate model to consider for application in New South Wales. Further, it is apparent that the model being now considered for adoption in South Australia bears close resemblance to the Victorian IBAC model in so far as it would locate complaints oversight within a general anti-corruption agency. As such, I do not consider the proposed South Australian model to be suitable for New South Wales either, for the same reasons I do not consider the IBAC to be suitable.

Queensland and Western Australia crime and corruption commissions

Both Queensland and Western Australia have broad-based anti-corruption agencies. Unlike Victoria, however, these states have included special organised crime investigation functions (like the NSW Crime Commission) within their anti-corruption bodies.

The role of the QLD Crime and Corruption Commission is to combat and reduce the incidence of major crime and corruption in the Queensland public sector. In summary, the Commission:

[I]nvestigates both crime and corruption, has oversight of both the police and the public sector, and protects witnesses. It is the only integrity agency in Australia with this range of functions. In brief, the CCC:

- investigates organised crime, paedophilia, terrorist activity and other serious crime referred to it for investigation
- receives and investigates allegations of serious or systemic corrupt conduct
- helps recover the proceeds of crime
- provides the witness protection service for the state of Queensland
- conducts research on crime, policing or other relevant matters.¹⁷⁹

The final dot point reflects the fact that the Crime and Corruption Commission has a specific function to examine systemic policing issues, as well as investigating or overseeing complaints.

The role of the WA Corruption and Crime Commission is 'to improve continuously the integrity of, and to reduce the incidence of misconduct in, the Western Australian public sector and to assist WA Police to combat and reduce the incidence of organised crime.'¹⁸⁰

¹⁷⁷ Review of Legislative Schemes, p 3; Recommendation #8.

¹⁷⁸ Review of Legislative Schemes, p 3; Recommendation #7.

¹⁷⁹ Crime and Corruption Commission, 'Role of the CCC', <http://www.ccc.qld.gov.au/about-the-ccc>.

The WA Commission deals with allegations concerning serious misconduct by:

- assessing allegations of serious misconduct, including police misconduct, and deciding on the action to take;
- investigating serious misconduct in the public sector;
- monitoring serious misconduct investigations undertaken by public sector agencies; and
- assisting WA Police to reduce the incidence of, and to prevent, misconduct amongst their members.¹⁸¹

As per my earlier comments regarding the Victorian IBAC, I do not believe that broad-based anti-corruption agencies are relevant for consideration in this review. In addition, while the Queensland and Western Australian agencies are responsible for oversight of police complaint handling, they both also incorporate general crime commission functions, which further render them unsuitable for consideration in this review.

Commonwealth - Australian Commission for Law Enforcement Integrity

The closest system in structural terms to New South Wales is the Commonwealth's. There is no broad-based anti-corruption body at a Commonwealth level, and police oversight involves the Australian Federal Police, Australian Commission for Law Enforcement Integrity (ACLEI) and the Commonwealth Ombudsman.

The ACLEI is responsible for preventing, detecting and investigating serious and systemic corruption issues for the following bodies:

- the Australian Crime Commission and the former National Crime Authority
- the Australian Customs and Border Protection Service
- the Australian Federal Police
- the Australian Transaction Reports and Analysis Centre
- the CrimTrac Agency
- prescribed aspects of the Department of Agriculture.¹⁸²

The structure of the Commonwealth system and the context that gives rise to it are described succinctly in the submission by the ACLEI to this review:

The question of whether a single agency could or should be responsible for all aspects of police integrity in the Australian Government was reviewed by the Australian Law Reform

¹⁸⁰ Crime and Corruption Commission, *Fact Sheet No. 1*, <https://www.ccc.wa.gov.au/PreventionAndEducation/Resources/Documents/Fact%20Sheet%20No.%201%20About%20the%20CCC.pdf>.

¹⁸¹ Crime and Corruption Commission, *Fact Sheet No. 1*, <https://www.ccc.wa.gov.au/PreventionAndEducation/Resources/Documents/Fact%20Sheet%20No.%201%20About%20the%20CCC.pdf>.

¹⁸² Australian Commission for Law Enforcement Integrity, *Integrity in Law Enforcement*, <http://www.aclei.gov.au/Pages/default.aspx>.

Commission in its 1996 report, *Integrity: but not by trust alone* (Report No 82). While recommending that a single agency be established (the National Integrity and Investigation Commission), the report also noted the special challenges of investigating police corruption, and identified the need to demarcate carefully between complaint handling functions and corruption investigations. The government's consideration of the ALRC report was overtaken by events in other jurisdictions, including the Wood Royal Commission in NSW.

The present Commonwealth law enforcement integrity model is a graduated risk and harm model. For instance, in the AFP's case, minor matters are dealt with at a management level (with internal oversight), more serious matters attract internal investigation (with oversight from the Commonwealth Ombudsman), while any corruption issues must be notified to ACLEI (for decision as to their handling).¹⁸³

Given the similarity of this system to the current New South Wales system, the Commonwealth system offers little by way of a suitable single civilian oversight model for this state.

North America

The United States and Canada are not useful sources of 'best practice' models for 'single' police oversight due to the localised nature of most of their policing services, save for the Royal Canadian Mounted Police. However, I do want to outline New York City arrangements here, even though I am not endorsing them as 'best practice'. This is mainly because they were explored in the Wood Royal Commission's interim report but have changed dramatically in recent years – and not towards a single civilian oversight model.

In the time of the NSW Royal Commission, there were only two external bodies to oversight the New York City Police Department (NYPD). Today there are three:

- the New York City Civilian Complaint Review Board (CCRB), which was established in 1993 to investigate individual complaints about excessive or unnecessary use of force, abuse of authority, discourtesy and offensive language. The CCRB is charged with receiving, investigating, mediating, hearing, making findings and recommending action on such misconduct complaints. The CCRB forwards its findings to the Police Commissioner.¹⁸⁴
- the Commission to Combat Police Corruption (CCPB), which was created in 1995 following a recommendation of the *Commission To Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department* (the 'Mollen Commission'). The Mollen Commission found that the New York City Police Department had undergone alternating cycles of corruption and reform. It believed that the creation of an independent commission to monitor the anti-corruption

¹⁸³ Australian Commission for Law Enforcement Integrity submission, p 6.

¹⁸⁴ NYC Civilian Complaint Review Board, *About CCRB*, <http://www.nyc.gov/html/ccrb/html/about/about.shtml>.

activities of the Police Department, and help keep the NYPD vigilant in that area, would help break the cycles of corruption.¹⁸⁵

- the Office of the Inspector General for the NYPD, which was established in 2013 as an independent office charged with investigating, reviewing, studying, auditing and making recommendations relating to the operations, policies, programs and practices of the NYPD.¹⁸⁶

I consider the Office of the Inspector General for the NYPD to be an interesting post-Royal Commission civilian oversight development having been created following ‘... the uproar over the over-use of stop and frisk’.¹⁸⁷ Its goal is to look at system improvements and thereby protect public safety and civil rights.¹⁸⁸ For example, the office’s latest report is ‘*Body-Worn Cameras In New York City: An Assessment of NYPD’s Pilot Program and Recommendations to Promote Accountability*’.¹⁸⁹

While, as mentioned, I do not consider the New York arrangements to be suitable for New South Wales, I note that this systemic/operational practice focus was raised in some submissions to this review and discussed in the public forum ‘The Future of Police Accountability’ held at Parliament House on 30 July 2015.

Finally, I briefly looked at a number Canadian oversight systems during this review. Similar to Australia, Canada has numerous versions of external accountability at a provincial level; however, I did not consider any of those systems to be appropriate as complete precedents in the context of looking at ‘single’ models.

¹⁸⁵ NYC Commission to Combat Police Corruption, *About the Commission*, <http://www.nyc.gov/html/ccpc/pages/about/about.shtml>.

¹⁸⁶ NYPD Inspector General, *About the Inspector General*, <http://www.nyc.gov/html/oignypd/pages/about/about.shtml>.

¹⁸⁷ Greg Smith, ‘NYPD inspector general fielded 150 complaints about cops in first year, highlights tensions in report’, *Daily News*, <http://www.nydailynews.com/new-york/nyc-crime/nypd-inspector-general-reveals-year-complaints-article-1.2168106>.

¹⁸⁸ NYPD Inspector General, ‘About the Inspector General’, <http://www.nyc.gov/html/oignypd/pages/about/about.shtml>.

¹⁸⁹ New York City Department of Investigations – The Office of the Inspector General for the NYPD, *Body-Worn Cameras in NYC: An Assessment of NYPD’s Pilot Program and Recommendations to Promote Accountability*, July 2015, <http://www.nyc.gov/html/oignypd/assets/downloads/pdf/nypd-body-camera-report.pdf>.

7. Gaps and overlaps in current police oversight

Generally speaking, gaps and overlaps fall into one of two categories: those which can be remedied in the current system, and those which are best addressed in a new single body oversight model.

Those which can be remedied within the current system include:

- certain aspects of the oversight of critical incident investigations
- oversight body responses to reports of the Police Integrity Commission (PIC) Inspector
- the NSW Police Force response to oversight bodies' recommendations and findings
- the inability of the PIC Inspector to access telephone intercept material obtained by the oversight body
- access to treatment for people appearing before police oversight bodies
- the Police Force providing reasons when it declines to investigate a complaint.

Those which can be best addressed in a new single oversight body model include:

- other aspects of the oversight of critical incident investigations
- external oversight of the Police Division of the Ombudsman's Office
- a 'one stop shop' for complaints against police
- direct investigations of complaints into serious matters that fall short of serious police misconduct
- clarity of the role of the oversight body in monitoring police investigations
- oversight of the Crime Commission
- transparency of the costs of external oversight
- oversight of policing practices that may create misconduct risks.

Terms of reference 2 and 3 require me to look at any gaps in the current oversight system, and also at any functional overlaps between police accountability bodies, which detract from the success of external oversight. Some of these gaps and overlaps can be addressed even if the current hybrid system of police oversight continues unchanged. These will be the primary focus of the first half of this chapter.

By contrast, other gaps and overlaps can only be addressed by a new single agency model of police oversight. Indeed, as the majority of submissions I received argue, structural reform of the police oversight system is necessary because of the 'gaps, overlaps, inefficiencies and

failures of the current system'.¹⁹⁰ I will examine some of this category of gaps and overlaps in the second half of the chapter; with consideration of the remainder to be interweaved throughout the rest of the report in the context of whether there should be a single body oversight model, and if so, what it should look like.

Further matters, such as the less-than-optimal way in which intelligence is shared between the Police Integrity Commission (PIC) and the Police Division of the Office of the Ombudsman (PDOO), might be characterised as gaps in the current system. However, they can also be considered in the context of improvements that would flow from creating one oversight body. As such, they will be dealt with in the next chapter.

As my terms of reference require me to focus principally on options for a single civilian oversight model and then on a recommended model, the time I have been able to devote to the consideration of gaps and overlaps that can be addressed regardless of whether there is any change to the current oversight model, has been necessarily limited, with the exception of the key issue of critical incidents. Although I have not had as much time as I would have liked to consider the others, I have responded to them as best I can.

Moreover, I have not included formal recommendations in this chapter as I consider it preferable that all specific recommendations and guidance for change be dealt with in the context of a preferred new model of oversight, which I explore later in this report.

Gaps and overlaps that could be addressed within the current system

Inspector's ability to audit certain material

During my meeting with the Honourable James Wood AO QC, the former Royal Commissioner expressed concern that when he was the Inspector of the PIC, he had been prohibited by Commonwealth law from obtaining access to certain material generated by PIC telephone intercepts.¹⁹¹ The current Independent Commission Against Corruption (ICAC) and PIC Inspector, the Honourable David Levine AO RFD QC, also recently told the Parliamentary Joint Committee which oversees the ICAC that his audit of an ICAC inquiry earlier this year was compromised by the fact that under Commonwealth law, he could not be given 'telephone intercepts, if they exist'.¹⁹²

As Commonwealth law currently stands, the PIC Inspector is authorised to access telephone intercept material when investigating a specific complaint. But the Inspector is prohibited from gaining access to such material when conducting a general audit of the PIC. Like his

¹⁹⁰ Redfern Legal Centre submission, p 5.

¹⁹¹ Meeting with the Honourable JRT Wood AO QC, 5 August 2015.

¹⁹² The Hon David Levine, Report of proceedings before the Committee on the Independent Commission Against Corruption, NSW Parliament, *Review of the 2013-14 Annual Reports of the ICAC and of the Inspector of the ICAC*, 7 August 2015, p 3.

immediate predecessor as Inspector of the ICAC Mr Harvey Cooper AM, Inspector Levine has advocated increasing inspector access to telephone intercept material. During a Senate inquiry in 2014, he explained:

The current position is ... that the inspector is unable to fully perform his or her statutory functions. In particular, in performance of the inspector's audit function, he or she may wish to assess the legality and propriety of the ICAC's reliance on telephone intercepts in furtherance of its investigations and in order to do so, may need to access the intercepted information obtained under warrant. A warrant and interception under the TIA Act could proceed for purposes not appropriate to the objectives of the ICAC but rather, for improper purposes.¹⁹³

In connection with my review, Inspector Levine submitted that these arguments apply equally to his role as Inspector of the PIC. He proposed that the definition of 'permitted purpose', under section 5 of the *Telecommunications (Interception and Access) Act 1979*, be specifically amended as follows to include 'audit':

(dc) in the case of the Inspector of the Police Integrity Commission:

- (i) Dealing with (by reports and recommendations) complaints of abuse of power, impropriety or other forms of misconduct (within the meaning of the Police Integrity Commission Act) on the part of the Police Integrity Commission or officers of that Commission; or
- (ii) Dealing with (by reports and recommendations) conduct amounting to maladministration (within the meaning of the Police Integrity Commission Act) by the Police Integrity Commission or officers of that Commission; or
- (iii) Auditing the operations of the Police Integrity Commission for the purpose of monitoring compliance with the law of the State.¹⁹⁴

Given Inspector Levine's view that he is unable to fully perform his statutory functions without this amendment, and the fact that this same point has been made by two of his predecessors, I recommend that the matter be raised again, by the NSW Government with its Commonwealth counterpart, notwithstanding that previous representations may have been unsuccessful.

Access to medical treatment

The Police Association submitted to this review that being summoned by an oversight body or being required to give evidence to such a body 'can be a stressful and traumatic experience, and can place the mental health and safety of officers at risk'.¹⁹⁵ This is exacerbated when any such officer is given a non-disclosure direction that makes it a

¹⁹³ Annabel Hepworth, 'ICAC inspector David Levine warns his powers are limited', *The Australian*, 19 April 2014.

¹⁹⁴ Email from Police Integrity Commission Inspector to the Review Secretariat, 10 August 2015.

¹⁹⁵ Police Association of NSW submission, p 23.

criminal offence to consult a doctor or allied health professional in connection with that stress.¹⁹⁶ In that regard, the Association referred to the oversight bodies' response to this issue, and cited its consequential concerns as follows:

They [the oversight bodies] have indicated persons subject to a non-disclosure order can seek a variation of a non-disclosure direction allowing them to access treatment. This means when officers receive the direction, they will be under the impression they would breach the direction were they to obtain counseling in relation to their involvement in the inquiry. If through their legal representative, they are informed of their ability to seek a variation to the direction, this would require the individual to disclose, to an agency investigating them, their intention to access treatment and discuss their involvement in the inquiry. It is completely understandable if an officer were reluctant to seek this variation for fear of compromising their position.¹⁹⁷

Accordingly, the Police Association is seeking an automatic exemption to non-disclosure directions for publication to a medical practitioner, psychologist or counselor for the purpose of medical or welfare assistance.¹⁹⁸ The NSW Police Force also supports a standing exemption, noting:

It is an exemption that the NSW Police Force believes should be substantively in place, not one that affected police need to seek with each new inquiry.¹⁹⁹

It seems to me that there is merit in the Association's argument that the very act of seeking a variation on a case-by-case basis might compromise the applicant's position. This is an issue, however, that is not limited to police oversight. It also involves the ICAC which falls outside my terms of reference, and the Crime Commission which does too, as far as this issue is concerned. So I do not believe that it would be appropriate for me to recommend a specific legislative solution here. Moreover, there is also a more general policy issue that involves balancing the public interest in maintaining the integrity of investigations, with the public interest in people being able to seek appropriate treatment in a timely and confidential way, without risk of committing a criminal offence.

That said, I note that the NSW Parliament's Select Committee on the conduct and progress of Operation Prospect has recommended that the Government amend all relevant legislation covering the Ombudsman, the ICAC, the Crime Commission and the PIC to allow for an exemption on medical grounds.²⁰⁰ Allowing for the constraints of my terms of

¹⁹⁶ Police Association of NSW submission, p 23.

¹⁹⁷ Police Association of NSW submission, p 24.

¹⁹⁸ Police Association of NSW submission, p 24.

¹⁹⁹ NSW Police Force submission, p 6.

²⁰⁰ Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", NSW Legislative Council, *Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect"*, 25 February 2015, Recommendation 3.

reference, my view is in spirit the same as that of the Prospect Committee, but in jurisdictional scope, necessarily more limited.

Response to recommendations of PIC Inspector

In relation to oversight of the PIC, the Police Association submitted to this review that ‘obligations should be placed on the oversight body to at the very least consider the findings of the Inspectorate and publish a response to those findings’.²⁰¹

The PIC Inspector’s principal functions include auditing the operations of the PIC, and dealing with, by reports and recommendations, complaints of abuse of power, misconduct or maladministration by the PIC or PIC officers.²⁰² Among other things, the Inspector can report to Parliament at any time on the operational effectiveness of the PIC or on any administrative or general policy matter relating to his principal functions.²⁰³ However, there is no legislative requirement for the PIC to respond to any reports or recommendations made by the Inspector. This is a gap that could be filled by imposing the same reporting requirements on the PIC as are placed on Victoria’s Independent Broad-based Anti-corruption Commission (IBAC). In that regard, IBAC is required to report back to the Victorian Inspectorate stating whether or not it intends to take a recommended action and, if the IBAC does not intend to take that action, to state the reason for not taking it.²⁰⁴ I believe a similar obligation should exist in relation to reports of the New South Wales Inspector.

Response to recommendations of oversight bodies

Some submissions I received suggested that there was a gap in the current oversight framework because the oversight bodies’ recommendations are not binding on the NSW Police Force. For example, the NSW Greens argued that the oversight of police is ‘toothless’ in that:

The current system does not allow oversight bodies to make binding recommendations on improving processes and procedures for handling police misconduct, or police processes more broadly. While reports with recommendations are often presented to Parliament by the Ombudsman, there is no enforceable obligation on the Police Commissioner to implement the recommendations, and no obligation on the Government to respond. There is no avenue for either oversight bodies or complainants to press for the implementation of recommendations. As a result, these bodies, and in particular the Ombudsman’s office, are seen as essentially toothless by both the general community and the police.²⁰⁵

²⁰¹ Police Association of NSW submission, p 21.

²⁰² *Police Integrity Commission Act 1996 (PIC Act)*, s 89.

²⁰³ *Police Integrity Commission Act 1996*, s 101.

²⁰⁴ Independent Broad-based Anti-corruption Commission, *Annual Report 2013-14*, p 9.

²⁰⁵ NSW Greens submission, p 4.

The Redfern Legal Centre submitted that the new oversight body should be empowered to make binding recommendations which the Commissioner of Police cannot ignore.²⁰⁶

The PIC can currently make recommendations as to whether consideration should, or should not, be given to the taking of disciplinary action or to the launching of criminal proceedings. To that end, the PIC can assemble evidence and furnish it to the Director of Public Prosecutions in a criminal matter or to an appropriate state authority in a disciplinary matter. In addition, the PIC may make assessments and form opinions as to whether police misconduct, or other misconduct, or corrupt conduct (in the case of an administrative officer), has or may have occurred and report to Parliament accordingly.²⁰⁷ In my view, these are significant powers.

In relation to matters involving systemic issues as distinct from the conduct of individual officers, the PIC can also make recommendations, 'for the taking of other action that the Commission considers should be taken in relation to the subject-matter of its assessments or opinions or the results of any such investigations'.²⁰⁸ The Ombudsman can also investigate and make recommendations to the Police Commissioner.

There is no requirement in the current legislation, however, for the Police Commissioner to act on recommendations made by either of these watchdogs.

By contrast, in Victoria the recommendations of the IBAC are, *prima facie*, binding. So the Chief Commissioner of Police *must* adopt a recommendation made by IBAC or take the requested action, or provide a report to IBAC stating the reasons for not adopting the recommendation or taking the requested action.²⁰⁹

Given my terms of reference require that changes I recommend must allow the Police Commissioner to maintain responsibility and accountability for the Police Force's disciplinary decisions and performance management, it would not be consistent with that policy position to impose on the Commissioner a requirement to implement the recommendations of an oversight body. I am also not attracted to a 'prima facie' approach. It seems to me, however, that transparency would be enhanced if the Police Commissioner was required to report his reasons for not adopting a formal recommendation made by an oversight body, in a timely way.

Monitoring power

Section 145 of the *Police Act 1990* provides that when a police officer is carrying out an investigation in relation to a complaint under Part 8A, the police officer 'must have regard to

²⁰⁶ Redfern Legal Centre submission, p 6.

²⁰⁷ *PIC Act*, ss 16(1), 96 and 97.

²⁰⁸ *PIC Act*, s 16(1).

²⁰⁹ Independent Broad-based Anti-corruption Commission, *Annual Report 2013-14*, p 23.

any matters specified by the Commissioner or Ombudsman as needing to be examined or taken into consideration'. Under section 146, the 'Ombudsman may monitor the progress of an investigation if of the opinion that it is in the public interest to do so'. While the term 'monitor' is not specifically defined, section 146 states that the 'Ombudsman may be present as an observer during interviews conducted by police officers for the purposes of an investigation, and may confer with those police officers about the conduct and progress of the investigation'.²¹⁰

In the context of sections 145 and 146 of the *Police Act*, the Police Association submitted that:

In the reform of the oversight system, the monitor power should be amended to ensure the monitoring agency can review the police investigation, but with no ability for the monitor agency to exert control, direction or influence over the police investigators.²¹¹

It seems to me that there is ambiguity around the wording of these sections, especially in relation to section 145(1)(b), which provides that 'the police officer(s) ... carrying out an investigation ... must have regard to any matters specified by the Commissioner or Ombudsman as needing to be examined or taken into consideration'. However, this statutory ambiguity appears to have been clarified in an agreement dated 30 November 2010 between the former NSW Ombudsman, Bruce Barbour, and the former Assistant Commissioner in charge of the Professional Standards Command, Paul Carey APM. Relevantly that agreement provides:

26. Under section 145, the Ombudsman can identify matters as needing to be examined or taken into consideration by the investigation. Where such matters relate to an interview, the Ombudsman should raise with the CMT [Complaints Management Team] that owns the investigation as far as practicable in advance of an interview.

27. Where circumstances do not allow these matters to be brought to the attention of a CMT in advance of the interview the Ombudsman may raise them with the investigator(s) carrying out the interview.

28. Investigators are required to take matters raised by the Ombudsman into account. However, in doing so they should consider them within the context of the instructions they have from their CMT and any investigation plan. Where necessary, the commencement of an interview might be delayed while advice is obtained from the CMT or investigation supervisor.

29. There is no obligation for NSW Police to act on matters raised by the Ombudsman. However, the officers concerned should ensure that they can justify their actions in response to matters raised by the Ombudsman and document the reasons on the complaint file.²¹²

²¹⁰ *Police Act 1990*, s 146(2).

²¹¹ Police Association of NSW submission, p 17.

In my view, these provisions draw a clear distinction between active monitoring, which is permitted, and giving directions to investigators, which is not permitted. In doing so, they clarify the boundaries in a way that section 145(1)(b) does not. Therefore, I believe this legislative provision would benefit from a clarifying amendment that would achieve the effect of paragraphs numbered 28 and 29 above.

More generally, it seems to me that the agreement of 30 November 2010 provides appropriate guidance around the monitoring of Part 8A investigations, and as such, it would be appropriate for a similar agreement to be signed off by the NSW Police Force and any new oversight body created as a result of this review.

Provision of reasons not to investigate a complaint

The *Police Act* provides that if the Police Commissioner decides that a complaint does not need to be investigated, the Ombudsman and the complainant must be notified of that decision.²¹³ If the Ombudsman disagrees with the Commissioner's decision, the Ombudsman must notify the Commissioner and the complainant of that fact and the Commissioner must cause the complaint to be investigated.²¹⁴ But the Ombudsman's task here is said to be complicated by the fact that there is no legislative requirement on the Commissioner to inform the Ombudsman why the complaint was not investigated in the first place. Therefore should the *Police Act* be amended to require this?

The former Ombudsman advised that in order for his office to be able to exercise the power to require the Police Force to reverse a decision not to investigate a complaint, 'the Ombudsman must be provided with the reasons for the Commissioner's initial decision not to investigate'.²¹⁵ While the logic of this argument is obvious, I note the Ombudsman's submission to this review stated that it is current police practice to provide reasons 'as a matter of policy'.²¹⁶ Therefore I am loath to recommend a legislative change that may impose an extra administrative burden on police when it appears that the Ombudsman receives reasons already. Were this police practice to be abandoned, however, then the option of a legislative amendment requiring police to give reasons should be revisited.

The *Police Act* lists several factors that may be taken into account when the Police Commissioner, or the Ombudsman for that matter, is deciding whether or not to investigate a complaint against a police officer under Part 8A.

The list is non-exhaustive and includes whether:

²¹² NSW Ombudsman supplementary submission, Attachment 2.

²¹³ *Police Act 1990*, s 139(4).

²¹⁴ *Police Act 1990*, s 139(5).

²¹⁵ NSW Ombudsman submission, Attachment A, pp 14-15.

²¹⁶ NSW Ombudsman submission, Attachment A, pp 14-15.

- the complaint is frivolous, vexatious or not made in good faith
- the subject-matter of the complaint is trivial
- the conduct complained of occurred too long ago to justify investigation
- there is or was available to the complainant an alternative and satisfactory means of redress in relation to the conduct complained of.²¹⁷

The Redfern Legal Centre contended that this section of the Act is ‘so broad that it damages the public interest more than it protects it.’²¹⁸ For example, the term ‘too long ago’ is not defined in the legislation; therefore it is the subjective view of the police, or the Ombudsman, that determines whether or not an investigation will be refused on this ground. While I agree that ‘too long ago’ is not precise, there has to be some flexibility in determining whether or not to investigate a complaint. In that regard, some conduct will be so serious that there should be no time limit which prevents it being investigated. However in cases of very minor misconduct, a 12 month limitation may be more than enough. It should be noted too that this provision does not require complaints to be declined on the basis of age alone. It merely allows age to be taken into account as one of the listed factors, or any others that the decision maker ‘thinks fit’. So rather than being prescriptive about time, I think it is important to maintain flexibility, provided reasons are given in the context of the seriousness or otherwise of the conduct complained of when weighed against the time elapsed.

The Police Force Complaint Handling Guidelines state that when a decision has been made to decline an investigation, the following procedures and notifications must be undertaken:

All documentation relied on to make the decision to decline must be uploaded/ scanned into the c@ts.i system. Where a command has relied upon media footage (CCTV, ICV) to decline a matter, a copy of the media footage must be sent to the NSW Ombudsman.

The command must also send correspondence to the complainant outlining the reasons for declining the complaint and upload/scan this document onto c@ts.i. Advice may also be given by phone or in person. This should be recorded.²¹⁹

It seems to me that these procedures and notifications ensure both the complainant and the Ombudsman are adequately informed about the basis for the decision not to investigate and that there will be an accurate record of it. Accordingly, there should be regular audits of this documentation by the Professional Standards Command and as appropriate by the civilian oversight body.

²¹⁷ *Police Act 1990*, s 141(1).

²¹⁸ Redfern Legal Centre submission, p 17.

²¹⁹ NSW Police Force, Professional Standards Command, *Complaint Handling Guidelines* (‘Complaint handling guidelines’), March 2012, p 29.

Another issue concerning the discretion held in relation to the handling of complaints was raised by the Redfern Legal Centre, which referred to an example of a complainant with civil proceedings against the state for unlawful imprisonment, which the Ombudsman declined to make any findings on, on the basis of there being a satisfactory alternative means of redress.²²⁰ The Legal Centre argued that the *Police Act* should expressly exclude civil proceedings as a reason to decline to investigate a complaint. A similar issue was raised in discussion at a recent forum at Parliament House on 'The Future of Police Accountability', organised by the University of New South Wales and the Redfern Legal Centre,²²¹ in the context of criminal matters. In general terms, the concern seems to be that a complainant does not always have the opportunity to pursue the allegation of misconduct against police in the other jurisdiction.

Relevantly, the Professional Standards Command's Complaint Handling Guidelines provide as follows:

If declining to investigate a matter on the basis that the issues will be explored in criminal court proceedings e.g. section 141 (i)(e) of the *Police Act*; alternative redress, commands must have a reasonable belief that the issues **will** be explored in that jurisdiction. For example, allegations of racist language by police during an arrest may be noted during proceedings but may not be explored to the extent necessary to satisfy Part 8A complaint obligations.²²²

It may be beneficial in relation to complaints being investigated by the NSW Police Force to introduce a minor amendment to the Guidelines to make it clearer that criminal and/or civil proceedings are rarely likely to provide a satisfactory alternative to a complaints investigation. However, I am not attracted to a legislative prohibition on either the Ombudsman or the Commissioner being able to take into account civil and criminal court matters as a reason not to investigate a complaint.

Critical incidents oversight

Critical incidents almost invariably involve the death of or serious injury to people arising as a result of interaction with police officers. The occurrence of a critical incident does not necessarily arise as a result of police misconduct or wrongdoing. Indeed in some cases, police deserve bravery awards. Nevertheless, as a number of the submissions to my review make clear, if a person is seriously injured or killed as a result of contact with police, any investigation of the circumstances should be conducted transparently and to the highest standard.

²²⁰ Redfern Legal Centre submission, p 16.

²²¹ See video record of the public forum, 'The Future of Police Accountability', Parliament House, 30 July 2015 at <https://www.youtube.com/watch?v=5rfZKbN8kGA>.

²²² Complaint handling guidelines, p 27.

According to the Ombudsman's submission, 'the most significant gap in the current system for civilian oversight of police relates to the independent oversight of NSWPF investigations into critical incidents.'²²³ Similarly, the PIC asserted that 'there is only one significant gap in the current oversight framework and that is the absence of a legislated power to oversee the investigation of police 'critical incidents'.²²⁴ This is a gap which requires attention, regardless of whether a new model of oversight is adopted.

As things stand, there is no specific statutory oversight of police critical incident investigations. Any oversight that occurs does so within the existing complaints regime, the coronial process and the standing power of the PIC to investigate police misconduct. As the PIC pointed out, while the current police oversight system provides for a comprehensive independent oversight framework for investigating complaints against police, 'there is no such corresponding framework for critical incidents.'²²⁵

Under the current system, the Ombudsman can only monitor a critical incident investigation if a complaint has been made. The PIC has no direct role, unless police misconduct has been identified. Further, there is no statutory requirement for the NSW Police Force to notify any oversight body that a critical incident has occurred. Therefore the majority of critical incident investigations are conducted by police with no independent oversight.

The PIC submitted that there should be a statutory definition of 'critical incident' and mandatory notification of all critical incidents to an independent oversight agency so the agency 'can oversee investigations, as it sees fit, with the powers and obligations equal to those applicable in the oversight of police complaints.'²²⁶

Because the oversight of critical incidents has been identified as a significant gap by many of the submissions to this review, and because it is a complex policy area in its own right, I have devoted chapter 10 to its consideration.

Also referred to in that chapter is a related issue, the case of *Baff v NSW Commissioner of Police*,²²⁷ which Legal Aid NSW argues may have an impact on the ability of the Police Force to thoroughly investigate critical incidents.²²⁸ In *Baff*, the Supreme Court found that the Police Commissioner could not direct an officer to answer questions if he or she claimed privilege against self-incrimination. Prior to *Baff*, the Police had understood that during a 'non-criminal' interview, an officer could be directed under the *Police Act* to provide a statement and could not assert any privilege against self-incrimination.

²²³ Ombudsman submission, p 55.

²²⁴ Police Integrity Commission submission, p 10.

²²⁵ Police Integrity Commission submission, p 11.

²²⁶ Police Integrity Commission submission, p 10.

²²⁷ *Baff v NSW Commissioner of Police* [2013] NSWSC 1205.

²²⁸ Legal Aid submission, p 24.

Critical incidents oversight

Just as there is a gap in critical incident oversight that could be addressed whether or not the current system remains in place, so there is a critical incident overlap which can only be ameliorated by a new system of single body oversight. This latter issue is illustrated by the critical incident involving the death of the Brazilian student, Roberto Laudisio-Curti. In that case, both the Ombudsman's Office and the PIC were involved – the Ombudsman because a complaint had been made to his office which enlivened his jurisdiction, and the PIC because the Coroner who inquired into Mr Curti's death had referred certain matters to the Commission. Further complicating things was the fact that, while the Ombudsman had criticised certain aspects of the police investigation, the Coroner had complimented the investigators.

According to the PIC Inspector's submission to my review, this involvement of both the Ombudsman's Office and the PIC in the same critical incident investigation is an example of the 'doubling up of inquiries' which could be reduced if the Ombudsman's oversight role was taken up by an enlarged PIC, or, it can reasonably be inferred, by a new single civilian oversight body.²²⁹ This particular type of doubling up is further considered in the next chapter.

Direct investigations by oversight bodies

The NSW Police Force acknowledged in its submission to this review that external investigation powers are an essential part of police accountability:

Of course, in certain circumstances it would be necessary for the oversight body to conduct its own investigation into particular complaints, independently of the Police Force. Such investigations are necessarily in the public interest and are warranted where allegations of serious or systemic police misconduct are made.²³⁰

Concerns have been expressed by both the Legal Aid Commission and the Redfern Legal Centre, however, that under the current system in which investigative powers are split between the Ombudsman and the PIC, some cases may be falling between the cracks.

In this regard, I note that very few direct investigations are undertaken by the Ombudsman's Office.²³¹ The Ombudsman has the power to directly investigate complaints about police, as well as police conduct that could be, but is not, the subject of such a complaint, provided such investigations are in the public interest.²³² However as a matter of

²²⁹ Inspector of the Police Integrity Commission submission, pp 2-3.

²³⁰ NSW Police Force submission, p 2.

²³¹ Legal Aid Commission submission, p 3; Redfern Legal Centre submission, p 6.

²³² *Police Act 1990*, ss 156 and 159.

recent practice, the Ombudsman has tended to deploy this power to investigate problems arising from the administrative conduct of the NSW Police Force as a public authority, rather than the conduct of individual police officers.²³³

According to the Ombudsman's Annual Report for 2013-14, there was one complaint investigated in 2009-10, four investigated in 2010-11, one investigated in 2011-12, five investigated in 2012-13, and one investigated in 2013-14, when in that same financial year alone, a total of 3,390 complaints against police were notified to the PDOO. Thus between 2009 and 2014 an average of only 2.4 investigations by the Ombudsman into complaints about police were finalised.²³⁴ The Acting Ombudsman's supplementary submission noted that the PDOO's staff allocation had fallen from 35 in June 2005 to 29 in June 2015. This squeeze on staff, the Acting Ombudsman said, meant that the Ombudsman's Office has had to 'cut back on the use of direct investigations into systemic concerns'.²³⁵ It is interesting to note, however, that the Ombudsman's Annual Report for 2005-06 identified only three police matters that were directly investigated by his office that year.²³⁶ It follows that the fall in the number of PDOO staff over the last decade has been far greater than the drop in the average number of complaints directly investigated by them. Indeed over the whole decade, the average direct investigation rate has been very low. Therefore it seems to me that the average rate of only 2.4 direct investigations per year, over the last five years, is not a direct result of any recent problem with staff numbers. I also note that the then Ombudsman gave evidence to the Royal Commission that the position has always been this way:

In her submission to RCPS the Ombudsman indicated that few direct investigations had been conducted since power was given in 1993 'as a direct result of insufficient funding and the rising level of complaints.'²³⁷

To understand what may be missing from this space, it is instructive to consider the work of New Zealand's Independent Police Conduct Authority (IPCA) which in 2013-14 received 2,193 complaints against police.²³⁸ Unlike the NSW Ombudsman, the IPCA has no general own motion investigative power but it can launch own motion investigations into critical incidents. It also has statutory power to investigate any complaint alleging misconduct or neglect of duty by a police officer.²³⁹ In practice, however, the breadth of this power is narrowed by the IPCA itself to Category 1 Complaints which it defines as 'serious complaints with high public interest'.²⁴⁰ Therefore on the face of it, the IPCA seems to have adopted an

²³³ NSW Ombudsman submission, p 24.

²³⁴ NSW Ombudsman, *Annual Report 2013-2014*, pp 41-42.

²³⁵ NSW Ombudsman supplementary submission, pp 9-10.

²³⁶ NSW Ombudsman, *Annual Report 2013-2014*, pp 41, 43.

²³⁷ Wood Royal Commission, first interim report, footnote 73, p 71.

²³⁸ New Zealand Independent Police Complaints Authority, *Annual Report 2013-2014*, p 13.

²³⁹ New Zealand Independent Police Conduct Authority Act 1988, ss 12, 17 and 19.

²⁴⁰ New Zealand Independent Police Complaints Authority, *Annual Report 2013-2014*, p 12.

investigation policy that is aimed at complaints of a more serious nature than those generally investigated by the NSW Ombudsman. Even so, with just 25.2 full-time equivalent staff and annual revenue from the Crown of \$4,006,000 in 2014, the IPCA had 60 open investigation files as at 30 June 2014.²⁴¹ These investigations appear to relate to the IPCA's own motion investigations of critical incidents, as well as complaints about things as diverse as injuries sustained during the police eviction of party-goers, the policing of a charity car rally, the policing of student protests, and allegations against police in relation to the taking of a murder suspect's confession.²⁴²

Apart from resources, there may be other explanations for the low investigation numbers. One possible explanation is that the Police Force's own complaints investigations, monitored as necessary by the Ombudsman, are conducted with rigour and integrity, as was intended by the changes introduced following the Wood Royal Commission. That is, a low number of direct investigations by the Ombudsman may be the logical consequence of hard work by the Professional Standards Command in the Police Force and the local complaints management teams. I understand that there is a productive working relationship between the Ombudsman and those police officers who are responsible for dealing with complaints, as a matter of routine.

Another possible explanation is that the PIC conducts investigations similar in character to the Category 1 New Zealand investigations, as these types of matters are considered sufficiently serious by the PIC for it to enliven its jurisdiction. I note, however, that the PIC advises that it carefully selects the matters it chooses to investigate to focus on serious matters:

Insofar as it is required by its legislation to direct its attention to serious forms of police misconduct, the Commission is highly selective in the matters it chooses to investigate and, as a consequence, its focus may be regarded as narrow in scope. In any given year, the number of investigations commenced by the Commission is small relative to the total number of misconduct complaints made against police.²⁴³

My view is that a single oversight body would do much to overcome the risk that significant matters are not being externally investigated when they should be, without undermining the central role of the Police Force in managing its own conduct. This is because within one external oversight organisation, decisions about which matters to investigate, and at what level, will be able to take place in the collegiate atmosphere of regular meetings between the executives of the merged organisation, rather than via a complex system of interagency referral arrangements.

²⁴¹ New Zealand Independent Police Complaints Authority, *Annual Report 2013-2014*, pp 10, 16 and 39.

²⁴² New Zealand Independent Police Complaints Authority, *Four Monthly Performance Report for the Period Ending 30 June 2013*, pp 11-12.

²⁴³ Police Integrity Commission submission, p 3.

It also needs to be said that while the IPCA regularly investigates and reports on misconduct, those investigations do not appear to develop into full blown confrontational public hearings. So although I accept that any new police oversight body in this state must have a suite of royal commission type powers, the New Zealand experience is that the public hearing element of these powers does not often need to be deployed. However, each jurisdiction has its own culturally-specific context, and in New South Wales, public hearings are a necessary element in maintaining public confidence that the PIC is able to prevent, detect and investigate corruption and serious misconduct. On the other hand, I am confident that the direct investigation of significant matters without the need to resort to public hearings can be facilitated better through a new oversight body.

I note that in their recent review of the ICAC's jurisdiction, the Honourable Murray Gleeson AC QC and Mr Bruce McClintock SC considered how decisions to hold public hearings are made, as well as the manner in which such hearings are conducted. They concluded that no legislative amendments were necessary.²⁴⁴ I refer again to this issue in the police oversight context in chapter 9.

Oversight of 'everyday' policing practices

Some review participants raised concerns about a gap in the level of oversight of 'everyday' policing:

We argue in favour of the preventative power of a focus on 'everyday' police activity. Structural decisions should not be made on the basis of the cases that get the most publicity. The most frequently raised police misconduct issue should be the guide. The primary structure of the oversight system should be determined based on what will best monitor and improve the everyday exercise of police powers in NSW.²⁴⁵

During the recent public forum at Parliament House on 'The Future of Police Accountability', some of the participants also described this gap as relating to the exercise of statutory discretions in a way that may encourage a culture that is not misconduct-resistant.²⁴⁶

In England and Wales, the role of the Independent Police Complaints Commission, referred to in my terms of reference, is augmented by Her Majesty's Inspectorate of Constabulary (HMIC) which has a broad responsibility for reviewing police forces and recommending improvements. And in that way, there is some oversight of systemic issues. For example in

²⁴⁴ *Independent Panel - Review of the Jurisdiction of the Independent Commission Against Corruption*, report to the NSW Government by the Hon. Murray Gleeson AC QC and Bruce McClintock SC, 30 July 2015, pp 57-63 available at

http://www.dpc.nsw.gov.au/announcements/independent_panel_review_of_the_jurisdiction_of_the_independent_commission_against_corruption.

²⁴⁵ Redfern Legal Centre submission, p 5.

²⁴⁶ See video record of the public forum, 'The Future of Police Accountability', Parliament House, 30 July 2015 at <https://www.youtube.com/watch?v=5fZKbN8kGA>.

July 2013, the HMIC published a report entitled ‘*Stop and Search Powers: Are the police using them effectively and fairly?*’ finding that the police use of such powers is too often ineffective in tackling crime, and procedurally incorrect.²⁴⁷ I also noted in the previous chapter that a new oversight body has recently been introduced in New York City with a focus on systemic issues.

For a short period from 1991, the NSW Police Service had an Inspector General. However, after the resignation of the incumbent in 1993, the position was not filled, as the Police Minister of the day put it, ‘due to lack of justification for continuing the appointment’.²⁴⁸ As Commissioner Wood later noted, ‘the reasons for this decision are not apparent. The position no longer exists’.²⁴⁹ In the event, Commissioner Wood did not recommend that the position of Inspector be revived, preferring instead the internal managerial model, with oversight by the PIC and the PDOO, which continues to this day. I too do not favour the re-establishment of a separate position of Inspector General of the NSW Police Force. However, there remains a need for some oversight of general policing practices.

Under the present New South Wales system, the PIC has a power to conduct audits into ‘policing activities’, which must be ‘for the purpose of ascertaining whether there is police misconduct or any circumstances that may be conducive to police misconduct’.²⁵⁰ Part 8A of the *Police Act* also provides the Ombudsman with jurisdiction to investigate complaints alleging or indicating ‘conduct of a police officer that is engaged in in accordance with a law or established practice, being a law or established practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect’.²⁵¹

The Ombudsman’s Office noted that it has the ability to address these issues through its reviews and reports on the use of police powers: ‘[C]oncerns about ‘over-policing’ are often the reason why Parliament requires the Ombudsman to monitor the NSWPF’s implementation of new police powers for an initial period’.²⁵² It follows in my view, that there is no shortage of power under the current system to oversight ‘everyday’ policing in both a systemic sense and an individual officer sense. Indeed, as the Ombudsman submits, in recent years his office has conducted investigations into NSW Police Force policies and procedures relating to the use of Tasers, and also into the handling of domestic and family violence complaints.²⁵³

However, it appears these investigations are conducted infrequently. So a single oversight body, which has the benefit of more comprehensive shared intelligence, and greater

²⁴⁷ www.justiceinspectorates.gov.uk/hmic/publications/stop-and-search-powers.

²⁴⁸ Wood Royal Commission, first interim report, p 16.

²⁴⁹ Wood Royal Commission, first interim report, p 16.

²⁵⁰ *Police Integrity Commission Act 1996*, s 14(a).

²⁵¹ *Police Act 1990*, s 122(1)(d) and (e).

²⁵² Email from Deputy Ombudsman Michael Gleeson to the Review Secretariat, 12 August 2015.

²⁵³ NSW Ombudsman submission, p 25.

flexibility to conduct direct investigations, may be better positioned to respond to allegations relating to everyday policing that may raise misconduct risks.

Navigating the complaints system

Navigating the websites of the NSW Police Force, the Ombudsman and the PIC, it is difficult to ascertain the roles and responsibilities of each agency in the complaints process, and how the agencies interact during that process. It is also difficult for complainants to make an informed choice about which is the most appropriate body for them.

The NSW Police Force website advises that complaints can also be made to the NSW Ombudsman or the PIC, however, states that ‘in most circumstances complaints received by these agencies will be referred to the NSW Police Force to resolve.’²⁵⁴

The Ombudsman’s website informs complainants that they may choose to complain to either the Ombudsman or the NSW Police Force, but that the Ombudsman ‘generally refers complaints about police to the NSW Police Force for resolution.’²⁵⁵ The Ombudsman also informs complainants that ‘if the complaint involves serious misconduct we may oversight the NSW Police Force investigation’. The Ombudsman’s complaint website does not mention the PIC’s role in investigating complaints about serious police misconduct.

The PIC’s website does not have a ‘complaints’ page, but in reflecting its statutory responsibilities, has a webpage allowing complainants to report police misconduct.²⁵⁶ The information on this page notes that the PIC will only investigate serious police misconduct and that complaints about less serious police misconduct, such as the use of unreasonable force, traffic offences, failure to provide a satisfactory level of service and breaches of rules and procedures should be reported to directly the Ombudsman or the NSW Police Force. Links to both the NSW Police Force and the Ombudsman are included on the PIC’s website.

The PIC provides for an online facility to report police misconduct, and notes in bold at the end of the online report that ‘all information provided to the PIC is confidential’.²⁵⁷ In fact, the *Police Integrity Commission Act 1996* allows the Commission to either investigate the complaint or refer the complaint to other authorities, such as the NSW Police Force or the Ombudsman, to be dealt with.²⁵⁸ While there is no legislative provision that allows complainants to clearly stipulate that complaints made to the PIC are confidential, the PIC outlines on its website that the information it receives is confidential and is not forwarded to the NSW Police Force and the Ombudsman’s Office without the complainants’ consent.²⁵⁹

²⁵⁴ https://www.police.nsw.gov.au/services/complain_about_a_police_officer.

²⁵⁵ <https://www.ombo.nsw.gov.au/complaints/making-a-complaint>.

²⁵⁶ <https://www.pic.nsw.gov.au/ReportingMisconduct.aspx>.

²⁵⁷ <https://www.pic.nsw.gov.au/ReportMisconduct.aspx>.

²⁵⁸ *Police Integrity Commission Act 1996*, s 70.

²⁵⁹ <https://www.pic.nsw.gov.au/ReportingMisconduct.aspx>.

A lack of clear public information about complaints processes is a potential gap, and possibly even leads to duplication if complainants lodge complaints with all three bodies due to uncertainty about the process. Indeed it is to some extent a problem inherent in the current structure of the oversight system which will be eased if a single civilian oversight model is adopted. However, a number of submissions further suggest that this gap may be overcome by a 'one stop shop' whereby all complaints are directed in the first instance to an independent body.²⁶⁰ I consider whether that is a solution below.

One stop shop for making complaints

The NSW Greens advocated for a model 'that would provide for all complaints to be directed in the first instance to an independent body'.²⁶¹ The Women's Legal Services NSW also supported this approach, noting that it is the approach taken in Northern Ireland:

... we support the approach in Northern Ireland that with the complainant's consent, Police investigate where the independent body has deemed it is not a serious complaint. We see it as an important role of the independent body to undertake this initial assessment.²⁶²

The Women's Legal Services NSW further argued that 'with all complaints going to the independent body systemic issues can be more quickly identified and addressed, irrespective of who ultimately is asked to resolve the matter'.²⁶³

Similarly, the Public Interest Advocacy Centre (PIAC) submitted:

One option that PIAC believes is worth consideration is the model adopted by the Northern Ireland Police Ombudsman, who receives all complaints in the first instance. PIAC supports a model that would provide for all complaints to be directed in the first instance to an independent body. Where appropriate, the complaint could be referred back to the relevant Local Area Command for informal resolution.²⁶⁴

I note that 'streamlining' the user experience is a commonly pursued goal of recent government service reform. An example is the establishment of Service NSW, 'a NSW government initiative delivering improved one-stop services for government customers',²⁶⁵ and, at the Commonwealth level, myGov: 'a fast simple way to access government services online'.²⁶⁶ It is also instructive to consider the establishment of the NSW Civil and Administrative Tribunal, which brought together numerous smaller tribunals. In the 2012 second reading speech for the legislation establishing the tribunal it was described as 'a

²⁶⁰ NSW Ombudsman supplementary submission, p 2; Community Legal Centres NSW submission, key recommendation 3; Public Interest Advocacy Centre submission, p 11; NSW Greens submission, p 12.

²⁶¹ NSW Greens submission, p 12; Public Interest Advocacy Centre submission, p 11.

²⁶² Women's Legal Services submission, p 2.

²⁶³ Women's Legal Services submission, p 2.

²⁶⁴ Public Interest Advocacy Centre submission, p 11.

²⁶⁵ <http://www.service.nsw.gov.au/about-us>.

²⁶⁶ <https://my.gov.au/mygov/content/html/about.html>.

one-stop shop for tribunal services. It will be independent, transparent and accountable, and it will place customers at the centre of service design.’²⁶⁷

While creating a one stop shop for complaints might be seen to further simplify Part 8A, because this proposal would result in complaints being solely made to one body, there are important countervailing managerial and cultural considerations which Commissioner Wood referred to in his 1996 interim report. In my view, Commissioner Wood’s reasoning on this point remains persuasive. Moreover, as the message at the front of the NSW Police Force Complaint Handling Guidelines makes clear, ‘effective complaint handling is the key to an ethical police force’.²⁶⁸ It seems to me that effective complaint handling will be more problematic in an organisation that has no obligation to receive complaints directly from the public. This is because the act of receiving a complaint is the first step in taking responsibility for it, whether as a Regional Commander, a Local Area Commander, a Professional Standards Duty Officer, or as a member of a Complaint Management Team. As the NSW Police Association submission contends: ‘the NSW Police Force and the independent oversight agency should both be empowered to receive complaints’.²⁶⁹

In his supplementary submission, the Acting Ombudsman advocated a ‘one stop shop’ single portal for complaints to be made in relation to all government agencies, ‘provided that there continues to be appropriate flexibility in where and how complainants may raise concerns...’.²⁷⁰ I support the idea of a single portal for complainants to go to when they want to make an online complaint against police. However, I also support the view that complainants should have the choice as to where they lodge their complaint. Some people will prefer to go direct to the source and lodge their complaint with the Police Force, whereas others will prefer to complain to an independent body. I envisage that there may be an IT solution, whereby the complaints page of both the NSW Police Force website and any new oversight body could be linked to provide complainants with the option to complain directly to either body.

In relation to the one stop shop concept, I also recognise that making one agency responsible for the receipt of all complaints would place a large administrative burden upon that agency. Therefore it is recommended that, in the new system, it should continue to be possible for complaints to be received either by the Police Force or an oversight body, but thereafter they should be recorded centrally.²⁷¹

I am also concerned that there may be a significant and undesirable resource implication, as well as one of principle, in removing the responsibility of police in the resolution of

²⁶⁷ The Hon. Greg Smith SC, second reading speech: Civil and Administrative Tribunal Bill, 22 November 2012.

²⁶⁸ Complaint Handling Guidelines, p 1.

²⁶⁹ Police Association of NSW submission, p 12.

²⁷⁰ NSW Ombudsman supplementary submission, p 2.

²⁷¹ Wood Royal Commission, first interim report, p 100.

complaints about their own conduct. It seems to me that efficiencies are achieved in the public interest by maintaining a direct complaint-resolution relationship between the public and those who serve them in primary policing roles. To confer all functions relating to the receipt of formal complaints on an external body not only lessens the Police Force's ownership of its own problems, but also risks vastly increasing costs associated with processing those complaints.

Oversight of the Police Division of the Ombudsman's Office

As I noted in chapter 5, unlike the PIC, the Ombudsman's Office is not currently subject to oversight by an Inspector. This is an issue which has been identified by the Police Association. And given the complex interaction of these two watchdogs in the police oversight space, which is a necessary consequence of the way Part 8A of the *Police Act* is currently drafted, this could be construed as a gap in the current oversight model.²⁷²

Part of the reason for this is historical. The Ombudsman is a long-established watchdog which is focused on maladministration and complaints handling, and answerable to Parliament. By contrast, the ICAC and the PIC were established much later, each of them having a corruption prevention focus and extraordinary evidence-gathering powers.

Moreover, the ICAC did not have an Inspector in the early years but was advised by an Operations Review Committee, which included the Commissioner of Police and other persons appointed by the Governor on the recommendation of the Minister.²⁷³ That advisory committee was abolished and replaced by an Inspector following the 2005 *Independent Review of the Independent Commission Against Corruption Act 1988*. The reviewer, Mr Bruce McClintock SC, noted that the creation of an Inspector for the ICAC had been recommended by ICAC's Parliamentary Oversight Committee and was considered a necessary precondition for the conferral on the ICAC of a power to obtain urgent surveillance device warrants.²⁷⁴

But just as there are differences between the Ombudsman and the other watchdog agencies, there are similarities too. So, like investigations carried out by the PIC and the ICAC, the investigation of complaints by the Ombudsman can involve the exercise of significant royal commission type powers, although not covert surveillance type powers. And in that regard, I note that the Victorian Inspectorate has an oversight role in relation to the Victorian Ombudsman. Therefore if there was to be a new single police oversight body in this state, it would be appropriate for all its functions to in turn be subject to oversight by

²⁷² See for example, the Police Association of NSW submission, p 20.

²⁷³ *Independent Commission Against Corruption Act 1988*, s 60.

²⁷⁴ *Parliamentary Committee on the Independent Commission Against Corruption: Report, Consideration of Proposed Powers*, 19 October 2000, p. 38.

an Inspector. Indeed the very adoption of a single civilian oversight body model would facilitate the oversight of all these functions by an Inspector for the first time.

Oversight of the NSW Crime Commission

There is also overlap in the oversight of the NSW Crime Commission, which is currently undertaken by its Inspector, the PIC, and also indirectly by the PIC's Inspector.²⁷⁵

As detailed in chapter 11, the Crime Commission Inspector's role is similar to that of the Inspector of the PIC and the ICAC, which is to examine, amongst other things, complaints of abuse of power, impropriety and other forms of misconduct. But in his oversight of complaint handling, as summarised on his website, the Crime Commission Inspector does something more, by undertaking an Ombudsman-like role.²⁷⁶

The Inspector of the Crime Commission is also different to the ICAC and PIC Inspectors in another key respect; while the ICAC and the PIC are themselves oversight bodies, the Crime Commission is not. The Crime Commission is an investigative body which was established to 'reduce the incidence of organised and other serious crime.'²⁷⁷ The Crime Commission is therefore much like the NSW Police Force, albeit with extraordinary investigative powers. And overlap occurs because the Crime Commission Inspector's function is not to oversight a watchdog, but to oversight an investigative body that is already subject to oversight by watchdog, namely the PIC. This leads to unfortunate consequences. As the Crime Commission Inspector observed: '[H]aving given the (Crime Commission) Inspector and the PIC concurrent powers to investigate complaints, the statutes are silent about which office should exercise them on any particular occasion ... This duality of responsibility is peculiar'.²⁷⁸

Apart from the overlap arising out of this concurrent power to investigate complaints, the PIC and the Crime Commission Inspector also overlap in relation to direct investigations where there has been no complaint or report of suspicious conduct. And this in turn has resulted in a system where the PIC cannot instigate own motion investigations into the Crime Commission without the Crime Commission Inspector's consent.²⁷⁹

These overlaps in Crime Commission oversight are analysed at length in chapter 11. For present purposes though, they provide further support for a single oversight model, not least because the Crime Commission Inspector carries out some functions akin to those of

²⁷⁵ Independent Commission Against Corruption Act 1988, Part 5A; *Crime Commission Act 2012*, Part 4; *Police Integrity Commission Act 1996*, Part 6.

²⁷⁶ NSW Crime Commission, 'Complaints', www.crimecommission.nsw.gov.au.

²⁷⁷ *Crime Commission Act 2012*, s 3.

²⁷⁸ *Special Report to the Minister made under section 67 of the Crime Commission Act 2012*, 28 October 2014, the Hon. Graham Barr QC, Inspector of the NSW Crime Commission [*Inspector Barr's Report to the Minister*], p. 4, tabled in the NSW Parliament on 4 November 2014.

²⁷⁹ *Inspector Barr's Report to the Minister*, p. 5.

the PIC Inspector, and others akin to those of the Ombudsman. It follows that if these functions are combined in a single body oversight model, then the current Crime Commission Inspector's dual PIC-like and Ombudsman-like responsibilities will fit comfortably within the divisional structure of the new body.

Transparency of police oversight costs

Because the PDOO is not a discrete entity for annual reporting purposes, its annual budget and personnel strength are not separately reported to Parliament. Rather, they are bundled up as part of the overall budget and staffing figures in the annual report covering the whole of the Ombudsman's Office. On the other hand, the PIC's costs in relation to oversight are more transparent. I discuss the costs and figures relating to the police oversight functions of these bodies in detail in the next chapter.

For the purposes of this section though, what the lack of transparency in relation to the PDOO budget and staffing figures means is that under the current hybrid oversight model, it is impossible to know from annual reports to Parliament just how much is being spent on the independent oversight of the NSW Police Force, or how many people are working in that oversight space. In the context of my terms of reference, this constitutes a gap in the current oversight system which has created a lack of transparency. This is a gap that can be addressed by way of a single oversight body with overall as well as divisional reporting entities, as further discussed in chapter 9.

8. Should there be a single civilian oversight model for New South Wales police?

A key question for this review is whether there should be a single civilian body, instead of the existing 'hybrid' system of overseeing police. In considering this, I have revisited the alternative oversight models outlined in the first interim report of the Police Royal Commission.

With the benefit of 19 years' hindsight of the current system's operation, I have tested a single civilian oversight model against the advantages and disadvantages Commissioner Wood outlined.

Although the current hybrid system has in some ways worked well, it has become overly complex and is impeded by gaps, overlaps and inefficiencies.

In my view, these issues can be addressed by the creation of a new oversight body, which combines the functions of the Ombudsman's Police Division with those of the Police Integrity Commission.

Division of responsibility under the current system

As a member of the NSW Legislative Assembly in 1994, I did not support the creation of the Royal Commission into the NSW Police Service, in the belief that the Independent Commission Against Corruption (ICAC) adequately dealt with serious police misconduct. After being confronted by the problems later uncovered by Commissioner James Wood, however, I became a firm supporter of the model of civilian oversight he recommended, namely what I call the 'hybrid model' operating in New South Wales today.

This hybrid model is made up of two independent bodies:

- the Police Integrity Commission (PIC), which is a standing statutory body with royal commission type powers to conduct own motion investigations and whose principal function is the detection and investigation of serious police misconduct
- the Ombudsman, who has primary responsibility for the oversight of complaints against police under Part 8A of the *Police Act 1990*, a function carried out by the Police Division of his Office (PDOO).

The Ombudsman's jurisdiction under this hybrid model is a continuation of the office's jurisdiction prior to the Wood Royal Commission's establishment. By contrast, the PIC was a

new police-specific body created on Commissioner Wood's recommendation; it was tasked with exercising ICAC-like powers to target police corruption in place of the ICAC.

It seems to me that at the heart of the terms of reference for my review is the proposition that Commissioner Wood's model might be modified to combine the functions of the PIC and the PDOO in a single new oversight body. In this chapter, therefore, I consider such a model, and in doing so I examine the continuing relevance and application of the principles underpinning the Royal Commission's first interim report.

How to assess the pros and cons of a new oversight model?

Although during the last decade proposals to establish a single oversight body have twice been rejected (in 2006 and 2014²⁸⁰) by parliamentary committees, there was a sea change earlier this year when the Legislative Council Select Committee into Operation Prospect recommended that such a body be established.²⁸¹ In particular, the committee found that a multi-agency approach could be 'confusing and has the potential to undermine each agency's findings.'²⁸²

According to the former NSW Ombudsman, Bruce Barbour, however, any such move would 'seriously diminish the effectiveness of police oversight.'²⁸³ The PIC takes a different view, stating in its submission to this review that an oversight model combining the police oversight functions performed by the Ombudsman with the functions of the PIC is 'feasible'. The PIC's consideration of this option (which it called 'Option 1'²⁸⁴) provides reassurance that the impediments to a single model that existed 20 years ago may no longer stand in the way of further reform. With the benefit of almost 20 years' institutional operating experience, the Commission has submitted:

Option 1 would be a consolidation of the police overseeing functions currently performed by two agencies in one agency. The Commission's view is that Option 1 would be feasible in the NSW context. Provided there is no reduction in the resources currently available to the Commission and the Ombudsman's Police Division, a level of police oversight approximately equating to that currently performed by these two agencies from separate organisational structures, should be able to be performed within a single organisational structure to effectively:

²⁸⁰ Committee on the Office of the Ombudsman and the Police Integrity Commission, NSW Parliament, *Ten year review of the police oversight system in New South Wales*, 2006; Report 8/55, August 2014.

²⁸¹ Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", NSW Legislative Council, *Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect"* ('Select Committee 'Prospect'), 25 February 2015, Recommendation 6.

²⁸² Select Committee, 'Prospect', pp iv, 1 and 114-119.

²⁸³ Sean Nicholls, 'Ombudsman Bruce Barbour warns single police watchdog would undermine public confidence', *Sydney Morning Herald*, 11 July 2015, <http://www.smh.com.au/nsw/ombudsman-bruce-barbour-warns-single-police-watchdog-would-undermine-public-confidence-20150710-gi9fhd.html>.

²⁸⁴ Police Integrity Commission submission, p 9.

- Prevent, detect and investigate serious police misconduct
- Oversight a large proportion of police misconduct investigations and monitor the police complaints system.²⁸⁵

It seems to me that if with almost 20 years' experience, the corruption-fighting agency created out of the Royal Commission is comfortable that performing complaints oversight work would not be detrimental to its anti-corruption responsibilities, there is great merit in exploring the option of a single body to undertake both these functions.

In his February 1996 interim report, Commissioner Wood considered four options for investigating police complaints and corruption. These models were:

1. Police responsibility for all investigations.
2. An external agency responsible for all investigations.
3. Police responsibility for investigations but subject to monitoring and review by an external agency.
4. Shared responsibility for investigations between police and an external oversight agency.

The Commissioner described the second model as a 'single' model, and listed the advantages and disadvantages that he foresaw with it. However, care must be taken not to confuse that model with the single oversight model being considered in this review. The Royal Commission's first interim report used the term 'single external agency' to cover the Crime Commission and the then Office of Professional Responsibility, as well as the police functions of the Ombudsman's Office and the ICAC. It is not within my terms of reference to consider a single civilian oversight model that includes the work of the Crime Commission and the Office of Professional Responsibility (now the Professional Standards Command), as well as the PDOO and the PIC. In the Royal Commission's first interim report, the use of the term 'single' refers to a model of accountability that relies entirely on investigators external to police. In my terms of reference, however, the term 'single' contemplates a variation on the existing model whereby complaints oversight and external corruption detection/prevention investigation may be combined into one entity. Where the investigative work of other agencies such as WorkCover²⁸⁶ and the Coroner fits in requires additional consideration.

In the event, Commissioner Wood did not choose his 'single external agency', but focused instead on the fourth model (that is, shared responsibility for investigations between police and an external oversight agency). He considered whether that fourth model could be

²⁸⁵ Police Integrity Commission submission, pp 9-10.

²⁸⁶ The name 'WorkCover' is used throughout this report as this is the name of the regulator referred to in the terms of reference. It should be noted, however, that the *State Insurance and Care Governance Bill 2015* will, when proclaimed, abolish the WorkCover Authority and confer its workplace health and safety regulator functions to a new agency known as 'SafeWork NSW'.

implemented by combining the functions of police complaints oversight (Ombudsman work) and external corruption investigation (then ICAC work) into one agency. The Commissioner stated that such a combination ‘would have the attraction of simplifying and integrating the process.’²⁸⁷

The Royal Commission ultimately did not recommend the combined agency approach to implementation, due to three factors:

- 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
- the resources needed for effective monitoring of the complaint system.²⁸⁸

The Royal Commission instead recommended a new stand-alone commission principally focussed on the detection, prevention and investigation of serious officer misconduct, including corruption. The Royal Commission also recommended that complaints oversight remain with the Ombudsman. This structure was outlined in chapter 4 of this report.

Regardless of the fact that Commissioner Wood did not recommend the implementation of his version of the single oversight model, I believe I should test the advantages and disadvantages he listed in regard to that model against the existing hybrid model and the single oversight model currently under consideration. In addition, I believe it is prudent to test the ongoing application of Commissioner Wood’s three reasons for not recommending a model that combines police complaints oversight and external corruption investigation in one body. I will also reflect on whether some of the gaps and overlaps identified in the preceding chapter can be addressed by a combined model.

Advantages of combining complaints oversight and corruption investigation

Commissioner Wood listed a number of advantages of a ‘single external’ model of complaints and corruption investigation. He considered that a single model would:

- unify the presently fragmented system and integrate management
- ensure that individual cases do not fall between the cracks
- centralise record keeping and enhance intelligence collection
- provide cost-effective structure with a clear focus
- facilitate pre-emptive strikes against corruption by allowing early identification of and intervention in matters which may be symptomatic of more serious corruption problems

²⁸⁷ The Hon Justice JRT Wood, *Royal Commission into the New South Wales Police Service: Interim Report*, February 1996 (‘Wood Royal Commission, first interim report’), p 91.

²⁸⁸ Wood Royal Commission, first interim report, p 91.

- facilitate reporting and remove any uncertainty as to obligations in that regard
- prevent duplication of effort and operational conflict, and introduce greater consistency in the disciplinary process.²⁸⁹

Notwithstanding the fact that Commissioner Wood's version of a single model is not under consideration in this review, my view is that the cited advantages are helpful in a policy analysis of whether a departure from the current hybrid model is desirable. I therefore consider a number of these advantages below.

Cost-effectiveness

Commissioner Wood listed one advantage of his single model to be cost-effectiveness, but went on to note that a persuasive reason not to combine the oversight work of the Ombudsman with a new external corruption-fighting function into one body was 'the resources needed for the effective monitoring of the complaint system.'²⁹⁰ He also cited evidence given to the Royal Commission from the then NSW Ombudsman about 'insufficient funding' and a 'rising level of complaints'.²⁹¹

As I raised in the last chapter, under the current hybrid system that has emerged, it is very hard to obtain a clear picture of resources allocated to police accountability work. This is due to the fact that the current hybrid model is not made up of two bodies; rather it is made up of one body, the PIC, and part of another, the PDOO. In practical terms this means that there are transparency and accountability drawbacks to the hybrid model. According to the PIC's Annual Report for the year ended 30 June 2014, the Commission employed 96.77 full-time equivalent staff members and had an annual recurrent appropriation of \$16,933,000.²⁹² Based on the PIC's mission, we can assume that they were all working in the police integrity space.

On the other hand, the PDOO is just a part of the Office of the Ombudsman, which has a wide remit over the whole of the New South Wales public sector, and it cannot be determined from the Ombudsman's Annual Report for 2013-14 how many of the office's 193 employees are engaged in police oversight or how much of its \$23,909,000 recurrent appropriation is spent on such oversight. The only specified police-related figure in the Ombudsman's Annual Report for that year was a grant of \$2,203,000 from the Department of Premier and Cabinet for Operation Prospect.²⁹³

The Ombudsman's Office informed me during this review that although there is no published information about the costs of police oversight functions separate to

²⁸⁹ Wood Royal Commission, first interim report, p 89.

²⁹⁰ Wood Royal Commission, first interim report, p 91.

²⁹¹ Wood Royal Commission, first interim report, footnote 73, p 71.

²⁹² Police Integrity Commission, *Annual Report 2013-2014*, pp 62 and 101.

²⁹³ NSW Ombudsman, *Annual Report 2013-2014*, pp 114 and 121.

whole-of-office information, those separate costs were \$3.17m.²⁹⁴ That figure does not include costs such as rent and IT support. The Ombudsman's Office also advised that an average of 29 staff are attached to the Police Division.²⁹⁵ However, as with the division's budget information, this staffing information is not generally available or regularly published in any report tabled in Parliament.

The risk identified by Commissioner Wood regarding the resources needed for effective monitoring of the complaints system still exists in relation to the efficient and adequate resourcing of police complaints oversight within a specialised police accountability body. But a clear benefit of combining the PIC and the PDOO in one body is that the Parliament and the public would have a complete picture of how many people were working in the police/law enforcement external oversight and corruption-fighting space, and at what cost, because this information would be contained in the single oversight body's annual report. That information is not available now.

In addition, the new body would be required to report on overall staffing, expenditure and corporate costs such as rent, IT support and the like, as is ordinarily the case. The result would be improved accountability around the public resources devoted to the civilian oversight of law enforcement in New South Wales, which should in turn drive a more cost-effective structure.

Preventing cases from 'falling between the cracks'

Another of Commissioner Wood's listed advantages of a single external oversight model is that it would assist in ensuring that '*individual cases do not fall between the cracks*'. I agree that this is an important consideration and note that this was a concern raised in relation to submissions about the current hybrid system.

In my view, it is crucial that the NSW Police Force retains primary responsibility for the investigation and management of complaints against its members. Although it is 19 years since Commissioner Wood said 'the Service (Force) should endeavour to move from the formal adversarial model to a more managerial or remedial model that places the responsibility on commanders at patrol or equivalent level to deal with complaints and matters of discipline', it seems to me that an ongoing emphasis on his managerial model remains vitally important.²⁹⁶ But so too is an external body, which in appropriate cases, can step in to directly investigate matters, including complaints under Part 8A of the *Police Act*.

Under the current hybrid system, the PIC is required to focus principally on serious police misconduct, while the Ombudsman's priority is to oversight the NSW Police Force's

²⁹⁴ Email from Deputy Ombudsman Michael Gleeson to the Review Secretariat, 17 July 2015.

²⁹⁵ NSW Ombudsman supplementary submission, p 9.

²⁹⁶ The Hon Justice JRT Wood, Royal Commission into the New South Wales Police Service: Final Report, Volume II, May 1997, p 310.

complaint handling. However, Part 8A also authorises the Ombudsman to directly investigate complaints or the handling of complaints, if it is in the public interest to do so.²⁹⁷ Although the Ombudsman has had this power for many years, it is a power that is not often exercised. The first interim report of the Royal Commission found it was the Ombudsman's limited resources that had 'restricted the number of direct investigations and reinvestigations is has been able to undertake.'²⁹⁸ The evidence of the Ombudsman to the Royal Commission was summarised as follows in the interim report:

In her submission to the RCPS the Ombudsman indicated that few direct investigations had been conducted since power was given in 1993 "as a direct result of insufficient funding and the rising level of complaints".²⁹⁹

In his submission to this review, the immediate past Ombudsman also confirmed that his office still exercises this power 'sparingly'.³⁰⁰ In my view, and with the greatest of respect, it is exercised perhaps a little too sparingly. Indeed, as noted in the last chapter, over the last five years, the PDOO has conducted an average of just 2.4 direct investigations per year.³⁰¹ What this means is that some complaints that the public might reasonably expect to be externally investigated seem likely to be falling between the cracks; that is, middle range cases involving significant misconduct but falling short of attracting the PIC's attention. Conversely, although the PIC notes that it carefully assesses whether matters are serious before it commences an investigation, there is a risk that middle range matters may be escalated to a more serious level of investigation because there is little chance under the current structure that they will be investigated by the Ombudsman.

Examples of these sorts of matters, drawn from the work of New Zealand's Independent Police Conduct Authority (IPCA), are detailed in chapter 6. That Authority conducts approximately 60 direct investigations per year.³⁰² To further illustrate what I mean by middle range matters, I quote from the following case study in the Ombudsman's 2010-11 Annual Report:

We received a complaint from a police officer that a highway patrol officer had used excessive force on more than one occasion when dealing with a member of the public. The NSWPF conducted a non-criminal investigation which found the subject officer had used unreasonable force and inappropriate language on one occasion. The officer was rotated out of highway patrol for three months.

Our concerns about the handling of this investigation included the failure to:

²⁹⁷ *Police Act 1990*, s 156.

²⁹⁸ Wood Royal Commission, first interim report, p 65.

²⁹⁹ Wood Royal Commission, first interim report, footnote 73, p 71.

³⁰⁰ Ombudsman submission, p 24.

³⁰¹ NSW Ombudsman, *Annual Report 2013-2014*, pp 41 and 42.

³⁰² New Zealand Independent Police Complaints Authority, *Annual Report 2013-2014*, pp 10, 16 and 39.

- investigate the matter criminally
- consider the officer's use of force on another occasion
- take adequate management action.

The officer's complaint history since 2003 included four previous matters involving unreasonable force.

We began a direct investigation, uncovering allegations of two further unreasonable uses of force by the subject officer, and information that one of the involved officers may have been untruthful in response to our inquiries.

We found that the subject officer had assaulted a member of the public on two occasions. We recommended that an additional 'unreasonable use of force' finding be added to the subject officer's history, and that police:

- conduct a criminal investigation into the further allegations of assault and untruthfulness
- review the management action taken against the subject officer
- suspend his 'Leading Senior Constable' designation.

The NSWPF accepted all of our recommendations and we were satisfied with their subsequent investigation. The subject officer's Leading Senior Constable designation was removed and he was issued with a Commander's warning notice and placed on a six month conduct management plan.³⁰³

The creation of the PIC following the Royal Commission provided increased capacity in the system to investigate serious misconduct matters externally from the NSW Police, but it is unclear whether the hybrid structure has been able to respond appropriately to matters one might consider somewhere in the middle range. There is also a risk that the split in investigative functions between the PIC and the Ombudsman does not encourage the right mix of investigations about middle range conduct. In my view, an oversight agency that merges the serious misconduct/corruption and complaints responsibilities into one body would have greater capacity to identify and address these types of matters, without undermining the NSW Police Force's managerial model or the capacity of the body to undertake its vital anti-corruption functions.

Unifying a fragmented system

Navigating the complaints system

Much of the complexity in police oversight arises from the fact that in the current hybrid model three separate entities must interact under Part 8A of the *Police Act*. This was illustrated by the NSW Police Force, which highlighted how Division 4 of Part 8A, covering the referencing of complaints between authorities, has the potential to cause confusion:

³⁰³ NSW Ombudsman, Annual Report 2010-2011, p 58.

It directs the Police Integrity Commission [and] the Ombudsman ... to refer complaints to the Commissioner for Police for Investigation. However, the Police Integrity Commission also has an express statutory authority to refer a complaint to the Ombudsman rather than the Commissioner, or refer part of a complaint to the Ombudsman and the remainder to the Commissioner. Alternatively, the Ombudsman may conduct the investigation into the complaint itself. The potential for confusion, duplication and wasted public resources with this system of complaint management is significant.³⁰⁴

The NSW Ombudsman has also conceded that ‘... the [complaints] legislation is complex and difficult for members of the public (and some police) to understand and ... it is important to clarify and better explain the role of oversight agencies.’³⁰⁵

As discussed in the last chapter, it is difficult to ascertain the roles and responsibilities of the NSW Police Force, the Ombudsman and the PIC in the complaints process by trying to navigate their websites. I emphasise this point again here by providing the following extracts, taken on 13 July 2015, from the PIC and Ombudsman websites regarding complaints:

Police Integrity Commission

Its principal functions are to detect, investigate and prevent police misconduct, and as far as practicable, it is required by law to turn its attention to serious police misconduct by NSW police officers.

The PIC’s functions also include the detection, investigation and prevention of misconduct by administrative officers of the NSW Police Force and officers of the Crime Commission.³⁰⁶

NSW Ombudsman

Our role in the police complaints system includes independently reviewing the way the New South Wales Police Force handles complaints about serious misconduct and investigating particular areas of police practice, if it is in the public interest to do so. We check how police handle less serious complaints, and regularly audit the way their complaint-handling processes are working to ensure they are effective and comply with legislative requirements.

We work with police to make sure the complaints system appropriately identifies criminal and serious misconduct and is accessible, flexible and responsive.³⁰⁷

To someone well-versed in the New South Wales police complaints system, these respective descriptions would no doubt be intelligible. But to an ordinary member of the public, they would be confusing, especially in the context of understanding how serious police misconduct, mentioned in both these descriptions, is targeted and dealt with.

³⁰⁴ NSW Police Force submission, p 8.

³⁰⁵ NSW Ombudsman submission, p 101.

³⁰⁶ <https://www.pic.nsw.gov.au/>.

³⁰⁷ <http://www.ombo.nsw.gov.au/what-we-do/our-work/police>.

I do not believe, however, that a better written explanation (on websites or elsewhere) alone can meet increased public expectations of a streamlined experience when the underlying system remains fragmented. The Independent Police Complaints Commission for England and Wales expressed similar sentiments in a submission to the British Home Office in February 2015:

One of the best ways of making the system easier for the public to understand is by making the system itself simpler. There are two ways in which this can be done: by further streamlining the system's processes, and by simplifying the language in which the system can be described.³⁰⁸

If the combined external model under consideration was adopted today, the three accountability roles would be reduced to two: a single civilian body and the Police Commissioner. This alone would deliver simplicity, and a more user-friendly experience, through both the necessary redrafting of Part 8A and in its consequent operation. Although the Acting Ombudsman argued in his supplementary submission that the current system has worked in practice, I do not accept that a merger should not be pursued in 2015 where there is such potential to reduce confusion and improve the user's experience.³⁰⁹

In my view, a new body combining the functions of the PIC and the PDOO would enable a more unified and simplified complaints and oversight system, both to members of the general public and to police officers.

Oversight of critical incidents

Another important illustration of the way in which a single oversight body might help '*unify the presently fragmented system*' was provided in the PIC Inspector's submission in the context of critical incidents.

As mentioned in the last chapter, critical incident investigations by police will be considered in detail in chapter 10. For the present purpose though, which is simply to consider the threshold question of whether a combined oversight model would benefit New South Wales, I note that the PIC Inspector commented on the fragmentation (and hence risk of duplication) that exists in the current system as follows:

Currently the NSW Ombudsman has a police complaints oversight function. This is in my view, a layer of oversight which could be taken up by the Commission (PIC) to avoid "doubling up of inquiries". An example is the critical incident involving the death of a Brazilian student, Roberto Laudisio-Curti.³¹⁰

³⁰⁸ Independent Police Complaints Commission submission to the Home Office, 'Improving police integrity: reforming the police complaints and disciplinary systems', February 2015, p 18.

³⁰⁹ NSW Ombudsman supplementary submission, pp 1 and 2.

³¹⁰ Inspector of the Police Integrity Commissioner submission, pp 2 and 3.

The Inspector noted that the Ombudsman ceased overseeing the police critical incident investigation of the Curti matter after the PIC announced that it would look into whether there was any serious police misconduct in relation to Mr Curti's death. If a combined oversight model had been in operation, there would have been no fragmentation in oversight functions between the PIC and the PDOO, and risk of duplication of oversight arising from a need to move from oversight to investigation would have been resolved internally.

Enhancing intelligence collection and early identification of problems

The capacity of a combined oversight/anti-corruption body to '*centralise record keeping and enhance intelligence collection*' was recognised by the Australian Law Reform Commission (ALRC) in 1996 during a comprehensive inquiry into the civilian oversight of the Australian Federal Police and the National Crime Authority. The ALRC recommended the establishment of a single new Commonwealth agency, namely the National Integrity and Investigations Commission (NIIC), to both oversight complaints and directly target corruption.³¹¹

The ALRC asserted that this new single police oversight model 'would have access to the complete flow of information about complaints and corruption to enable it to provide comprehensive responses to individual complaints, but also to clearly identify trends and issues of policy and procedure'.³¹²

A combined oversight body's ability to access information about the handling of complaints by the Police Force could provide very useful intelligence about patterns. The PIC advised that:

The combining of the Commission's and Ombudsman's information holdings would provide any new police oversight organisation with an enhanced intelligence capacity for investigative and complaint assessment purposes. It would also establish a larger pool of investigation, complaint assessment and oversight case files for evaluating systemic and organisational issues within the NSWPF, such as the effectiveness of the complaints system and corporate policies and guidelines issued by the Professional Standards Command.³¹³

Direct access to more complaints information may also enable the new commission to identify worrying trends earlier, which was another of Commissioner Wood's cited advantages of his single model, that is, to '*facilitate pre-emptive strikes against corruption by allowing early identification of and intervention in matters which may be symptomatic of more serious corruption problems*'.³¹⁴ The NSW Coroner also noted the benefits of

³¹¹ Australian Law Reform Commission, *Integrity: but not by trust alone*, Report No. 82, December 1996, p 14.

³¹² Australian Law Reform Commission, *Integrity: but not by trust alone*, Report No. 82, December 1996, p 162.

³¹³ Email from Police Integrity Commission to the Review Secretariat, 31 July 2015.

³¹⁴ Wood Royal Commission, first interim report, p 89.

information about complaints in identifying problems early in his submission. In particular, the Coroner noted:

An increase in the prevalence of a particular type of allegation or an increase in the number of complaints being made in relation to an individual officer or the officers of a particular unit or region, even if the allegations themselves are relatively minor, can flag a failure of management of the existence of more serious on-going misconduct that has not been detected.³¹⁵

It seems to me that the strong public interest advantages for intelligence-gathering and early risk identification would be realised through a new agency that combines the functions of the PDOO and the PIC.

Disadvantages of combining complaints oversight and corruption investigation

Commissioner Wood listed what he described as the ‘significant disadvantages’ of his version of a single police oversight model in his first interim report as follows:

- the sheer volume of complaints in New South Wales is such that the external agency risks being swamped, and diverted from dealing with serious corruption
- the external agency may experience internal tensions as a result of conflict between the different approaches which complaints handling and corruption fighting necessitate (for example, the openness required of a complaints handling body versus the secrecy required of a corruption fighting body)
- depending on the extent to which responsibility is transferred to the external agency, the ownership and responsibility of the Police Service to deal with its problems, and the incentive to pursue integrity as a first priority may be severely threatened
- similarly, the opportunity for management to intervene early, and enforce discipline, may be reduced.³¹⁶

I will now assess the disadvantages listed in the Royal Commission’s first interim report against the proposed combined oversight model under consideration today. I will also consider the impact of removing police oversight on the Ombudsman’s other functions.

Internal tensions and operational risks

The former Ombudsman rightly submitted to this review that any decision to depart from the long-standing hybrid model should not be taken without careful thought about the potential negative consequences:

³¹⁵ NSW Coroner submission, p 5.

³¹⁶ Wood Royal Commission, first interim report, pp 89-90.

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 agency would create undue complexity and diminish the tactical advantages of keeping these functions separate.³¹⁷

The extent to which the single oversight body under consideration will be able to answer Commissioner Wood's concerns regarding internal tensions and having its corruption-fighting objectives being swamped by complaints handling will depend significantly on its structure. The operational culture of the NSW Police Force and its oversight bodies has developed and matured since the days of the Royal Commission. When the PIC was established, the Royal Commission was still on foot and the focus on anti-corruption was understandably intense. At that time too, the Police Force's managerial approach to its own conduct management was in its infancy. An institutional separation of complaints oversight work and serious misconduct/anti-corruption work flowed almost necessarily from those historical circumstances.

I am convinced that a 'deterrent factor' will always be necessary in an effective relationship between police and oversight, no matter how much time passes since the Royal Commission. The PIC has met that need effectively to date, free from the demands of ordinary complaints oversight work. The changes in culture and capacity over time, however, mean it should now be possible for an oversight body to undertake effective anti-corruption work without that being undermined by the burden of high volume complaints work. Conversely, those same changes should mean it is now possible for a single oversight body to ensure that important complaints oversight work is not undervalued within the organisation. A single model that meets these goals is achievable now in a way that may not have been the case in 1996, providing any new model is structured in a way that recognises and protects the importance of both functions.

I note that the recommendation by the ALRC in 1996 to create the NIIC (discussed earlier) dealt with the sort of 'significant disadvantages' in a combined model that were identified by Commissioner Wood by way of institutional structure. Although I provide detail in chapter 9 about how a new structure should be approached in New South Wales, I believe it is worth providing here the following extract from the ALRC's report as it demonstrates that a structural response to such concerns has been explored in detail by a highly respected law reform organisation in another jurisdiction:

There would be two main divisions within the NIIC:

- the Office of the Commissioner for Complaints
- the Office of Anti-Corruption.

³¹⁷ Ombudsman submission, p 8.

This organisational distinction between complaints and corruption is necessary because the two require different approaches.

The handling of complaints is likely to:

- be reactive to individual complainants
- be concerned with day to day policing
- have a significant focus on accessibility and service provision to complainants.

Anti-corruption is likely to:

- be pro-active to be effective
- rely on diverse intelligence information and not merely on a formal complaint
- be secretive
- require surveillance and sophisticated methods of investigation, often conducted on a covert basis.

The two divisions would be physically separated within the NIIC but would share infrastructure and an information system and establish strong liaison. Both divisions would have access to the NIIC database subject to any special security requirements, particularly those relating to the Office for Anti-Corruption.³¹⁸

While I acknowledge that the ALRC's recommendation has not been adopted at the Commonwealth level, and instead a stand-alone anti-corruption body (the ACLEI) was established ten years later with the Ombudsman retaining a complaints oversight role, I believe the rationale behind how to value both roles through a structural approach so as to avoid the disadvantages identified by the Royal Commission remains cogent. And I am fortified in this view by the PIC's submission, referred to earlier in this chapter, that a combined oversight body is 'feasible'.

Responsibility of Police Force to address its problems

In terms of Commissioner Wood's concern about maintaining the 'responsibility of the Police Service to deal with its problems' and the 'opportunity for management to intervene early and to enforce discipline', I strongly believe the following observations in the Royal Commission's final report are as important today as they were 19 years ago:

The [Royal] Commission is firmly of the view that the Service should endeavour to move from the formal adversarial model to a more managerial or remedial model that places the responsibility on commanders at patrol or equivalent level to deal with complaints and matters of discipline ... 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 their 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

³¹⁸ Australian Law Reform Commission, *Integrity: but not by trust alone*, Report No. 82, December 1996, p 99.

performance. Unless this can be achieved, no system of discipline or complaint management will ever bring about reform.³¹⁹

As outlined in chapter 4, these managerial principles were introduced into the NSW Police Force following the Royal Commission. The principles are reflected in the message at the beginning of the Police Force's *Complaint Handling Guidelines*:

Effective complaint management handling is the key to an ethical police force. Any police force that is accountable for the conduct of its police officers must be prepared to deal with complaints openly, efficiently and fairly.

Police complaint handling is a highly complex function governed by statutes, regulation and agreements and those involved in the process need guidance on how to work within the complaints handling regime.

These guidelines provide an up to date guide for complaint handling managers to help them manage complaints in a timely and effective manner. They are reflective of the governing legislation and form the basis for the NSW Police Force complaint handling policy.

The guidelines are designed to support the practical application of Part 8A of the Police Act 1990 and provide guidance on the statutory administrative requirements governed by the Act.

Complaint handling managers are expected to adhere to the guidelines at all times.³²⁰

In his supplementary submission, the Acting Ombudsman provided the following update of how the NSW Police Force is managing complaints:

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 ... Significantly, 247 of these officers (79% of those charged) were charged as a result of concerns reported by other officers ... Of the 1,915 complaint investigations that we (the Ombudsman's Office) oversaw in 2014-15, management action was taken in 1,091 (57%) of cases ... The principles underpinning the 'managerial model' introduced following the Wood Royal Commission remain sound.³²¹

I agree that these principles remain sound and for that reason my terms of reference do not contemplate the single model considered by Commissioner Wood in 1996 (referred to at the beginning of this chapter), which would have incorporated the then Office of Professional Responsibility into that agency. In any new single oversight model today, the conduct management responsibilities of the NSW Police Commissioner, Professional Standards Command, Complaint Management Teams and Professional Standards Duty

³¹⁹ Wood Royal Commission, final report, Volume II, p 310.

³²⁰ NSW Police Force, Professional Standards Command, *Complaint Handling Guidelines* ('Complaint handling guidelines'), March 2012, p 1.

³²¹ Ombudsman supplementary submission, p 6.

Officers within the NSW Police Force should be maintained, and should also continue to be informed, among other things, by the Force's *Complaint Handling Guidelines*.

Impact on Ombudsman's other functions

The final point I wish to consider in this chapter is the impact (other than the obvious reduction in budget and staff numbers) on the Ombudsman's Office if the PDOO is transferred to a single new body overseeing the NSW Police Force.

The Ombudsman expressed concerns about the impact on the office's ability to exercise its other oversight and review functions if its police oversight functions were removed, stating:

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.³²²

I take these concerns seriously as the NSW Parliament has seen fit to confer on the Ombudsman over recent years an array of new interagency service review and audit responsibilities that may well be supported (as the Ombudsman asserts) by its concurrent and long-standing responsibility for police complaints oversight. I acknowledge, therefore, that relocating the work of the PDOO in another agency may cause disruption to these newer responsibilities, but I am not convinced that I should balk at recommending a useful long-term structural change because of short-term disruptions.

The Victorian experience seems to be that change can be managed. For a number of years, the Victorian Ombudsman had a wide police jurisdiction which included integrity matters. Indeed the Victorian Ombudsman's Office eventually became 'by default the state's anti-corruption watchdog'.³²³ So with the establishment of Victoria's Independent Broad-based Anti-corruption Commission in 2013, which among other things assumed jurisdiction for the investigation and prevention of police misconduct, there was significant disruption to the Victorian Ombudsman's Office.³²⁴ This disruption seems to have been managed, however, and the Victorian Ombudsman, Deborah Glass, commented: 'the existence of a separate anti-corruption body in IBAC ... allows me to refocus the work of the Ombudsman back to the traditional Ombudsman role'.³²⁵

³²² Ombudsman submission, p 49.

³²³ Victorian Ombudsman, *Annual Report 2014*, p 4.

³²⁴ Independent Broad based Anti-corruption Commission, *Annual Report 2013-2014*, p 8.

³²⁵ Victorian Ombudsman, *Annual Report 2014*, p 5.

It should also be noted that the New Zealand Ombudsman does not have a role in police oversight and yet manages a broad-based jurisdiction handling complaints and the investigation of the conduct of other state sector agencies.³²⁶

Conclusion

After considering all these matters, I believe that the current hybrid model of police oversight should be replaced by a combined 'single' model. The recommended structure and features of that model will be considered throughout the remainder of this report.

While the following statistics do not alone prove there is a need for a single oversight body, I note that a clear majority of the submissions, including those from Community Legal Centres NSW, the Council of Social Service of New South Wales, the Gay and Lesbian Rights Lobby, Inner City Legal Centre, the PIC Inspector, the NSW Coroner, ACON, UTS: Jumbunna, the Law Society of NSW, Legal Aid New South Wales, the NSW Bar Association, the NSW Greens, the NSW Police Force, the Police Association of NSW, the Public Interest Advocacy Centre, Redfern Legal Centre, Shopfront Youth Legal Centre, and Women's Legal Services NSW, expressed support for the creation of a single civilian oversight agency, albeit for a wide range of different reasons. Some institutional submissions, including those from the Australian Commission for Law Enforcement Integrity, the Crime Commission Inspector, the Information and Privacy Commission, the NSW Director of Public Prosecutions, the PIC and WorkCover expressed no firm view one way or the other. Only the Ombudsman's submission and the submission from the NSW Council for Civil Liberties could be broadly categorised as being on balance against the single agency model.

³²⁶ The Hon Sir Rodney Gallen, *Review of the Police Complaints Authority*, October 2000, pp 32-34.

9. Guidance on proposed new model

A new statutory commission should be established to address the gaps, overlaps and inefficiencies in the current system of police oversight in New South Wales.

The new commission should be conferred with the functions and powers of the Police Integrity Commission (PIC), the Ombudsman's functions and powers under Part 8A of the *Police Act 1990* and the Inspector of the Crime Commission's functions and powers. A number of the Ombudsman's other statutory police-related functions and powers should also be conferred on the new commission.

This new body should be headed up by a Commissioner and should have a divisional structure to accommodate the very different responsibilities inherent in its integrity and oversight functions. Each division should be led by a Deputy Commissioner. A deliberative Commissioner's Council, comprising this leadership group, should confer about the management of investigations, public hearings and similar matters.

The commission must be funded in a way that does not reduce the resources available for the work now performed by the Ombudsman and the PIC, or for that matter the other non-policing parts of the Ombudsman's jurisdiction.

Having concluded that there should be a single civilian oversight body for the NSW Police Force, my follow on task is, as required by paragraph 5 of my terms of reference, to provide guidance on this body's design, structure and cost. As indicated in chapter 8, I have concluded that this body should be one that combines the functions presently carried out by the PIC and the Police Division of the Office of the Ombudsman (PDOO). It should also oversee the NSW Crime Commission.

A new entity or an existing one with extra responsibilities?

The NSW Law Society submitted that an existing body should be conferred with extra responsibilities, and suggested 'that the logical entity is the Ombudsman, who should be given greater investigative and monitoring powers'.³²⁷ This model, however, is not favoured by the NSW Ombudsman,³²⁸ nor is it favoured by me. My problem with the suggestion is that all civilian oversight of policing, including the vitally important PIC function, would be subsumed in a body whose primary function is to handle complaints across the public sector.

³²⁷ Law Society submission, p 1.

³²⁸ NSW Ombudsman submission, p 35.

By parity of reasoning, extra responsibilities should equally not be conferred on the Independent Commission Against Corruption (ICAC) because all civilian oversight of policing, including the vitally important PDOO function, would be subsumed in a body whose primary function is the investigation of serious corruption across the public sector. I acknowledge, however, that this is the approach taken in Victoria and potentially too in South Australia, if the Government there accepts the Independent Commissioner Against Corruption's recent recommendation to that effect (as discussed in chapter 6).³²⁹

The Ombudsman's submission asserted that 'realistically there are just two options':

- Option A: The PIC takes on the Ombudsman's current *Police Act* functions
- Option B: Establish a purpose-built police complaints and corruption agency.³³⁰

I agree. In regard to Option A, I am concerned that it sends a signal that the complaints oversight function is somehow less important or less of a priority than the corruption fighting function. My view is that each of these functions should be, and be seen to be, of equal priority for the new body. Therefore my preferred option is Option B. This option is also acknowledged by the PIC, which submitted:

The most feasible option, taking into account the New South Wales context, would be for the functions of the Commission to be combined with the police oversight functions of the Ombudsman in a single organisational structure. To maintain an efficient and effective level of police oversight, any new agency assuming the functions of the Commission and Ombudsman would require the same powers currently exercised by both agencies.³³¹

Recommendation 1

To simplify and improve the police oversight system in New South Wales, a new single civilian police oversight commission, headed up by a commissioner, should be established to exercise the functions currently carried out by the Police Integrity Commission, the Police Division of the Office of the Ombudsman and the Inspector of the Crime Commission.

³²⁹ The Hon. Bruce Lander QC, South Australian Independent Commissioner Against Corruption, *Review of Legislative Schemes: The Oversight and Management of Complaints about Police*, 30 June 2015, pp 5-7.

³³⁰ NSW Ombudsman submission, p 33.

³³¹ Police Integrity Commission submission, p 20.

What should the new commission be called?

Giving evidence to the House of Commons Home Affairs Committee's Inquiry into the Independent Police Complaints Commission on 6 November 2012, the then Chairman of the Police Federation of England and Wales said: 'Nomenclature is important. It is very important when you are dealing with any organisation to get the name right'.³³²

I agree, and believe that the name of the new body should reflect the equal importance of both the corruption fighting function and the complaints oversight function. It could also reflect my recommendation in chapter 11 that this new body will also be assuming responsibility for overseeing the NSW Crime Commission. Accordingly the new organisation could be called the Law Enforcement Integrity and Complaints Commission (LEIACC). The words 'Law Enforcement' would indicate that the new body will oversight both the NSW Police Force and the Crime Commission; the word 'Integrity' indicates that it will assume the role now undertaken by the PIC; and the word 'Complaints' that it will also assume the role now undertaken by the PDOO.

Alternatively, the new body's name could reflect its primary role of overseeing police, rather than its combined role of overseeing police and Crime Commission officers. Taking into account that the great bulk of complainants will presumably be doing online searches around 'police complaints' rather than 'law enforcement complaints', the new body might be called the Independent Police Integrity and Complaints Commission (IPICC). The inclusion of the word 'Independent' is a reminder that the body is not subject to the direction of the executive government of the day in the exercise of its powers and sits outside the Police Force.

At the end of the day, the name of the new body is a matter for government. In that regard, I note that Commissioner Wood's recommendation in 1996 had been to name the new police corruption-fighting body the Police Corruption Commission,³³³ but the government later changed this to the Police Integrity Commission. As the then Police Minister, the Honourable Paul Whelan, explained: 'I am hopeful that the shift in emphasis will reflect the future rather than the past.'³³⁴

³³² Home Affairs Committee, House of Commons, *Report on the Independent Police Complaints Commission*, 1 February 2013, p 25.

³³³ The Hon Justice JRT Wood, *Royal Commission into the New South Wales Police Service: Interim Report*, February 1996 ('Wood Royal Commission, first interim report'), pp 93-94.

³³⁴ The Hon Paul Whelan MP, Second reading speech: Police Integrity Commission Bill, 4 June 1996.

Recommendation 2

To help stakeholders understand the purposes of the new commission, its name should reflect both its integrity responsibilities and its complaints oversight responsibilities; for example, the ‘Law Enforcement Integrity and Complaints Commission’ or the ‘Independent Police Integrity and Complaints Commission’.

Legislative structure options

A new Act?

As one of my terms of reference is to eliminate unnecessary duplication, overlap and complexity, it follows that this new body should be established by its own legislation.

Because the PIC would cease to exist in its current form, the *Police Integrity Commission Act 1996 (PIC Act)* could be repealed, rather than extensively amended. That seems to be a more attractive and simple option than making significant amendments and changing the name of the Act. But the substance of the *PIC Act’s* provisions, relating especially to its corruption fighting powers and responsibilities as outlined in chapter 5, would need to be included in any new Act. The new legislation would also need to incorporate the substance of Part 8A of the *Police Act* in so far as it relates to the Ombudsman, reflecting the simplification that will be introduced by the removal of one oversight body.

A statutory right to make a complaint about a police officer to the Police Commissioner should continue to be available under the *Police Act*, as this reinforces the primary role of the Commissioner in complaint handling. This is similar to the Victorian legislation. If a new body is created today, it presents a useful opportunity to recast and update the language of Part 8A and move the provisions relating to external oversight into stand-alone police oversight legislation. I expand on this issue later in this chapter where I recommend that under any new system, a person should continue to be able to exercise a statutory right to complain to the Police Force.

Recommendation 3

To improve understanding about how the complaints process works, and make it more ‘user-friendly’, all functions and powers of the new commission should be found in the Act establishing the commission, including:

- i. all the functions and powers of the Ombudsman currently set out in Part 8A of the *Police Act 1990*, such as the obligation to receive complaints, the obligation to keep

- the NSW Police Force complaints system under review, the right to monitor certain police investigations and the right to undertake direct investigations into complaints;
- ii. all the functions and powers of the Police Integrity Commission, including in relation to preventing, detecting and investigating serious police misconduct; and
 - iii. the functions and powers of the Inspector of the Crime Commission to the extent these are different to those of the Police Integrity Commission.
-

Objectives of the new commission

The principal functions that the new body will assume – namely, the detection, prevention and direct investigation of corruption and police misconduct and the oversight of complaints and critical incident investigations by police – are each of vital public importance. To ensure that one of these functions is not swallowed up or swamped by the other, the statutory structure of the new body should recognise and safeguard what have until now been the separate responsibilities of the PIC and the PDOO. At the same time, this structure must allow sufficient flexibility at the highest levels of the new organisation’s management to take advantage of the potential for sharing skills and knowledge across the organisation.

As a first step, the principal objects of the new Act should reflect the new body’s dual roles of detecting, investigating and preventing police corruption and other serious police misconduct, as well as overseeing, monitoring and reviewing complaints against police and critical incident investigations. Clear statutory objectives will be important in establishing an organisational culture that respects and recognises the value of both roles. The first interim report of the Wood Royal Commission expressed doubt that the different approaches required for the two kinds of work could sit together easily in one body. I am convinced that a careful legislative expression of the value of both will help to ameliorate the risk that one trumps the other.

Recommendation 4

To provide a clear basis for the new commission to embrace a variety of skill sets and work styles, the objects of the new Act should recognise that combining oversight and integrity functions in one organisation should not enable one function to take precedence over the other.

I believe, however, that it is desirable for the establishing legislation to go further in structural terms to ensure that this dual focus is maintained. Drawing on the Australian Law Reform Commission’s 1996 report, *Integrity: but not by trust alone*, which recommended a

single and comprehensive framework of accountability to replace the present fragmented complaints and disciplinary processes for the Australian Federal Police and National Crimes Authority,³³⁵ the new Act should clearly support a divisional structure, particularly in the early years of the new organisation's existence. This will be a critical period in which the new body must be able to:

- manage the transition from being two entities into one in as seamless a manner as possible so that no gaps in oversight occur
- ensure that neither of the two roles is subsumed, for reasons of budget or administrative or other convenience, by the other.

In the New South Wales context, the most logical approach appears to be for the new entity to be structured into an Integrity Division and an Oversight Division, each headed by a Deputy Commissioner, who is a statutory officer.³³⁶ I have opted not to use the title 'Complaints' because it is simpler to reflect the principal existing emphases of the PIC and the PDOO. Moreover, critical incident monitoring and other police review functions of the Ombudsman are not dependant on the making of complaints. This divisional structure, however, should not preclude the Commissioner establishing positions that report directly to him or her, such as an Executive Director for Education and Research.

The Integrity Division should continue to perform the functions currently undertaken by the PIC. The Oversight Division should do likewise in relation to the complaints oversight and other roles of the PDOO. Different drafting options might be employed to support such a structural separation. In considering such options, the capacity of the Commissioner to run the organisation effectively must also be taken into account. He or she needs to have some flexibility to meet possible changes in circumstances in the years ahead. At a minimum, however, the differences in nature of the work of each of these divisions should be recognised in the establishing legislation through the creation of task-specific Deputy Commissioners, whose unique responsibilities and powers are listed separately.

An example of where this occurs elsewhere is the requirement in the *Ombudsman Act 1975* that a Deputy Ombudsman must be appointed as the Community and Disability Services Commissioner, and that a Deputy Ombudsman must be appointed to monitor and assess Aboriginal programs.³³⁷ The *Civil and Administrative Tribunal Act 2013* also brought together a number of smaller entities into one and uses a divisional structure, common in larger tribunals, to recognise that different skill sets must be valued after amalgamation. In the second reading speech to the bill creating the tribunal, the then Attorney General described how organisational structure was being used in this way:

³³⁵ Australian Law Reform Commission, *Integrity: but not by trust alone*, Report No. 82, December 1996.

³³⁶ Australian Law Reform Commission, *Integrity: but not by trust alone*, Report No. 82, December 1996, p 99.

³³⁷ *Ombudsman Act 1974*, ss 8 (1A) and 8(1B).

The structure of the New South Wales Civil and Administrative Tribunal will also provide each division with the flexibility to tailor services to meet the needs of their particular user groups. A one-size-fits-all approach will not be taken.³³⁸

Each Deputy Commissioner will require powers to conduct investigations, as well as powers in relation to their specialised functions relating to complaints oversight or corruption fighting. If it appears, however, that an investigation being undertaken in the Oversight Division would benefit from a public hearing then my expectation is the matter would be transferred to the Integrity Division. Whether to ‘gear-up’ a matter to the Integrity Division would be considered by the Commissioner’s Council, which is a proposal explained further below.

Recommendation 5

To establish an organisational structure that will support a smooth transition to a combined model, the new Act should create separate integrity and oversight divisions, each headed by a Deputy Commissioner who is able to exercise powers and functions, and receive funding allocations, that reflect each division’s distinct responsibilities.

Within the new body’s annual report, the Integrity Division and the Oversight Division should each be required to separately report on their activities for the year. Statistics on the number of people who work in each division and their respective budgets should also be included, along with key performance indicators. Functional reporting will limit the risk that one function is swamped by the other.

Recommendation 6

To enhance transparency around the costs of performing the functions of the new commission, the new Act should create separate reporting obligations for each division, in addition to any corporate-level annual reporting obligations.

Governance of the new commission

I agree with the PIC’s submission to this review that the new body should:

- have full discretion to exercise its powers

³³⁸ The Hon Greg Smith SC, Second Reading speech: Civil and Administrative Tribunal Bill, 22 November 2012.

- not be subject to any form of external direction or management in the performance of its functions
- report directly to Parliament.³³⁹

Accordingly the new legislation should incorporate these principles in the same way that they are incorporated in the legislation governing the PIC and the ICAC. Given the status of such an organisation, and the extraordinary powers it will exercise, the new body should also be headed up by a Commissioner who is a serving or retired superior court judge. This is appropriate given one of the Commissioner's principal functions will be to exercise royal commission type powers to detect, investigate and, as necessary, conduct public hearings into allegations of corruption and serious police misconduct. In addition, the Commissioner should be a statutory office holder appointed by the Governor for a term not exceeding five years.³⁴⁰

Recommendation 7

To recognise the status of the new commission as a body exercising royal commission type powers, the new commissioner should be a serving or retired superior court judge, appointed by the Governor for a term not exceeding five years.

As noted above, to recognise the importance of the dual roles of the new body, there should be two task-specific Deputy Commissioners. These should be appointed by the Governor with the concurrence of the Commissioner; similar to the requirement in the *Independent Commission Against Corruption Act 1988 (ICAC Act)* in relation to Assistant Commissioners.³⁴¹ This model will ensure that the Commissioner maintains a suitable level of control while creating high visibility for the different functional areas of the new institution. The Deputy Commissioners should each be appointed for terms not exceeding five years and be Australian legal practitioners of a minimum of seven years standing.

In addition, the Deputy Commissioner for Integrity should have special legal qualifications to, as necessary, conduct public hearings for the purpose of detecting, investigating and preventing police corruption and other serious officer misconduct. The Deputy Commissioner for Oversight should also have like qualifications to conduct investigations into complaints about police misconduct, as well as into conduct that could be, but is not,

³³⁹ Police Integrity Commission submission, p 20.

³⁴⁰ *Police Integrity Commission Act 1996*, Schedule 1.

³⁴¹ *Independent Commission Against Corruption Act 1988 ('ICAC Act')*, s 6.

the subject of such a complaint, provided that in either case, it is in the public interest to do so.

Recommendation 8

To recognise the status of the new commission as a body exercising royal commission type powers, the new Deputy Commissioners should be appointed by the Governor, with the concurrence of the Commissioner, each for a period not exceeding five years, and be Australian legal practitioners of a minimum of seven years standing.

I have also come to the view that it is necessary for the establishing legislation to provide for a formal process of involving these Deputy Commissioners in managing the affairs of the new body in a way that does not detract from the authority of the Commissioner. I therefore propose that there be a 'Commissioner's Council', comprising the Commissioner and Deputy Commissioners, which should be required to meet on a regular (I suggest weekly) basis. It will be the responsibility of this Commissioner's Council, among other things, to:

- determine which matters are to be investigated
- determine which matters are to proceed to a private hearing
- determine which matters are to proceed to a public hearing
- determine which matters are to be transferred from the Complaints Division to the Integrity Division (and vice versa)
- establish a triage system for the handling of complaints received
- determine the scope of referral arrangements to other bodies after consultation with the Police Commissioner
- settle class and kind agreements (currently provided for in Division 1 of Part 8A of the *Police Act*), after consultation with the Police Commissioner
- consider trends in intelligence.

As I have noted in earlier chapters, a theme in a number of submissions received from community sector organisations is that the Ombudsman's role is not sufficiently pro-active. I expect that one outcome of the new body, with a management arrangement as described above, will be the capacity of the organisation to cast a much more encompassing and vigilant eye over trends in particular types of complaints. I consider it likely that the Deputy Commissioner for Oversight's power to initiate public interest investigations will be activated more frequently, along the lines I discussed in chapter 7.

Recommendation 9

To develop a cohesive culture within the new commission and enable it to respond to the opportunity that a combined model presents for the efficient and effective allocation of work between divisions, the new Act should establish a deliberative Commissioner's Council, comprising the Commissioner and Deputy Commissioners.

To assist in the transfer of matters between the divisions, I recommend that a gearing provision along the lines of section 42 of the Commonwealth's *Law Enforcement Integrity Commissioner Act 2006* be included in the legislation.

Such a section will allow a statutory mechanism for a reconsideration of how to deal with a corruption issue, a serious police misconduct issue, or a more routine complaint issue. It will facilitate such matters being 'geared up' from Oversight to Integrity or 'geared down' from Integrity to Oversight. My expectation is that resolving changes in circumstances via an internal mechanism will allow the Commissioner's Council to address what the NSW Greens' submission describes as '[t]he current overlap between police oversight agencies [which] produces complex and repetitive investigations, poor accountability, delays, expense and frustration'.³⁴²

Recommendation 10

To ensure the new commission can respond appropriately to changing circumstances during the course of an investigation or monitoring exercise, the new Act should provide that the management of a matter can be transferred between divisions, following deliberation by the Commissioner's Council.

It is to be hoped that the Commissioner and Deputy Commissioners will be able to work in a collegiate atmosphere to determine all such matters. This should be especially so when considering the vitally important question of whether or not it is in the public interest to conduct a public hearing, which may have reputational consequences for those under investigation. But at the end of the day, if a consensus between these three statutory office holders cannot be reached, then the final decision in all such matters should be for the Commissioner alone to make.

³⁴² NSW Greens submission, p 5.

Recommendation 11

To ensure certainty in decision-making, as well as reflect the status of the new body as one exercising royal commission type powers, the Commissioner should have the final say if any matter being deliberated upon by the Commissioner's Council cannot be resolved by consensus.

Complaints system

Lodgement of complaints

The NSW Greens and the Public Interest Advocacy Centre have argued for a model that would provide for all complaints to be directed in the first instance to an independent body.³⁴³ The Women's Legal Services NSW also supported this approach:

... we support the approach in Northern Ireland that with the complainant's consent, Police investigate where the independent body has deemed it is not a serious complaint. We see it as an important role of the independent body to undertake this initial assessment.³⁴⁴

The Women's Legal Services NSW submission argued that such a centralised approach would mean that systemic issues could be more quickly identified, irrespective of who must finally resolve the matter.

Similarly, the Public Interest Advocacy Centre (PIAC) proposed that:

One option that PIAC believes is worth consideration is the model adopted by the Northern Ireland Police Ombudsman, who receives all complaints in the first instance. PIAC supports a model that would provide for all complaints to be directed in the first instance to an independent body. Where appropriate, the complaint could be referred back to the relevant Local Area Command for informal resolution.³⁴⁵

In the Acting Ombudsman's supplementary submission, he went further, advocating the benefits of a 'one stop shop' portal for complaints to be made in relation to all government agencies³⁴⁶ (the proposal for a 'one stop shop' was discussed in detail in chapter 7). On the other hand, the NSW Police Association asserted that 'the NSW Police Force and the

³⁴³ NSW Greens submission, p 12; Public Interest Advocacy Centre submission, p 11.

³⁴⁴ Women's Legal Services NSW submission, p 2.

³⁴⁵ Public Interest Advocacy Centre submission, p 11.

³⁴⁶ NSW Ombudsman supplementary submission, p 2.

independent oversight agency should both be empowered to receive complaints'.³⁴⁷ On this issue Commissioner Wood stated:

In reality, it is impossible to control the agency with whom people elect to lodge complaints. Some people will prefer to go direct to the source and lodge their complaint with the Police Service, whereas others will prefer to complain to an independent body. It is also recognised that making one agency responsible for the receipt of all complaints would place a large administrative burden upon that agency. Therefore it is recommended that, in the new system, it should be possible for complaints to be received by either the Police Service, the Ombudsman or the PCC, but thereafter they should be recorded centrally.³⁴⁸

It also seems to me that effective complaint handling must be more difficult to achieve in an organisation that has no obligation to receive complaints directly from the public it serves. This is because the act of receiving a complaint is the first step in taking responsibility for it, whether as a Regional Commander, a Local Area Commander, a Professional Standards Duty Officer, or as a member of a Complaint Management Team.

I note with interest the South Australian Independent Commissioner Against Corruption's discussion of a similar issue in his report on his review of *The Oversight and Management of Complaints about Police* and *The Receipt and Assessment of Complaints and Reports about Public Administration*.³⁴⁹ The Commissioner did not find a one stop (complaints) shop was an outcome he wanted to recommend. I am also concerned that there would likely be an unacceptable resource implication, as well as one of principle, in removing the expectation that police are directly involved in the resolution of complaints about their own conduct. It seems to me that efficiencies are achieved in the public interest by maintaining a direct complaint-resolution relationship between the public and those who serve them in primary policing roles. To confer all functions relating to the receipt of formal complaints on an external body not only lessens the Force's ownership of its own problems, but also risks vastly increasing costs associated with processing those complaints.

³⁴⁷ Police Association of NSW submission, p 12.

³⁴⁸ Wood Royal Commission, first interim report, p 100.

³⁴⁹ Independent Commissioner Against Corruption (South Australia) Review of Legislative Schemes: The Oversight and Management of Complaints About Police and The Receipt and Assessment of Complaints and Reports about Public Administration, 30 June 2015, pp 50-52.

Recommendation 12

To reflect the reality that people will complain directly to the NSW Police Force no matter what legislation provides, as well as the long-standing principle that the Police Force must take responsibility for the management of its own conduct, the *Police Act 1990* should retain an option to complain directly to the Police Commissioner.

Information about making complaints

In recommending a new model for police oversight, my terms of reference require me to recommend a user friendly system for complainants, police officers, and other affected parties. As discussed in chapters 7 and 8, when navigating the websites of the NSW Police Force, the Ombudsman and the PIC, it is difficult to ascertain the roles and responsibilities of each agency in the complaints process, and how the agencies interact during that process. While the proposed new system will be simpler as a result of the number of agencies being reduced to two, I would also suggest that a clear link be made between the websites of the NSW Police Force and the new commission to enable complainants to make an informed choice about which is the most appropriate body for them.

Recommendation 13

To enable stakeholders to navigate the new civilian oversight system easily, clear online information about the integrity and complaints process, including links between the new commission's website and the NSW Police Force website, should be available.

Notification requirements

Since it is proposed that the NSW Police Force retains a direct role in receiving complaints, there is a need to consider whether all complaints, regardless of seriousness, should be notified to the new body. Part 8A of the *Police Act* provides flexibility around which complaints must be notified to the Ombudsman through guidelines agreed upon between the PIC and the Ombudsman.³⁵⁰ These guidelines are sometimes described as 'class and kind agreements'. The current guidelines set out:

³⁵⁰ *Police Act 1990*, s 121.

- the type of complaints that should be notified to the oversight body, including complaints that suggest serious misconduct by police, to ensure that these matters receive rigorous civilian oversight; and
- the matters that do not require notification at all, and which do not need be treated as a Part 8A complaint. These are generally minor matters, such as service complaints.³⁵¹

This mechanism allows the Ombudsman and the PIC to determine the level of seriousness of complaints they wish to monitor. The *Police Act* requires the Police Commissioner to be consulted, but does not require his agreement. The guidelines may be amended from time to time.

The question is whether the new framework should provide similar flexibility. The NSW Coroner supports the principle that an oversight body should be notified of all complaints, on the basis that it would promote better accountability:

A difficulty in implementing an arrangement whereby only serious matters are considered by an external agency is that in many cases the seriousness of an incident cannot be assessed until at least some investigation is undertaken. Further, looking at a complaint in isolation from other intelligence about the subject officer or his/her associates can lead to an underestimation of the significance of the complaint.³⁵²

The Coroner submits that these concerns could be addressed by creating an agency that is notified of all complaints and serious incidents involving police officers and can assess all complaints and intelligence in relation to police misconduct.³⁵³

In Victoria, the Independent Broad-based Anti-corruption Commission (IBAC) is notified in writing of all complaints about ‘police misconduct’ received by Victoria Police.³⁵⁴ In England and Wales, the Independent Police Complaints Commission (IPCC) is only required to be notified when complaints meet mandatory referral criteria. In Western Australia, the Corruption and Crime Commission only needs to be notified of complaints regarding ‘reviewable police actions’.³⁵⁵

The Police Association proposes that Parliament, rather than the oversight body, sets the notification criteria:

³⁵¹ Police Integrity Commission and NSW Ombudsman, Guidelines agreed between the Police Integrity Commission and the Ombudsman after consultation with the Commissioner of Police under the *Police Act 1990* (‘PIC and Ombudsman guidelines’), 1 February 2014, https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0003/16149/MoU-Police-Integrity-Commission-and-consultation-with-the-NSW-Police-Force-Commissioner-16-December-2013.PDF.

³⁵² NSW Coroner submission, p 5.

³⁵³ NSW Coroner submission, p 5.

³⁵⁴ *Police Act 2013 (Vic)*, s 169.

³⁵⁵ *Corruption and Crime Commission Act 2003 (WA)*, s 21A.

A framework for mandatory referral criteria could be established where the oversight agency is notified of all complaints meeting certain criteria set by Parliament.³⁵⁶

The Association noted that a new oversight body should continue to have access to c@ts.i, and suggested: 'The independent agency should also be given access to the NSW Police Force complaints system, c@ts.i to facilitate the receipt and audit of complaint matters.'³⁵⁷

I agree that the new independent body should be free to audit complaints registered in the police complaints system.

I also agree with the Coroner that there are disadvantages in setting limits on the oversight of certain pre-determined classes of complaint. However, I do not think it would be desirable to remove all flexibility for a police oversight commission to come up with sensible and transparent guidelines about which matters should be entered onto c@ts.i or formally notified by other means, within any definition about conduct that may be the subject of a complaint.

I note that in Part 8A, the definition of 'police conduct' about which a complaint may be made is broad and I am not inclined to recommend any changes which might narrow that.

Recommendation 14

To ensure the new commission has access to the information required to perform its statutory functions, without creating an unreasonably high regulatory burden for the NSW Police Force, the new commission should be able to:

- i. access information about all complaints received by the Police Force, not just cases involving serious police misconduct;
- ii. have direct access to the Police Force's complaints registration system, c@ts.i.; and
- iii. issue guidelines or protocols, as is the case now with the Police Integrity Commission and the Ombudsman, setting out classes or kinds of complaint that do not need to be notified to the commission.

³⁵⁶ Police Association of NSW submission, p 12.

³⁵⁷ Police Association of NSW submission, p 12.

Own motion investigations

Own motion investigatory powers are vital to the effectiveness of an oversight body. By that, I refer to the ability to investigate a matter without requiring a formal complaint to have been made. A number of review participants raised this point and supported such a power, including the NSW Council for Civil Liberties and the Coroner. The PIC and the Ombudsman already have such a power, differently expressed, under the *PIC Act* and the *Police Act*. The Ombudsman is empowered to conduct a direct investigation '[i]f it appears to the Ombudsman that any conduct of a police officer could be, but is not, the subject of a complaint, the Ombudsman may make the conduct the subject of an investigation under the *Ombudsman Act 1974*'.³⁵⁸ The PIC has broad powers to conduct an investigation on its own initiative, even where no complaint has been made,³⁵⁹ and can also 'conduct an investigation even though no particular police officer, administrative officer, Crime Commission officer or other person has been implicated and even though no police misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer is suspected'.³⁶⁰

The powers of oversight bodies to initiate investigations without a specific complaint differ between jurisdictions. In New Zealand the IPCA has powers to investigate all complaints but only has own motion powers in regard to critical incidents. Whilst it has been proposed that these own motion powers be expanded, such changes are yet to be implemented.³⁶¹ In Victoria, the IBAC has broad own motion investigation powers for matters involving corrupt conduct and police misconduct without requiring a complaint to be made.³⁶² The Police Ombudsman of Northern Ireland also has own motion powers to formally investigate a matter of police conduct even if no complaint is made, if it is in the public interest to do so.³⁶³ In both cases these powers are outlined in the relevant legislation. The British Government has announced that they are seeking 'to legislate at the first available opportunity' to allow the IPCC to investigate a matter on its own motion provided the power is 'limited to issues of police conduct as opposed to wider perceived issues with a force'.³⁶⁴

³⁵⁸ *Police Act 1990*, s 159(1).

³⁵⁹ *PIC Act*, s 23(1)(a).

³⁶⁰ *PIC Act*, s 23(2).

³⁶¹ Independent Police Conduct Authority, Briefing to incoming minister, December 2011, p 9, <http://www.ipca.govt.nz/Site/media/2012/2012-Feb-02-Briefing-to-Incoming-Minister-.aspx>.

³⁶² Independent Broad-based Anti-corruption Commission Act 2011 (Vic), ss 55, 60 and 64.

³⁶³ *Police (Northern Ireland) Act 1998*, s 55(6).

³⁶⁴ UK Home Office, Improving police integrity: reforming the police complaints and disciplinary systems: Summary of consultation responses and next steps, March 2015, p 44.

The scope of a power to investigate police conduct without a formal complaint is an important consideration in a police oversight body that has both anti-corruption and complaint oversight functions. I believe any organisation responsible for detecting, investigating and preventing officer misconduct should be able to initiate investigations without relying on a formal allegation or complaint to be made first. The new body I recommend in this report should have those powers.

In the PIC context, however, its own motion powers are augmented by significant powers to conduct covert operations and public hearings, which are more appropriate for serious misconduct. It would not be appropriate in a combined model for these covert investigation techniques now available to the PIC to be exercised in investigations into complaints being dealt with by the Oversight Division. Public hearings should also not become a tool for investigations of less serious conduct in a combined model. In that regard, I note that investigations by the Ombudsman under section 17 of the *Ombudsman Act* 'shall be made in the absence of the public.'³⁶⁵

The work of the Integrity Division should continue to be guided by the principle that it turns its attention principally to serious officer misconduct.

Recommendation 15

To provide the new commission with the capability to detect and prevent serious police misconduct, as well as investigate other misconduct or concerns about complaints management, the new commission should have the power to conduct own motion investigations in the same way as the Police Integrity Commission and Ombudsman do now.

Recommendation 16

To ensure that covert investigative techniques continue to be used only for more serious police conduct investigations under a new single civilian oversight model, only the Integrity Division of the new commission may exercise such techniques.

Conduct of public hearings

The new commission should not be judged by the number of high profile public hearings it does or does not conduct. It is interesting to note that in the first Annual Report of the PIC, the first Commissioner turned his mind to this issue and articulated it as follows:

³⁶⁵ Ombudsman Act 1974, s 17.

One of the products of the Commission (which is a long term body) and a significant measure of its success, will be the extent to which the evidence and information it acquires is able to be used in such prosecutions. This has implications for the way in which the Commission operates since the assembling of admissible evidence is not always best carried out by public hearings, particularly since answers given or material produced at such hearings are not generally admissible in evidence against the witness in civil or criminal proceedings (although they are admissible in disciplinary proceedings).³⁶⁶

In its supplementary submission to this review, the NSW Police Association also argued that '[i]t is critical that Counsel Assisting at an inquiry, like a prosecutor in a criminal matter, be impartial and importantly appear to be impartial. The reputations of many have been destroyed by a simple expression of opinion'.³⁶⁷ The Association then set out Rules 82, 84 and 85 of the New South Wales Bar Rules, which were current at the time the submission was made, and applied equally to prosecutors and to barristers appearing before inquisitorial bodies. However, as at 1 July 2015, these rules were superseded by the *Legal Profession Uniform Conduct (Barristers) Rules* which provide different and quite specific rules for those appearing before royal commissions and the like, as follows:

97. A barrister who appears as counsel assisting an investigative/inquisitorial tribunal must fairly assist the tribunal to arrive at the truth and must seek to assist the tribunal with adequate submissions of law and fact.
98. A barrister who appears as counsel assisting an investigative/inquisitorial tribunal must not, by language or other conduct, seek to inflame or bias the tribunal against any person appearing before the tribunal.
99. A barrister who appears as counsel assisting an investigative/inquisitorial tribunal must not argue any proposition of fact or law which the barrister does not believe on reasonable grounds to be capable of contributing to a finding on the balance of probabilities.
100. A barrister who appears as counsel assisting an investigative tribunal must not publish or take any step towards the publication of any material concerning any current proceeding in which the barrister is appearing or any potential proceeding in which a barrister is likely to appear, other than:
 - (a) a barrister may supply answers to unsolicited questions concerning a current proceeding provided that the answers are limited to information as to the identity of any witness already called, the nature of the issues in the proceeding, the nature of any orders, findings, recommendations or decisions made including any reasons given by the investigative tribunal; or

³⁶⁶ Police Integrity Commission, *Annual Report 1996-1997*, pp 1-2.

³⁶⁷ Police Association of NSW supplementary submission, pp 7-8.

- (b) a barrister may, where it is not contrary to legislation, in response to unsolicited questions supply for publication:
 - (i) copies of affidavits or witness statements, which have been read, tendered or verified in proceedings open to the public, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection;
 - (ii) copies of transcript of evidence given in proceedings open to the public, if permitted by copyright and clearly marked so as to show any corrections agreed by the witness or directed by the investigative tribunal; or
 - (iii) copies of exhibits admitted in proceedings open to the public and without restriction on access.

It seems to me that if these new investigative tribunal-specific rules are abided by and as necessary, enforced, they will go some way towards addressing the Police Association's legitimate concerns about procedural fairness. And if the new body was to build a public hearing media communications policy for itself around Rule 100, then the Police Association's call for a clear media policy framework for this new body would go some way towards being met as well.

Once an inquisitorial body commences a public hearing, it is almost inevitable that there will be significant reputational impact to so called 'persons of interest'. It follows, in my view, that there should always be a compelling reason to embark on such a course. In the case of the new police oversight body, before doing so, the Commissioner's Council should be satisfied that a matter cannot be determined by an examination of witnesses' written statements, or by a private hearing. That said, however, I note that the Honourable Murray Gleeson AC QC and Mr Bruce McClintock SC recently released a *Review of the Jurisdiction of the Independent Commission Against Corruption* in which they did not accept the need for any specific legislative limitations on holding public hearings. The report stated that:

... the Panel accepts that public inquiries, properly controlled, serve an important role in the disclosure of corrupt conduct. They also have an important role in disclosing the ICAC's investigative processes. The Panel is not attracted to the idea that the powers of the ICAC should all be exercised in private.³⁶⁸

The Panel also pointed to section 31 of the *ICAC Act*, which provides public interest factors that the ICAC must take into account before deciding to hold a public hearing. It found that the requirements of that section were 'adequate'. I respectfully agree with that view.

³⁶⁸ Independent Panel - Review of the Jurisdiction of the Independent Commission Against Corruption, [Review of the Jurisdiction of the ICAC] report to the NSW Government by the Hon. Murray Gleeson AC QC and Bruce McClintock SC, 30 July 2015, p 59 available at http://www.dpc.nsw.gov.au/announcements/independent_panel_review_of_the_jurisdiction_of_the_independent_commission_against_corruption.

It is worth noting that as recently as 2012, a mirror provision was added to the *PIC Act* following the Government's review of that Act. That provision is section 33(3A) and reads as follows:

- (3A) Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a hearing wholly or partly in public, the Commission is to consider the following:
- (a) the benefit of exposing to the public, and making it aware of, officer misconduct,
 - (b) the seriousness of the allegation or complaint being investigated,
 - (c) any risk of undue prejudice to a person's reputation (including by not holding the hearing in public),
 - (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

During the second reading speech, the then Premier noted that this provision was based on the *ICAC Act* and reflected on the important role of public hearings:

The Police Integrity Commission holds public hearings, which play an important role in the transparency and accountability of the commission. There is, however, a need to balance the consideration of the public interest and the benefit of public exposure against the potential for undue prejudice to a person's reputation when deciding to hold a public inquiry. Item [6] of the bill amends section 33 of the principal Act, which specifies the criteria that the commission is to consider when determining whether to conduct a hearing wholly or partly in public. The additional criteria are consistent with the requirements for the Independent Commission Against Corruption when it decides whether to hold public hearings.³⁶⁹

Recommendation 17

To ensure that public hearings continue to be used only for more serious police conduct investigations in a new single civilian oversight model, only the Integrity Division of the new commission may conduct such hearings.

Recommendation 18

To ensure that a decision by the commission to hold a public hearing is informed by a diversity of views within the commission, a proposal to conduct a public hearing should be a matter for deliberation at a Commissioner's Council meeting.

³⁶⁹ The Hon Barry O'Farrell, Second Reading speech: Police Integrity Commission Amendment Bill 2012, 7 March 2012.

Content of reports

I note that the recent report by the Honourable Murray Gleeson AC QC and Mr Bruce McClintock SC³⁷⁰ proposed a limit on the powers of the ICAC to make findings, notwithstanding that the *ICAC Act* also contains a provision similar to section 13(2) of the *PIC Act*.³⁷¹

The panel recommended that the power of the ICAC to make corruption findings in a report should be limited by legislative amendment to cases of serious corrupt conduct only. The panel's reasoning was as follows:

If the conduct investigated ultimately is found to be other than serious it should not be stigmatised as corrupt. A power which has such obvious capacity to harm individuals should be reserved only for cases where the misconduct in question is serious.³⁷²

The panel's report has been very recently delivered and was only made public on 11 August 2015. So stakeholders in this review have not had an opportunity to consider what, if any, impact this recommendation might have in a police oversight context. For that reason, I do not believe it would be appropriate to express a recommendation about whether a legislative response is required or desirable for either the PIC or a new combined police oversight model. It may be possible to take a view that the PIC's statutory role is not to form an opinion about whether corruption has occurred but rather whether officer misconduct has occurred, so no changes are required. I note, however, that the PIC also receives complaints about possible corruption of administrative officers³⁷³.

Procedural fairness

The Police Association has long advocated strongly on behalf of individual members who have confronted integrity allegations, noting that reputational consequences cannot be undone once damaging allegations or imputations are made public. It has done so in the course of this review. The 2012 amendments to the *PIC Act* imposed additional obligations on PIC to improve procedural fairness, and these amendments were based on its concerns. In the second reading speech to the amending bill, the then Premier noted the Police Association's advocacy and agreed that fairness demanded a change:

In the past concerns have been expressed about the commission's observance of procedural fairness in certain matters before it. I am particularly aware of the sensitivity of this issue amongst police officers, who have raised the issue with the Government by way of the Police Association of New South Wales. Item [14] of the bill inserts a new section 137A into the Act to require the Police Integrity Commission, before including an adverse comment about a

³⁷⁰ Review of the Jurisdiction of the ICAC, 30 July 2015

³⁷¹ *ICAC Act*, s 12A.

³⁷² Review of the Jurisdiction of the ICAC, 30 July 2015, p64

³⁷³ *PIC Act*, s 75A.

person in a report, to give the person an opportunity to make submissions. This is also known as a "persons to be heard" provision. This new section will help to address concerns about procedural fairness, while allowing the commission to continue to vigorously detect and investigate corruption and misconduct. The "persons to be heard" requirement also will apply to reports of the Inspector.³⁷⁴

The utility of such a change may be linked inextricably with the conduct of investigations and hearings prior to a final report being prepared. I believe, however, that the new body should be subject to similar expectations around the way it conducts itself. I note again that the recent review of the ICAC's jurisdiction has not led to a recommendation to the Government that there be any additional legislative controls around the conduct of hearings in the ICAC.

Recommendation 19

To support fairness in the new commission's processes, without detracting from its corruption-fighting capacity, the Act establishing the commission should include a 'persons to be heard' provision along the lines of section 137A of the *Police Integrity Commission Act 1996*, as well as a provision similar to section 33(3A) of that Act setting out public interest factors to be considered in deciding whether a hearing should be in public.

Education role

According to the PIC's 2013-14 Annual Report:

The PIC works to prevent corruption in the NSW Police Force by providing informed advice and recommendations on improvements to systems and practices and on improvements to complaint investigations. The Commission has an extensive research program that seeks to identify and address areas of corruption risk that are common to both the Police Force and the NSW Crime Commission as well as risks specific to each agency. These reports can be made direct to the agency, published on the commission website or furnished to Parliament and made public.³⁷⁵

The Ombudsman's Office undertakes a not dissimilar role, identified in the Ombudsman's 2013-14 Annual Report as follows:

Section 160 of the Police Act requires the Ombudsman to keep the police complaints-handling system under scrutiny. Our work over the last year has included visiting police

³⁷⁴ The Hon Barry O'Farrell, Second reading speech: Police Integrity Commission Amendment Bill 2012, 7 March 2012.

³⁷⁵ Police Integrity Commission, *Annual Report, 2013-2014*, p 5.

commands to discuss trends in complaints and complaint-handling issues specific to each command, physically inspecting records and conducting audits. We also closely monitor specific aspects of the NSW Police Force's management of complaints across the state.³⁷⁶

This work is important. As Commissioner Wood suggested in his interim report 19 years ago, 'the PCC [PIC] should be ready to make recommendations to the Police Service, from time to time, as weaknesses or corruption prevention issues emerge in the course of its investigations'.³⁷⁷ However, the primary responsibility for the critically important education and corruption prevention strategies, the Commissioner said then, should be retained by the Police Service.³⁷⁸ Moreover 'the PCC should not have a specific educative or corruption prevention role, as that may divert from its primary task of active corruption investigations'.³⁷⁹ The *PIC Act* reflects that approach and I do not believe there is a case for a different strategy now. Section 14(c) of the *PIC Act* states that one of the PIC's functions is to:

[M]ake recommendations concerning police corruption education programs, police corruption prevention programs, and similar programs, conducted within the NSW Police Force or by the Ombudsman or the Independent Commission Against Corruption for the NSW Police Force.

In contrast, section 2A(ii) of the *ICAC Act* confers a specific corruption education role on the ICAC under the principal objects of the Act, which include 'to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community.' That is not an approach I favour in police oversight, given the emphasis on performance management and discipline being firmly a matter for the NSW Police Commissioner.

I do not think that it is appropriate to be too prescriptive in legislation about the role of a corruption prevention unit in the new single agency oversight model. Rather, this is an issue to be worked through by the Commissioner's Council once the new body is up and running.

Recommendation 20

To ensure the NSW Police Force maintains primary responsibility for managing poor conduct and performance of its members, while benefitting from the perspective offered by external civilian oversight, the new commission should have a recommendatory power in relation to police corruption education programs and similar within the Police Force, as well as a right to make recommendations for improvements to complaints management systems.

³⁷⁶ NSW Ombudsman, Annual report 2013-2014, p 47.

³⁷⁷ Wood Royal Commission, first interim report, p 108.

³⁷⁸ Wood Royal Commission, first interim report, p 107.

³⁷⁹ Wood Royal Commission, first interim report, p 108.

Transitional arrangements for current work

A great deal of work currently being undertaken by both the PIC and the PDOO, which may include litigation currently before the courts, will need to be transferred to the new body. This is an issue which confronted the Victorian Government and Parliament in 2011 when the Office of Police Integrity (OPI) was abolished and its jurisdiction was subsumed into the newly created IBAC.³⁸⁰ The savings and transitional provisions, which facilitated the transfer of work and legal proceedings in progress from the OPI to the IBAC, are to be found in the Schedule to the *Independent Broad-based Anti-corruption Commission Act 2011*. In my view, they provide a useful precedent.

However, I believe that the current Ombudsman's inquiry, known as Operation Prospect, should not be transferred to the new body. Instead, the Ombudsman's Office should continue to have responsibility for this inquiry until it is concluded, not least because of its apparent complexity and the fact that some of the allegations it covers predate the present millennium. What Operation Prospect needs is continuity and finality. This view is mirrored in the Chair's foreword to the General Standing Committee No. 4 report on *The Progress of the Ombudsman's investigation "Operation Prospect"*, released on 25 August 2015.³⁸¹ Just how many PDOO staff may be involved in Prospect is unknown so it may be necessary for the new body to recruit new personnel to fill some of the positions in its new Oversight Division.

Recommendation 21

To recognise that it would be impractical to impose an obligation to conclude a unique major operation on a new commission, Operation Prospect should remain with the Ombudsman's Office until its conclusion.

Budget and staffing

One of the NSW Ombudsman's key concerns about the merger of the PIC and the PDOO into a new statutory body is that the complaints function might be overshadowed by the integrity function. As the Ombudsman highlighted it in his submission to this review:

³⁸⁰ Independent Broad-based Anti-corruption Commission, *Annual Report 2012-2013*, p 8.

³⁸¹ General Purpose Standing Committee No. 4, NSW Legislative Council, *Progress of the Ombudsman's investigation "Operation Prospect"*, 25 August 2015, p viii.

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.³⁸²

It is important to ensure that the merger is not viewed as an opportunity for cost cutting, even though in some cases, mergers of statutory bodies may present an opportunity to realise efficiencies. While responsible public sector budget management should be a constant goal, cost savings should not be an object of combining police oversight functions in a single entity. Indeed, at least initially, greater financial provision will need to be made for transitional costs and for the extra cost involved in conferring on the new body its increased responsibilities in overseeing the NSW Crime Commission (see chapter 11). Additional resourcing is also likely to be necessary for the new body's critical incident investigation oversight function (see chapter 10).

To enable the new commission to establish itself effectively and maintain focus on all its vital functions, its budget in the first four years should not be less than the combined total of the current PIC and PDOO budgets, after adjustment for inflation and additional transition costs. Staffing should be settled according to the same principle. As the PIC submission asserted: '[T]he present staffing establishment of the Commission and the Ombudsman's police team would need to be migrated into the new agency in order that there be no reduction in the level of police oversight in NSW'.³⁸³ Indeed, as far as possible, the present staffing ratios between the PIC and the PDOO should be reflected in the new Integrity and Oversight Divisions.

I note also that staff in the Ombudsman's Office are employed under the *Government Sector Employment Act 2013*. The PIC also has a separate staff employment agency under Part 3 of Schedule 1 of that Act. I understand, however, that some PIC staff were still engaged on the basis of individual agreements of three years duration during the last reporting period. The PIC Annual Report for 2013-14 noted that discussions were underway with the Public Service Commission to determine how to manage these historical employment practices. The PIC also reported that it has taken initial steps to accommodate existing executive level positions within the new government sector executive framework, and that full accommodation into the new executive structure will be achieved within the next reporting period.³⁸⁴

It would seem to me to be advantageous to a new body for all staff to be employed under the same standard Government Sector Employment arrangements to enable a smooth transition. There should still be capacity, however, for the new body to engage consultants directly.

³⁸² NSW Ombudsman submission, p 100.

³⁸³ Police Integrity Commission submission, p 22.

³⁸⁴ Police Integrity Commission, *Annual Report 2013/14*, p 61.

Recommendation 22

To ensure the new commission is properly resourced to perform all of its functions, while ensuring that the Ombudsman's Office can continue to perform the functions it retains, the budget for the new model should be developed with the following factors in mind:

- i. the creation of a new oversight model is not designed to realise cost-savings in the immediate or short-term, although it is reasonable to expect that some efficiencies may be gained over time with greater sharing of skills and information across functional areas (such as investigations of complaints and audits);
- ii. the existing budget for the Police Integrity Commission and the Police Division of the Ombudsman's Office, including any ad hoc funding for special projects in the Ombudsman's Office involving police, should be made available in full to the new commission for at least four years, adjusted for any additional functions conferred on the entity during that time as is required;
- iii. additional allowance should be made at the time of establishing the new commission for the transitional costs associated with the transfer of staff, the establishment of new premises for the Oversight Division, and the movement or purchase of equipment and services from the Ombudsman's Office, particularly information technology costs;
- iv. some additional employee-related costs may be incurred since the new commission will not be able to leverage off the work of staff in other divisions of the Ombudsman's Office, such as the Aboriginal Unit in the Strategic Projects Division;
- v. some additional employee-related costs will need to be included to ensure there is sufficient capacity to monitor critical incident investigations by the NSW Police Force;
- vi. additional resources will be needed for the Inspector of the new commission to exercise a much wider set of responsibilities; and
- vii. all staff in the new commission should be employed under the same statutory regime, preferably the *Government Sector Employment Act 2013*, but the organisation should still be able to engage consultants on a short term basis, if required.

Employment of serving or former NSW police

Commissioner Wood said in his 1996 interim report that ‘to ensure public confidence in the independence and integrity of the PCC [the PIC], no members or former members of the NSW Police Service should be employed in it’.³⁸⁵ As a result, section 10 of the *PIC Act* prohibits the PIC from employing current or former members of the NSW Police Force. However, there has been no similar provision applied to the PDOO, where it has been a longstanding practice for serving and former New South Wales police officers to be usefully employed in connection with overseeing the handling of police complaints. As the Deputy Ombudsman in charge of the PDOO recently stated:

We have employed police from various jurisdictions including the NSW Police Force ... [and they] have made a valuable contribution to our work including their investigative expertise and detailed understanding of operational matters. They also enhance the credibility of our work with police ... The ability to employ former police including NSWPF officers to assist in the oversight and investigation of complaints is invaluable and should be retained in any future arrangements for civilian oversight of police in NSW.³⁸⁶

The PIC, however, took a different view in its submission to this review, as follows:

...this [section 10] prohibition should continue if a single agency approach were adopted so as to maintain full independence from the NSWPF, and maintain public confidence that the agency is separate from the NSWPF in every respect, including the staff that it employs.³⁸⁷

While I accept that for the foreseeable future this prohibition should continue to apply to the Integrity Division, the question is whether it should apply to the Oversight Division, especially because in his interim report, Commissioner Wood went on to say: ‘If considered necessary or desirable in the future, this restriction [on the employment of NSW police] may be open to review’.³⁸⁸

In considering this question, I have given considerable weight to the NSW Coroner’s submission, which makes the point that ‘[g]enerally, police officers are no less ethical than members of the general population’.³⁸⁹ He further says that there would be benefits in employing police officers in an oversight agency, including that:

Officers in the field are more likely to accept critiques informed by the views of experienced officers working for the oversight agency. The mistrust and animosity towards the agency

³⁸⁵ Wood Royal Commission, first interim report, p 97.

³⁸⁶ Email from Deputy Ombudsman Michael Gleeson to the Review Secretariat, 17 July 2015.

³⁸⁷ Police Integrity Commission submission, p 21.

³⁸⁸ Wood Royal Commission, first interim report, p 97.

³⁸⁹ NSW Coroner submission, p 6.

will diminish as more and better officers undertake secondments to the agency and return to the force.³⁹⁰

A significant argument in favour of the employment of police officers is that 'police have access to information, skills and expertise which an outside organisation would lack.'³⁹¹ While I accept these views, and am in no doubt that the NSW Police Force has significant investigative skills that would be well utilised in an investigation agency, I am not convinced that it is appropriate to have current or former police officers employed in an agency which investigates serious police misconduct.

While I accept that the NSW Police Force today is a completely different organisation to the one that Commissioner Wood investigated, I am mindful of the PIC submission which states that 'there is a continuing risk of serious police misconduct in NSW, it cannot be eliminated, and historically, and in the absence of effective external mechanisms to deal with it, has undergone resurgences.'³⁹²

I am not convinced that the benefit of harnessing the expertise of New South Wales police officers outweighs the risk of disclosure of sensitive information or covert investigative techniques to police under investigation. I also note that the majority of submissions addressing the point advocated for a ban on employment of current or former New South Wales police officers in police oversight bodies to maintain complete independence from the Police Force, ensure the integrity of the organisation and 'maintain public confidence that the agency is separate from the NSWPF in every respect.'³⁹³

Bearing in mind, however, my recommendation below that the two divisions should be physically located in separate parts of the same building, preferably on separate floors with discrete security arrangements, I think that it should be possible, in the first instance, for former New South Wales police to carry out specific tasks in the Oversight Division. As the NSW Greens commented:

...there may well be a carefully circumscribed role for highly competent and well regarded former NSW police to undertake reviews and advice within a new oversight body.³⁹⁴

Therefore, while there should be a statutory prohibition on the employment of serving or former New South Wales police officers in the Integrity Division, there should be no such blanket prohibition or the engagement of former officers in the Oversight Division. However, the final decision about whether or not to employ any former New South Wales

³⁹⁰ NSW Coroner submission, pp 5-6.

³⁹¹ Independent Commissioner Against Corruption (South Australia), *The Oversight and Management of Complaints About Police*, report to the South Australian Deputy Premier, 30 June 2015, p.25 available at <http://icac.sa.gov.au/content/legislative-reviews-0/#legreport>.

³⁹² Police Integrity Commission submission, p 7.

³⁹³ Police Integrity Commission submission, p 21.

³⁹⁴ NSW Greens submission, p 4.

police in this way must rest with the Commissioner's Council. And if these arrangements work well, then down the track, consideration could be given to seconding serving New South Wales officers to the Oversight Division.

Recommendation 23

To ensure the Oversight Division has access to the skills it requires to exercise its responsibilities in the complaints handling area, former New South Wales police officers should not be prohibited from being engaged to perform work for that division (as they are not prohibited from working with the Ombudsman's Office now); however, the final decision on any particular proposal to engage a former officer should be made following deliberation by the Commissioner's Council.

Accommodation

In relation to premises, the PIC made the following suggestion to this review:

The Commission's accommodation includes a number of purpose-built facilities, including its hearing room and telecommunications interception unit. The costs of relocating these facilities to a new site and restoring the existing premises to their pre-lease condition are likely to be very high. If a single agency option is adopted, it is submitted that the current accommodation at 111 Elizabeth Street should be retained as its principal location.³⁹⁵

I agree to the extent that it makes sense for the Integrity Division to be located where the PIC is now so that the covert surveillance equipment, hearing room and related facilities at that location can continue to be utilised. However, the Oversight Division would need to be located elsewhere, preferably on a different floor of the same building, with a separate user friendly public entrance. Further, each division would need its own discrete security arrangements, with access to all but the public areas of the Integrity Division strictly controlled.

Recommendation 24

To contain costs, the principal location of the new commission should be the current Police Integrity Commission premises.

³⁹⁵ Police Integrity Commission submission, pp 21-22.

Recommendation 25

To recognise the need for continued high levels of secrecy and security in relation to integrity work, the Oversight Division should not occupy the same floors on which the Integrity Division is conducting covert investigation work, and should preferably have a separate 'public facing' foyer on a separate floor.

Accountability arrangements

At present, the PIC is oversighted by an Inspector pursuant to the provisions of Part 6 of the *PIC Act*, and both are also oversighted by a Parliamentary Joint Committee pursuant to Part 7. While the Ombudsman's Office is answerable to the same Parliamentary Committee as the PIC under Part 4A of the *Ombudsman Act*, and in almost identical terms, there is no provision for oversight of the Ombudsman by an Inspector. So the issue now is whether present arrangements for oversight of the PIC should be migrated across into the new legislation, or whether different arrangements should apply.

The position of PIC Inspector was originally recommended by Commissioner Wood in his interim report of February 1996. That report suggested that a serving or former Supreme Court Judge should be given the jurisdiction, among other things, to deal with complaints of abuse of power and other forms of misconduct, have access to records and require employees to supply information, assess complaints and incidents of misconduct either alone or in conjunction with the PIC Commissioner, and recommend internal disciplinary action or criminal prosecution.³⁹⁶ As such, this was a departure from the Operations Review Committee model which then oversighted the ICAC. But in 2006, the oversight of the ICAC was brought into line with that of the PIC by the abolition of the Operations Review Committee and the appointment of an ICAC Inspector under Part 5A of the *ICAC Act*.³⁹⁷

The provisions of the *PIC Act* which cover the Inspector are based on Commissioner Wood's recommendations, although section 91 expressly spells out what Commissioner Wood implied, namely that the Inspector has royal commission type powers to make or hold inquiries and to deal with misconduct by way of reports and recommendations. But as the current PIC Inspector, the Honourable David Levine AO RFD QC, explained to the Parliamentary Joint Committee in March 2014, 'the Inspector is not an appeal court'.³⁹⁸ Following recent legislative change in 2012 to allow one person to hold both positions,

³⁹⁶ Wood Royal Commission, first interim report, p 95.

³⁹⁷ See debate on the Independent Commission Against Corruption Amendment (Operations Review Committee) Bill, NSW Parliamentary Hansard, 10 May 2006.

³⁹⁸ The Hon David Levine, Report of proceedings before the Committee on the Independent Commission Against Corruption, NSW Parliament, *Review of the 2012-13 Annual Report of the Inspector of the ICAC* ('Levine evidence to ICAC Committee'), 28 March 2014, p 2.

Inspector Levine also doubles as Inspector of the ICAC. In his submission to this review, Inspector Levine supported an amalgamation of the PIC with the PDOO to avoid ‘doubling up of inquiries’, commenting:

Should the PIC’s function be expanded as a consequence of the present Inquiry, such as taking over the police complaints oversight function from the Ombudsman, the work of the Inspector would not increase to such an extent that it would make it difficult for the same person to occupy both the Office of Inspector of PIC and the Officer of the Inspector of the ICAC, which is currently the situation.³⁹⁹

The Police Association of New South Wales, however, submitted that ‘the function of the Inspector would be better served by a three person Inspectorate Panel’, which should be empowered to launch an inquiry, investigation, hearing, report or disclosure.⁴⁰⁰ The Association further proposed:

The final report, findings and recommendations of the panel will either be unanimous, or determined by the majority with the dissenting panel member providing their ultimate position and reasons attached to the report.⁴⁰¹

While I agree with the Police Association that a three person panel should be involved in governing the new body’s work, my view is that this panel should not operate externally and after the fact, like a Court of Appeal, but internally and before the fact, in the manner I have proposed for the Commissioner’s Council. External oversight of the new body should remain the province of a single Inspector along the lines Commissioner Wood envisaged 19 years ago and as now incorporated in Part 6 of the *PIC Act*. As one of Inspector Levine’s predecessors, the Honourable Mervyn Finlay QC, said in June 2003:

The PIC has a broad mandate to investigate police misconduct. Provided that the PIC acts within the scope of its mandate, the PIC should conduct its investigations in such a manner as it considers fit, free from interference from external influences.⁴⁰²

Since the creation of the ICAC over a quarter of a century ago, there has been broad acceptance in New South Wales for the proposition that all public servants, including police, are to be accountable for allegations of corruption and misconduct to a body with standing royal commission powers of this type. And since 2006, the ICAC and the PIC have each been oversighted by a single Inspector and each of them with the same powers. So I have two concerns with the external three person Inspectorate model:

- that it might in some way fetter the broadly accepted and longstanding royal commission model of public sector accountability

³⁹⁹ Inspector of the Police Integrity Commission submission, pp 2 and 5.

⁴⁰⁰ Police Association of NSW submission, p 21.

⁴⁰¹ Police Association of NSW supplementary submission, p 10.

⁴⁰² Inspector of the Police Integrity Commission, *Annual Report 2002-13*, pp 11-12.

- that it might result in the new oversight body being fettered in a way that the ICAC is not, thereby creating one system for law enforcement personnel and another for the remainder of the New South Wales public service.

It follows that if there was to be any change from the current single Inspector model to a three person Inspectorate model, such a change should cover the ICAC as well as the new body. And as such, it is beyond the scope of my review.

However, there was another reason why the Police Association suggested a three person Inspectorate: to share the extra workload that will be generated by oversight of the PDOO. In that regard, I am not as confident as Inspector Levine is that he (or whoever is in his position) will be able to handle this extra workload, as well as the work of overseeing the ICAC. Especially in light of what has happened at the ICAC during 2015, Inspector Levine's evidence to the Parliamentary Joint Committee in March 2014 has to be seen in a new light. 'I am confident that, certainly within six months, we will be running fairly smoothly', Inspector Levine said then. 'That, of course, requires the rider that something could suddenly explode in one field or the other'.⁴⁰³

With the benefit of hindsight, I share the Police Association's concerns that 'the Inspector clearly does not have the resources needed to perform this important function'.⁴⁰⁴ Indeed, the key question for me is whether one Inspector can now do both jobs. Before the Parliamentary Joint Committee in March 2014, Inspector Levine said:

I took up office as Inspector [of the ICAC] on 10 February ... I am also the Inspector of the Police Integrity Commission. The legislation enabling the one person to occupy both offices was assented to in September of last year [2013]. I anticipate that one effect of the one person occupying both offices will be beneficial in the financial sense that instead of there being six people there will be essentially three.⁴⁰⁵

While Inspector Levine went on to say that any temporary shortfall could be made up by the appointment of an Assistant Inspector, my view is that the Inspectorates of the ICAC and the police oversight body should be filled by different people.

Recommendation 26

To ensure that the new commission remains subject to external scrutiny, it should be accountable in relation to all its functions to an Inspector.

⁴⁰³ Levine evidence to ICAC Committee, p 1.

⁴⁰⁴ Police Association of NSW submission, p 21.

⁴⁰⁵ Levine evidence to ICAC Committee, p 1.

Recommendation 27

To recognise that the future workload of the Inspector of the new commission is likely to be much greater than the present workload of the Inspector of the Police Integrity Commission, the inspectorates of the Independent Commission Against Corruption and the new commission should be filled by different people.

If this recommendation to de-couple the inspector roles is accepted, then there will be no risk of incompatibility in the Inspector of the new commission being subject to the ICAC's jurisdiction. That risk was avoided when amendments were made to permit the same person to hold the role of the Inspector of the ICAC by providing an accountability role for the Ombudsman instead of the ICAC⁴⁰⁶.

Recommendation 28

To recognise that separating the inspector roles removes any potential concerns about incompatibility of office, the Inspector of the new commission should be subject to the jurisdiction of the Independent Commission Against Corruption in the same way the Inspector of the Police Integrity Commission was previously.

I do not believe that any change to the current system of oversight by the Parliamentary Joint Committee is necessary, other than consequential amendments to reflect the changes in the statutory bodies. However, I note recent media reports suggest that legal advice may have been sought regarding the scope of the Committee's powers to monitor and review the Commission's functions under section 64 of the *ICAC Act*.⁴⁰⁷ The functions of the Parliamentary Committee overseeing the Ombudsman, the PIC and the Crime Commission are similar to the ICAC Committee⁴⁰⁸.

Ombudsman's other police-related functions

As the Ombudsman's submission to this review makes clear, if the PDOO is transferred to the new body, then a question arises as to which of the Ombudsman's other police-related

⁴⁰⁶ *PIC Act*, s 125(2).

⁴⁰⁷ See Nicola Berkovic, 'Advice sought on ICAC's silence', *The Australian*, 21 August 2015, p 28; Chris Merritt, 'ICAC must explain how it got it so wrong', *The Australian*, 28 August 2015, p 27.

⁴⁰⁸ *PIC Act*, s 95.

functions should also be transferred to the new commission. These other functions are nominated in the Ombudsman's submission as follows:

- external investigations into alleged NSW Police Force 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
- legislative reviews – monitoring and reporting on the use of new police powers.⁴⁰⁹

Maladministration

The Ombudsman's submission notes his general jurisdiction under the *Ombudsman Act* to deal with matters of maladministration by public authorities, including the NSW Police. A recent example of the Ombudsman using these powers in relation to police was his report to Parliament in 2012 *Safe as Houses? Management of Asbestos in Police Buildings*.⁴¹⁰ I agree with the Ombudsman that his general powers relating to police maladministration should not be transferred to a new body whose focus is on police integrity and complaints against police. Investigations into matters or complaints about administrative issues that could occur in any public sector agency – such as managing public property assets or the maintenance of public records – should continue to be undertaken by the Ombudsman.⁴¹¹ I believe that this is consistent with some overseas approaches, such as Her Majesty's Inspectorate of Constabulary in the UK and the new Inspector General for the New York Police Department.

This ongoing jurisdiction over police should be limited, however, to ensure that there is no risk of duplication in oversight. Accordingly, whenever the Ombudsman intends to exercise his maladministration powers under the *Ombudsman Act* in relation to the NSW Police, he should notify the new body, and consent should be obtained before the Ombudsman can proceed. Moreover, the new body should be empowered to assume jurisdiction over *Ombudsman Act* investigations involving allegations of maladministration by the NSW Police, if it is satisfied it is in the public interest to do so. This might occur, for example, where the new body reasonably suspects there is a connection between the alleged maladministration and police misconduct more generally.

The assumption of investigations by the new body should not be limited to police misconduct matters, in the *PIC Act* sense. It should extend to all conduct that would or may

⁴⁰⁹ NSW Ombudsman submission, p 38.

⁴¹⁰ NSW Ombudsman, *Safe as Houses? Management of Asbestos in Police Buildings*, 25 July 2012, a Special Report to Parliament under section 31 of the *Ombudsman Act 1974*, tabled in Parliament 26 July 2012.

⁴¹¹ NSW Ombudsman submission, p 39.

fall within the broader class covered by Part 8A of the *Police Act*. In particular, it should not remain open to the Ombudsman to undertake special investigations of policing practices.

Recommendation 29

To recognise that maladministration involving the NSW Police Force (as a public authority) differs from individual misconduct in relation to policing duties, the Ombudsman should retain jurisdiction over maladministration involving the Police Force, subject to the following limitations:

- i. any such matter must be referred to the new commission if it relates to conduct that could be the subject of a complaint under the Act establishing the new commission;
 - ii. all proposed investigations into maladministration issues must be notified to the new commission before they commence;
 - iii. the new commission must be advised of the status of investigations into maladministration issues on a regular basis; and
 - iv. the new commission may elect at any time to take over the investigation of a maladministration issue if it is satisfied that it also involves officer conduct that could be the subject of a complaint and it is satisfied it is in the public interest to do so.
-

Auditing the use of covert powers

The Ombudsman has a statutory responsibility to monitor and audit the use of various covert investigative powers by the NSW Police Force, the NSW Crime Commission, the ICAC and the PIC. Among other things, the Ombudsman audits records relating to telephone interceptions; listening, optical surveillance, tracking and data surveillance devices; covert and criminal investigation search warrants; and controlled operations.⁴¹²

If the PIC is absorbed into a new body, the latter's Integrity Division will thereby be invested with these covert investigative powers. And as the Ombudsman's submission points out, transferring his office's auditing of covert powers to the new body 'will represent a significant conflict of interest, as this would effectively require the new body to audit its own use of these powers'. To deal with this issue, there appear to be four options:

⁴¹² NSW Ombudsman submission, p 40.

1. Permit the Ombudsman to continue to exercise these powers even though they are predominantly police oversight type powers;
2. Split the responsibilities between the new commission (in relation to Police and the Crime Commission) and, with additional resources, the existing Inspector (in relation to the new commission);
3. Create a new body to exercise these types of powers, like the Victorian Inspectorate;
or
4. Expand the functions of the existing Inspector to undertake the compliance work.

Each of these options has its pros and cons, both in a general policy sense and a resourcing sense. However, I am concerned that leaving the responsibilities with the Ombudsman would undermine in part the simplification in oversight arrangements that might be achieved by combining the PDOO and the PIC functions.

I also note that the Inspector of the PIC has commented on his continuing difficulty obtaining access to telephone intercept product to allow him to exercise his current audit functions in relation to the PIC (discussed in chapter 7), and has suggested that the definition of 'permitted purpose', under section 5 of the *Telecommunications (Interception and Access) Act 1979* should be specifically amended to include an 'audit' purpose.⁴¹³ As such, I recommend that the issue be raised again, by the NSW Government with its Commonwealth counterpart.

Recommendation 30

To recognise that the new commission could not perform statutory audits of the use of covert investigation techniques by all law enforcement agencies in New South Wales, given its own use of such techniques, this function will either need to remain with the Ombudsman (despite being a significant police oversight function) or be split between agencies, or other options for external scrutiny will need to be developed, such as resourcing the new Inspector to undertake such work.

Recommendation 31

To ensure the Inspector of the new commission can effectively carry out essential statutory audit functions, the NSW Government should write to the Commonwealth Government

⁴¹³ Email from Inspector Levine to the Review Secretariat, 10 August 2015.

seeking an amendment to allow the Inspector to access telephone intercept material for the purpose of auditing the new commission.

Adjudicating witness protection appeals

Under the *Witness Protection Act 1995*, the Police Commissioner 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 is also empowered to resolve complaints from protected witnesses about matters relating to how they are managed and assisted within the program.⁴¹⁴

In Victoria, the power to determine appeals against decisions of the Chief Commissioner of Police to terminate witness protection arrangements is vested in the IBAC, which also investigates misconduct by police personnel.⁴¹⁵ So to that extent, there is a precedent for transferring this power to the new body. However, the Ombudsman's submission contends 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 information provided by those sources and/or carries out those investigations.⁴¹⁶

I am not convinced that it is 'highly inappropriate' that the new body could review a decision to terminate witness protection arrangements simply because the protected witness is known to it in that same context. Looked at another way, the protected witness may in fact be better off where the appeal body is aware of the circumstances that are alleged to still give rise to danger. I also note that in Queensland, the Crime and Corruption Commission is responsible for managing all of Queensland's protected witness program, making it (according to its website):

[T]he only independent commission in Australasia with this responsibility. Elsewhere in Australia and New Zealand, witness protection programs are managed by state and territory police forces.⁴¹⁷

The 'appeal' and complaints mechanisms in the *Witness Protection Act* are really a form of modified oversight by the Ombudsman. While conflicts of interest with individual staff do

⁴¹⁴ NSW Ombudsman submission, p 41.

⁴¹⁵ Independent Broad-based Anti-corruption Commission, *Annual Report 2013-2014*, p 30.

⁴¹⁶ NSW Ombudsman submission, p 41.

⁴¹⁷ <http://www.ccc.qld.gov.au/witness-protection>.

need to be managed, I do not think the transfer of the appeals function to the new body is inappropriate.

Recommendation 32

To recognise that an organisation with specialist police knowledge may be best placed to consider witness protection decisions of the Police Commissioner under the *Witness Protection Act 1995*, this function could be moved from the Ombudsman to the new commission.

Monitoring the use of emergency anti-terrorism detention powers

Pursuant to the provisions of the *Terrorism (Police Powers) Act 2002*, the Ombudsman has the jurisdiction to scrutinise the exercise of preventative detention powers conferred on police and correctional officers. Among other things, the Ombudsman is required to respond to complaints from people held under these powers, while they are being detained in a police facility, a correctional centre, a juvenile justice centre, or any other place.⁴¹⁸

While I note that other agencies such as Corrections and Juvenile Justice are involved in carrying out preventative detention orders made under this Act, the Ombudsman's review role is primarily about the exercise of police powers (as the name of the Act suggests). I also note that persons subject to preventative detention orders also have a right to contact the PIC, not just the Ombudsman. It would be regrettable to lose ready access to the Ombudsman Office's expertise in correctional matters were this function transferred to the new single oversight body. However, the Parliament has more recently created an Inspector of Custodial Services, who may also be in a position to provide oversight of custodial arrangements.

I also note that Part 2A of the *Terrorism (Police Powers) Act* is due to sunset in December this year, although the Act is currently under review by the Department of Justice. It may be that there is a proposal to seek to extend that time period arising from the review. Given that possibility, I am inclined to recommend that the monitor power transfer to the new body, at least in relation to police action, but believe a final decision should be made as part of the current statutory review.

⁴¹⁸ NSW Ombudsman submission, pp 41-42.

Recommendation 33

To ensure that any change to the Ombudsman's responsibility to monitor and report on activities relating to preventative detention under the *Terrorism (Police Powers) Act 2002* is consistent with other government policy in this area, the question of which agency should undertake this monitoring work in the longer term should be considered further as part of the current statutory review of that Act and:

- i. the Ombudsman should continue to exercise those powers until the outcome of the statutory review is finalised; and
- ii. as the Police Division of the Ombudsman's Office is to be absorbed into the new commission, the statutory review should take into account that expertise in relation to these matters is likely to move to the new commission.

Reporting on use of emergency powers relating to riots and public disorder

Pursuant to section 87O of the *Law Enforcement (Powers and Responsibilities) Act 2002*, the Ombudsman has jurisdiction to scrutinise the exercise by police of their powers to establish cordons and roadblocks, to search persons and things, and to disperse groups in connection with the prevention or control of large-scale public disorder. Moreover, the Police Commissioner must notify the Ombudsman when these powers are to be used so that their exercise can be monitored in real time.⁴¹⁹

My view is that the Ombudsman's functions under this section relate to inherently difficult and demanding policing environments that may well generate complaints. As such, these functions are classic police oversighting functions and should therefore be transferred to the new body.

Recommendation 34

To recognise that statutory monitoring and review functions related to common policing issues should generally be exercised by the new commission rather than the Ombudsman, the role of the Ombudsman under the *Law Enforcement (Powers and Responsibilities) Act 2002* should be conferred on the new commission.

⁴¹⁹ NSW Ombudsman submission, p 42.

Legislative reviews

Acts conferring new powers on police frequently require the Ombudsman to monitor their operation for between one and three years, and then report back to the NSW Parliament on their effectiveness. These new powers may relate to searches, directions, on-the-spot fines, crime scene management, drug detection dogs, DNA evidence, the monitoring of child sex offenders and the disruption of criminal organisations. In his submission, the Ombudsman acknowledged that:

As most of our legislative review 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.⁴²⁰

In his Annual Report for 2013-14, the Ombudsman summarised a number of reviews his office was undertaking or had undertaken into legislation relating to police under the chapter heading of 'Police'.⁴²¹ From this I take it that the primary input into these reviews came from the PDOO. And indeed, these types of reviews also fit within the broad scope of one of the four goals set out in the PIC's Annual Report for 2013-14, namely 'to prevent serious officer misconduct by supporting improvements to the NSW Police Force and the NSW Crime Commission systems and practices'.⁴²² So it seems to me that such reviews would fit neatly within the jurisdiction of the proposed new combined oversight body. Accordingly, I recommend that this legislative review function be transferred to the new body.

Recommendation 35

To recognise that statutory monitoring and review functions directly related to common policing issues should generally be exercised by the new commission rather than the Ombudsman, the legislative review functions of the Ombudsman not otherwise specifically dealt with in these recommendations should be conferred on the new body.

⁴²⁰ NSW Ombudsman submission, p 43.

⁴²¹ NSW Ombudsman, *Annual Report 2013-2014*, pp 50-53.

⁴²² Police Integrity Commission, *Annual Report 2013-2014*, p. 5.

Impact on Ombudsman's other functions

There are a number of other important functions which the Ombudsman carries out that his office submits benefit from its police oversight responsibilities and the knowledge and relationships with police that this oversight work creates.

For example, in relation to child protection oversight, the Ombudsman's responsibilities 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
- receiving and dealing with notifications of reportable allegations and convictions that arise in the course of an employee's work with children.

The Ombudsman's submission states: 'Our most experienced investigators regularly liaise with senior police from local area commands and the NSW Police Force Child Abuse Squad in relation to the investigation of serious reportable allegations'.⁴²³ I see no reason why this arrangement cannot continue after the PDOO is transferred over to the new body, subject to the proviso that if any police misconduct is discovered in this space, it must be notified to the new body and followed up. In Victoria, where all external oversight of police misconduct has been transferred to the IBAC, the Ombudsman nevertheless continues to have a significant jurisdiction around child protection matters.⁴²⁴

More generally, the Ombudsman's Office should continue its role of monitoring and reporting on the effectiveness of multiagency programs, many of which involve police. So too with the oversight of Joint Investigation Response Teams, subject again in each case to the proviso that the new police oversight body is notified of any issues amounting to police misconduct which it can then take over if it is in the public interest to do so.⁴²⁵

I have thought carefully about whether the transfer of the PDOO could adversely affect the operation of the Ombudsman's Aboriginal Unit, which was set up in accordance with a recommendation by Commissioner Wood in 1996 to:

- focus upon the significant volume of complaints by Aboriginal people concerning police misconduct
- research and monitor issues concerning the complex and often troubling relationship between police and Aboriginal communities, and prepare reports on these matters
- assist in establishing better liaison, particularly in remote areas

⁴²³ NSW Ombudsman submission, p 45.

⁴²⁴ Victorian Ombudsman, *Annual Report 2013-2014*, p 32.

⁴²⁵ NSW Ombudsman supplementary submission, p 12.

- assist in the implementation of the Police Service Aboriginal Strategic Plan and the recommendations of the Royal Commission into Aboriginal deaths in Custody.⁴²⁶

This unit is currently located in the Ombudsman’s Strategic Projects Division. While it has a complaint handling function to provide ‘support and assistance to Aboriginal people about making a complaint - especially in relation to police, community services, housing, disability and Aboriginal agencies such as land councils...’,⁴²⁷ I see no reason to transfer the police component of this unit across to the new commission, provided (as with the other areas discussed above) that the commission is notified of any issues amounting to police misconduct which it can then take over if it is in the public interest to do so.⁴²⁸ As highlighted by the Acting Ombudsman in his supplementary submission: ‘[O]ur 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’.⁴²⁹ Indeed the Strategic Projects Division of the Ombudsman’s Office had primary responsibility for auditing the implementation of NSW Police Force’s new *Aboriginal Strategic Direction* (ASD) in the Barrier Local Area Command, as outlined by the Deputy Ombudsman:

The staff directly responsible for auditing Barrier LAC’s [Local Area Command’s] implementation of the ASD were all from the Strategic Projects Division – including members of the Aboriginal Unit, a Senior Project Officer and the Assistant Ombudsman, Julianna Demetrius. The SPD [Strategic Projects Division] has primary responsibility for managing this office’s commitment to monitoring the implementation of the ASD in its current iteration, and for keeping the Commissioner and the members of his Police Aboriginal Strategic Advisory Committee (PASAC) informed about the outcomes.⁴³⁰

Summarising the scope and outcome of this audit in the latest Annual Report, the Ombudsman said:

This year we audited the implementation of the ASD in the Barrier Local Area Command which includes Broken Hill, Dareton, Wilcannia and Menindee in Western NSW ... The new (Barrier) commander has acted swiftly to address a number of the issues our audit uncovered.⁴³¹

While the Specific Projects Division works closely with the PDOO, I can see no reason why this type of auditing should not continue after the PDOO has been transferred. My only proviso, once again, is that any issues amounting to police misconduct must be notified to the new body which can then investigate if it is in the public interest to do so.

⁴²⁶ Wood Royal Commission, first interim report, p 109; NSW Ombudsman submission, p 46.

⁴²⁷ NSW Ombudsman website, <https://www.ombo.nsw.gov.au/what-we-do/indigenous/our-aboriginal-unit>

⁴²⁸ www.ombo.nsw.gov.au/what-we-do/indigenous/our-aboriginal-unit.

⁴²⁹ NSW Ombudsman supplementary submission, p 10.

⁴³⁰ Email from Deputy Ombudsman Michael Gleeson to the Review Secretariat, 5 August 2015.

⁴³¹ NSW Ombudsman, *Annual Report 2013-2014*, pp 101 and 104.

I do accept, however, that moving all police oversight out of the Ombudsman's Office will mean the new body must consider how it can continue the Ombudsman's work following on from the Wood Royal Commission to improve the relationship between members of our Aboriginal community and police. It may be that it can continue to work closely with the Aboriginal Unit in the Ombudsman's Office and I believe that would be worth exploring operationally. It may also be helpful to give this issue prominence in the legislation establishing the new body, including a reference to the option of entering into cooperative arrangements with the Aboriginal Deputy Ombudsman.

Recommendation 36

To ensure that the new commission has the flexibility and resources to continue the work of the Ombudsman in improving the relationship between the Aboriginal community and the NSW Police Force, the commission should be able to enter into cooperative protocols with the Aboriginal Deputy Ombudsman.

Interaction of the new commission with WorkCover

WorkCover (soon to be SafeWork NSW in relation to its regulatory functions) has responsibility for administering the *Work Health and Safety Act 2011* and its related legislation. Its primary focus is to promote safe systems of work and to enable enforcement when this has not occurred. 'If any enforcement or prosecution action does take place', WorkCover advised this review, 'it is usually in regards to an organisation or Person Conducting a Business or Undertaking (PCBU) and not an individual'.⁴³²

That statement should be of some comfort to members of the Police Force who must surely struggle more than most to identify and manage their safe work obligations in such an inherently dangerous and unpredictable work environment.

In the area of police oversight, however, WorkCover's primary involvement relates to critical incidents, which it explained in its submission as follows:

When a police critical incident occurs it is WorkCover's role to investigate in relation to work health and safety. To facilitate cooperation and support during instances where parallel investigations are being conducted, WorkCover appoints a liaison officer to ensure incidents are assessed on a case by case basis. WorkCover has a constructive relationship with the NSW Police Force and holds regular meetings at the Executive level. WorkCover is also open

⁴³² WorkCover submission, p 2.

to developing an agreed operating framework that meets the objectives of both agencies and strikes a balance between protecting the community and NSW Police Force officers.⁴³³

Given that work place safety issues may arise during any critical incident, WorkCover must always be involved at an early stage to determine, at the very least, whether its jurisdiction has been enlivened and then whether any immediate remedial steps should be taken. To that extent, there may well be cross over with police critical incident investigators and oversight officers, which may increase if prosecution under the *Work Health and Safety Act* becomes necessary. In such cases, the cooperative arrangements outlined by WorkCover above are the way forward. And in my view, they are preferable to any attempt to specify an inflexible jurisdictional hierarchy in the critical incident space (this is discussed further in the next chapter).

I note that it would not be appropriate to require an independent oversight body to enter into any cooperative arrangements with WorkCover, although to the extent it may consider it to be useful then I would encourage that to happen.

Recommendation 37

To ensure that the distinct and important investigative functions of the NSW Police Force and the WorkCover Authority (soon to be SafeWork NSW in relation to its regulatory functions) do not adversely impact each other in relation to a particular incident, or in relation to witnesses who are interviewed about the same incident by both agencies, the Police Commissioner and the WorkCover Authority should enter into a cooperative arrangement about the management of investigations into police workplace incidents.

Recommendation 38

To ensure that investigating officers have a useful reference on how to perform their functions in a way that complements, rather than detracts, from the work of others at the scene of an incident, cooperative arrangements between the WorkCover Authority and the NSW Police Force should not seek to prioritise one investigative function over another.

Responding to report recommendations

As I noted in chapter 7, there is no requirement for the Police Commissioner to accept the recommendations of oversight bodies, which I consider remains appropriate. I do believe it

⁴³³ WorkCover submission, p 1.

is important for transparency, however, that the Police Force be required to report in a timely way to the new commission about what action it is taking in response to a commission recommendation and, if no action is being taken, to provide an explanation.

In relation to accountability of the PIC, the Police Association also submits that obligations should be 'placed on the oversight body to at the very least consider the findings of the Inspectorate and publish a response to those findings'.⁴³⁴

In Victoria, the IBAC is oversighted by the Victorian Inspectorate and is subject to such a reporting obligation. To quote from the Victorian Inspectorate's Annual Report for 2013-14:

Section 78 of the VI [Victorian Inspectorate] Act gives the VI the power to make recommendations to the IBAC in relation to any action that the VI considers should be taken. The IBAC is not required to comply with any such recommendation but the VI may require the IBAC to give it a report stating whether or not it intends to take a recommended action and, if the IBAC does not intend to take that action, to state the reason for not taking it.⁴³⁵

My view is that the new commission should be made similarly accountable to its Inspector. I therefore recommend that a provision, similar to section 78 of the *Victorian Inspectorate Act 2011*, be adopted.

Recommendation 39

To ensure that recommendations of the Inspector of the new commission are considered and responded to in a timely way, the new commission should provide a report stating whether or not it intends to accept a recommendation or take the requested action, and provide reasons if not.

Recommendation 40

To ensure that recommendations of the new commission are considered and responded to in a timely way, the Police Commissioner should provide a report stating whether the NSW Police Force intends to accept a recommendation or take the requested action, and provide reasons if not.

⁴³⁴ Police Association of NSW submission, p 21.

⁴³⁵ Independent Broad-based Anti-corruption Commission, *Annual Report 2013-2014*, p 9.

Access to medical treatment

As outlined in chapter 7 (p.68), the Police Association submitted to this review that being summoned by an oversight body or being required to give evidence to such a body 'can be a stressful and traumatic experience, and can place the mental health and safety of officers at risk'.⁴³⁶ This is exacerbated when any such officer is given a non-disclosure direction that makes it a criminal offence to consult a doctor or allied health professional in connection with that stress.⁴³⁷

While I note that a variation can be sought on a non-disclosure direction, I acknowledge the Association's position that seeking such a variation may compromise the applicant's position. This is an issue, however, that is not limited to police oversight, in that it also applies to the ICAC which falls outside my terms of reference. While this is an important issue that requires detailed consideration, as it is not confined to police oversight it would not be appropriate for me to recommend a specific legislative solution.

Recommendation 41

To ensure that individual police officers who are the subject of inquiries can access appropriate medical support, the NSW Government should give consideration to exempting disclosures in connection with oversight investigations to medical professionals in a similar way to the existing exemptions relating to legal advisers.

⁴³⁶ Police Association of NSW submission, p 23.

⁴³⁷ Police Association of NSW submission, p 23.

10. Oversight of critical incidents

The NSW Police Force should retain responsibility for the investigation of critical incidents. However, the Force should be required to notify the new commission of all such incidents as soon as practicable. At its discretion, that oversight body should also be able to conduct real time monitoring of any police critical incident investigation.

When undertaking real time monitoring, the new commission's representative should be able to watch witnesses being interviewed, discuss the progress of the investigation with officers and observe steps taken to preserve physical evidence. The commission may report any concerns to the Coroner and the Police Commissioner while the investigation is on foot and make a public report at its conclusion. However, the commission's representative should not be able to issue any directions to police investigators.

The details of the new framework should be set out in legislation, although detailed operational arrangements may be recorded by way of interagency protocol.

The NSW Police Force's Critical Incident Guidelines should be revised as necessary and then publically released as soon as practicable.

The majority of submissions I received identified critical incidents as a priority area for review. I agree with those submissions, noting that the difficulties arising from recent critical incident events are likely to be one of the reasons this broader review was instigated.

The current system was reviewed in 2013 by the Honourable Robert McClelland. Mr McClelland, as he then was, recommended an oversight model that would oblige the NSW Police Force to notify the Ombudsman of a critical incident 'as soon as it is reasonably practicable to do so' and to provide oversight 'in accordance with arrangements ... agreed to between the Ombudsman and the Commissioner of Police'.⁴³⁸ The Police Integrity Commission's (PIC) submission to this review, however, argued that Mr McClelland's proposed regime is less rigorous than the one currently in place for the oversight of complaints. According to the PIC:

[T]he proposed model places an obligation on the Ombudsman to agree upon oversight arrangements with the Commissioner of Police whereas arrangements are stipulated in legislation for complaints oversight or independently agreed between this Commission and

⁴³⁸ The Hon Robert McClelland, Oversight of Police Critical incidents ('McClelland report'), 29 November 2013, p xii and xviii

the Ombudsman. Also, in the McClelland model the Ombudsman's oversight of a critical incident investigation cannot adversely impact on the timely completion of an investigation, whereas for a complaint there is no such impediment.⁴³⁹

Mr McClelland's recommendations have not been actioned and the system of oversighting critical incidents appears to remain as it was before his review was undertaken. It is therefore not surprising that the Ombudsman submitted a similar view as the PIC to this review, stating 'the most significant gap in the current system for civilian oversight of police relates to the independent oversight of NSWPF investigations into critical incidents'.⁴⁴⁰

Accordingly, this chapter outlines the current arrangements for the oversight of police critical incident investigations in New South Wales. It considers alternative models from other jurisdictions, and recommends a model that provides greater independent oversight of the investigation of critical incidents.

Why has oversight of critical incidents proved to be a difficult policy issue?

One might fairly ask, as I did many times during this review: what is it that makes critical incidents so hard to deal with? Almost invariably involving a police action causing the death of, or serious injury to, a member of the public or to another police officer, critical incidents are often coloured by tragedy and highly charged with emotion. No police officers I have been associated with would ever strap on their appointments – their pistol, their Taser, their capsicum spray, their baton or their handcuffs – before they go on duty, with the intention of hurting, let alone killing, anybody. And no amount of training can ever prepare a front line police officer for every eventuality. Members of the general public have the comfort of knowing that, rather than stepping into a violent confrontation, we can always dial 000 for help. But the police who respond to such calls know that when they arrive on the scene, the buck stops with them. As noted in the Police Force submission: 'In situations from which many would instinctively flee, police officers are expected to intervene'.⁴⁴¹ And they do this in the knowledge that while they have to make split second decisions under often terrifying and stressful circumstances, their conduct will later be judged by those with the full benefit of hindsight. To quote again from the Police Force submission: 'Decisions that are forced on an officer in an instant can be clinically dissected by tribunals over days, months – and sometimes years'.⁴⁴²

As such, any reformed system that simply equates a critical incident to a complaint is bound to get police offside. While a critical incident always involves police conduct, it does not

⁴³⁹ Police Integrity Commission submission, pp 11-12.

⁴⁴⁰ NSW Ombudsman submission, p 55.

⁴⁴¹ NSW Police Force submission, p 2.

⁴⁴² NSW Police Force submission, p 2.

follow that such conduct amounts to police misconduct. Indeed, it may be conduct warranting a bravery award. That said, however, the understandable empathy within the Police Force for an officer who has been involved in a critical incident, precisely because the emotional and sometimes physical trauma to that officer could be great and the impact on the officer's future could be severe, may lead to a critical incident investigation that is less rigorous than the public should reasonably expect. As the NSW Coroner observed:

It is not suggested police officers investigating deaths that occur in an operational setting deliberately seek to "cover-up" misconduct or "run dead". Rather, in my experience, the understandable empathy more senior officers feel for the junior officers usually involved in these incidents can undermine the impartiality of investigators and internal review 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. On occasions searching questioning of the involved officers and other witnesses is appropriate. Once the opportunity to do that is missed it is often irretrievable and can negatively impact on other aspects of the investigation.⁴⁴³

With no doubt similar concerns in mind, a number of review participants have proposed, in one way or another, that the NSW Police Force should not be involved in the investigation of critical incidents at all. For example, the Public Interest Advocacy Centre submitted that 'an independent body should have the functions of critical incident investigation, removing that function from the Police Force'.⁴⁴⁴

In regard to a death resulting from an association with police contact, the NSW Police Force itself acknowledges that a transparent and comprehensive investigation is necessary. It notes, however, that in addition to the duty owed to the deceased person, their family and the general community, the Police Force also has a 'duty to its officers who have been involved in traumatic events and whose performance is under the microscope, and to the broader body of police to ensure that investigations are objective, thorough and accurate'.⁴⁴⁵

So it can be seen that while critical incidents do not necessarily equate with misconduct, it is essential that they are investigated in a manner that instils confidence in the public. Striking the right balance in this space has proven to be the single most difficult task I have undertaken during my review. I am optimistic that the model I have recommended achieves that balance; or if not, then a better balance than currently exists.

⁴⁴³ NSW State Coroner submission, pp 3-4.

⁴⁴⁴ Public Interest Advocacy Centre submission, p 10.

⁴⁴⁵ NSW Police Force submission, p 16.

What is a critical incident?

The term ‘critical incident’ is not defined in New South Wales law. However, the Critical Incident Guidelines (which have been developed by the NSW Police Force Professional Standards Command to establish policy and provide police officers with operational guidance for managing critical incidents) define such an incident as one involving a member of the Police Force, which results in the death or serious injury to a person:

- arising from the discharge of a firearm by the member
- arising from the use of appointments or application of physical force by the member
- arising from a police vehicle pursuit or from a collision involving a NSW Police Force vehicle
- in police custody
- arising from a NSW Police Force operation.⁴⁴⁶

The guidelines do not define the term ‘Police Force operation’ – an issue which I will consider later in this chapter.

In addition to death or serious injuries, a ‘critical incident’ can also be ‘any other event, as deemed by a region commander, that could attract significant attention, interest or criticism from the community, and the circumstances are such that the public interest is best served through an investigation independent of the officers involved.’⁴⁴⁷

Once a critical incident has been declared, a Critical Incident Investigation Team (CIIT) is appointed by the Region Commander.

The CIIT investigates the critical incident and the circumstances surrounding it by collecting evidence from the scene, from the police officers involved, and from other witnesses and sources. This evidence:

- enables the NSW Police Force 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
- for instances resulting in death, can assist the Coroner to conduct an inquest.⁴⁴⁸

Current oversight of critical incident investigations in New South Wales

As noted at the beginning of this chapter, there is currently no legislative framework in New South Wales for the oversight of police critical incident investigations. However, there are

⁴⁴⁶ NSW Police Force, *Critical Incident Guidelines* (‘Critical Incident Guidelines’) August 2012.

⁴⁴⁷ Critical Incident Guidelines.

⁴⁴⁸ NSW Ombudsman submission, pp 56-57.

several agencies that can and do become involved in the investigation and oversight of police critical incidents, depending on the circumstances.

In the case of a critical incident involving death, there is a legislative requirement for the Coroner to conduct an inquest.⁴⁴⁹ In these circumstances, the Critical Incident Guidelines specify that the investigation must be led by the Homicide Squad, and reviewed by the Professional Standards Command. The CIIT prepares a brief of evidence for the Coroner, who in turn can provide instructions and directions to the CIIT during its investigation.

The Coroner generally has no role in critical incidents that result in serious injury, unless the injury is the result of a fire or explosion or certain other matters that fall within the office's jurisdiction.

Critical incidents are sometimes the subject of a complaint under Part 8A of the *Police Act 1990*. Where this occurs, the Ombudsman can monitor the police investigation into the incident.

The Ombudsman has no power to monitor any such investigation unless a complaint has been made. Moreover, there is currently no statutory requirement for the NSW Police Force to notify the Ombudsman that a critical incident has occurred.

The PIC has no specific role in overseeing a critical incident investigation. However, the PIC can investigate, either by its own motion or following the receipt of a complaint, whether there was any serious misconduct in relation to the investigation of the critical incident.

The WorkCover Authority of NSW (WorkCover)⁴⁵⁰ is responsible for ensuring compliance with the *Work Health and Safety Act 2011*. In that regard, the Police Force is required to immediately notify WorkCover of critical incidents resulting in death or serious injury.⁴⁵¹ WorkCover has authority to investigate the circumstances of these critical incidents 'to promote safe systems of work and enable enforcement where this has not occurred.'⁴⁵² WorkCover does not oversight the police investigating the critical incident. WorkCover's submission to the review noted that '[i]f any enforcement of prosecution action does take place, it is usually in regards to an organisation or Person Conducting a Business or Undertaking (PCBU) and not an individual.'⁴⁵³

⁴⁴⁹ Coroners Act 2009, s 23.

⁴⁵⁰ As noted in earlier in the report, the *State Insurance and Care Governance Bill 2015* will, when proclaimed, abolish the WorkCover Authority and confer its workplace safety regulatory functions on a new agency known as 'SafeWork NSW'.

⁴⁵¹ Work Health and Safety Act 2011, ss 35 and 38.

⁴⁵² WorkCover submission, p 1.

⁴⁵³ WorkCover submission, p 2.

Although there are clearly a number of agencies that become involved and impact on the work of investigating police following a critical incident, from a public policy perspective, there are great benefits for individual police as well as a strong public interest in:

- the Police Force being, and being seen to be, accountable for its investigation practices when a death has arisen in connection with policing activities
- the Police Force being as safe a place to work as it can be given the inherently dangerous environment in which it operates
- the Police Force being subject to the direction of the Coroner in the compilation of briefs of evidence to enable a sound finding to be made around the circumstances of a death.

Concerns about oversight of critical incident investigations

A number of submissions commented specifically on a perceived duplication inherent in the circumstances that surround critical incidents. The NSW Police Force stated:

There are currently significant regulatory overlaps in the oversight of police critical incidents, with a range of bodies having a stake in the investigation and accompanying judicial process. This situation has proven especially problematic for police who are required to respond to sometimes conflicting requests from the Coroner, WorkCover and the Ombudsman while attempting to compile a criminal brief...⁴⁵⁴

This situation is not only problematic for police. The duplication of oversight has at times resulted in public reports by different agencies, detailing the same events, but with differing conclusions. This can be distressing for the families and friends of the person injured or killed, and also for the police officers involved. Such duplication is illustrated by the series of reports and investigations generated following the death of Brazilian student Roberto Laudisio-Curti.

Following Mr Laudisio-Curti's death, a CIIT was established in line with police protocol. This CIIT was led by officers from the Homicide Squad and the Coroner conducted a full inquest. After receiving a Part 8A complaint, the Ombudsman also became involved by monitoring the critical incident investigation. Then, following the Coroner's finding that the actions of the police who restrained Mr Laudisio-Curti should be referred to the PIC, the matter was further investigated by the PIC which subsequently referred some police officers to the Director of Public Prosecutions for consideration of criminal charges. In total, four agencies were involved in investigating the circumstances surrounding Mr Laudisio-Curti's death.

In relation to the critical incident investigation, the Coroner and the Ombudsman expressed differing views. In her findings, the Coroner praised the police who investigated Mr Curti's

⁴⁵⁴ NSW Police Force submission, p 10.

death, concluding that they ‘demonstrated a skill and lack of bias ... in a painstaking and distressing investigation. I thank them for a good job well done under various pressures, including those of time.’⁴⁵⁵ The Ombudsman, however, criticised the officers, stating that while they conducted a thorough job in compiling a comprehensive brief for the Coroner, they failed to adhere to the Critical Incident Guidelines and failed to ‘examine the lawfulness of police action and the extent of police compliance with relevant guidelines, legislation, internal policy and procedures.’⁴⁵⁶

There is no doubt in my mind that the job of a CIIT is a daunting one given the potential for competing and time consuming demands from oversight, regulators and other justice system players. I am also acutely aware that there are different opinions about the way in which oversight and regulatory agencies have conducted themselves in various cases, but it is not for this review to make any recommendations or findings in relation to specific matters.

Should there be an independent body to investigate critical incident investigations?

A number of review participants proposed that an independent external agency be established to conduct all critical incident investigations. As contended by the NSW Council for Civil Liberties: ‘The recent history of police investigations of police critical incidents/alleged misconduct in NSW provides persuasive reason as to the need for independent investigation of such matters.’⁴⁵⁷

In 2011, the Victorian Office of Police Integrity conducted a review of investigations of deaths associated with police contact, and in particular, considered the appropriateness of police conducting investigations into police related deaths. The office noted that ‘[a]lthough some consider police to have the most relevant investigative expertise and a greater capacity to respond in a timely fashion, others question the independence and impartiality of police in conducting such investigations.’⁴⁵⁸

There is a view that police have an inherent conflict of interest in the outcome of a critical incident investigation, whereby the ‘police “search for the truth” may conflict with their interest in protecting the reputation’ of the Police Force.⁴⁵⁹ The NSW Coroner suggested that because of the culture of loyalty and empathy within police services, detectives

⁴⁵⁵ NSW State Coroner, *Inquest into the death of Roberto Laudisio-Curti*, 14 November 2012, pp 20-21.

⁴⁵⁶ NSW Ombudsman, *Ombudsman monitoring of the police investigation into the death of Roberto Laudisio-Curti*, a Special Report to Parliament under s.161 of the *Police Act 1990*, February 2013, tabled 28 February 2013, p 4.

⁴⁵⁷ NSW Council of Civil Liberties submission, p 5.

⁴⁵⁸ Office of Police Integrity, *Review of the investigative process following a death associated with police contact* (‘OPI review’) June 2011, p 13.

⁴⁵⁹ OPI review, p 13.

investigating a police critical incident may have difficulty objectively assessing the actions of the officers involved.⁴⁶⁰

As the Office of Police Integrity pointed out, the alternative to police investigating police would be to establish a new independent investigative body, with all of the necessary experience and skills required to investigate homicides. An effective investigation into a death or serious injury involves significant expertise and resources, including:

- highly skilled and trained investigators
- forensic and ballistic capability
- scene attendance supports (such as vans, lights, travel kit, 24/7 staffing, forensic suits)
- available transport to facilitate prompt attendance to scenes state-wide.

In addition, investigators also need sufficient resources and requisite powers to:

- cordon off crime scenes to prevent entry by unauthorised persons and preserve evidence
- control and divert traffic if required
- record, isolate and detain witnesses
- coordinate other services such as the Coroner, pathologist, undertaker, photographer, crime scene unit and dog squad
- examine the scene
- collect exhibits.⁴⁶¹

To replicate the skills of the Police Force in another agency would be extremely resource intensive. As an example, I note that in British Columbia, which has a population of 4.6 million people, an Independent Investigations Office was established in 2012 to investigate officer-related incidents that result in death or serious harm. That office has a full time staff of 56 people and a budget of over \$8 million.⁴⁶² As the Victorian Office of Police Integrity noted, 'expertise, timeliness and taxpayers' money would be sacrificed in establishing any new investigative body independent of police.'⁴⁶³ While the PIC acknowledged in a report to Parliament on Operation Calyx⁴⁶⁴ that an independent investigative body would increase public confidence, it also stated that 'significant resources would be required to set up and operate ... [such a body] to investigate critical incidents.'⁴⁶⁵

⁴⁶⁰ NSW Coroner submission, p 1.

⁴⁶¹ OPI review, p 39.

⁴⁶² Independent Investigations Office of British Columbia, *Annual Report 2014/15*, pp 13 and 25.

⁴⁶³ OPI review, p 14.

⁴⁶⁴ Operation Calyx was held to investigate whether there was any police misconduct in the investigation by the NSW Police Force into the shooting of Adam Salter on 18 November 2009.

⁴⁶⁵ Police Integrity Commission, *Report to Parliament: Operation Calyx*, June 2013, p 269.

The PIC further noted in its submission to this review that:

... investigators must be able to reach the scene shortly after the [critical] incident has occurred so that evidence is not tainted or lost ... Were a NSW oversighting agency assigned an investigation function with regard to critical incidents, the distances officers from that agency may need to travel and the time that it may take them to reach the scene ... could impact adversely on the effectiveness of those investigations.⁴⁶⁶

In his submission, the Ombudsman contended that it would not be practical to have an independent body investigating police critical incidents, and that '[e]ven if NSW was to invest the substantial sums needed to enable independent investigations of some or all critical incidents, the IPCC [Independent Police Complaints Commission] model suggests that at least some incidents will continue to be investigated by police and most will require specialist police support.'⁴⁶⁷

Legislation governing the IPCC in England and Wales, and the Office of the Police Ombudsman in Northern Ireland (OPONI), provides for critical incidents to be investigated by the oversight agency. However, those jurisdictions are geographically much smaller than New South Wales and have access to a much greater range of privatised services required for such investigations, including forensic and pathology services. There are also greater numbers of critical incidents in those jurisdictions that justify the cost and resources for what is essentially a stand-alone homicide investigation unit, separate from the Police Force. For example, in the UK the IPCC reported that in 2014, there was a total of 130 deaths as a result of, or following, police contact.⁴⁶⁸ In New South Wales, by contrast, the Department of Justice informed me that there were a total of 30 critical incidents during 2014.⁴⁶⁹ Notwithstanding these points, the question of whether or not there should be an independent body established to investigate critical incidents, remains important. The IPCC and the OPONI, which are empowered to independently investigate critical incidents, will therefore be examined in further detail below, in addition to models in some other jurisdictions.

Approaches in other jurisdictions

As part of the Victorian Office of Police Integrity review of investigations of deaths associated with police contact, a detailed research and consultation process was undertaken in relation to the legislative and policy framework for investigating critical incidents. After

⁴⁶⁶ Police Integrity Commission submission, p 19.

⁴⁶⁷ NSW Ombudsman submission, p 94.

⁴⁶⁸ Independent Police Complaints Commission, *Deaths during or following police contact: Statistics for England and Wales 2013/14*, Research and Statistics Paper 27, July 2014, p 3. These figures include: 12 road fatalities, 11 deaths in custody, 68 suicides following police custody and 39 deaths following police conduct.

⁴⁶⁹ Email from Police Division of the Department of Justice to the Review Secretariat, 12 August 2015.

examining other jurisdictions in Australia and overseas, the research identified the following principles to underpin an optimal framework for critical incident investigations:

- independence
- effectiveness
- promptness (timeliness)
- next of kin involvement
- sufficient public scrutiny (transparency).⁴⁷⁰

The review identified five models worldwide for investigating deaths associated with police conduct. These were:

- investigation by another police service (in parts of Canada, including Quebec, and Nova Scotia)
- hybrid civilian/police model (Alberta, Canada)
- civilian managed/supervised investigation (IPCC in England and Wales)
- embedded civilian observer (Los Angeles Police Department)
- independent model (Northern Ireland, South Africa and New Zealand).⁴⁷¹

All Australian jurisdictions have a similar model to New South Wales, where the Police Force has primary investigative responsibility for critical incidents, and to a greater or lesser degree, there is independent oversight by anti-corruption or integrity agencies.

England and Wales

There is a legislative requirement in England and Wales for the police to notify the IPCC of deaths and serious injuries as a result of police conduct.⁴⁷² Once a referral is made to the IPCC it must determine whether the matter should be investigated. If the IPCC decides that the matter should be investigated then it must determine the mode of investigation, having regard to the seriousness of the case and the public interest.⁴⁷³ The IPCC can decide to:

- Investigate the matter – an independent investigation conducted by the IPCC’s own investigators.
- Manage a police investigation – the investigation is carried out by police under the direction and control of the IPCC.
- Supervise a police investigation – the investigation is conducted by police, under their own direction and control. The IPCC will set out the terms of reference for the investigation and receive a report when the investigation is complete.

⁴⁷⁰ OPI review, p 8.

⁴⁷¹ OPI review, Appendix 8.

⁴⁷² *Police Reform Act 2002* (UK), Schedule 3, Part 2A, s 14C.

⁴⁷³ *Police Reform Act 2002*(UK), Schedule 3, ss 5, 14, 14D and 15.

- Refer the matter back to the Police Force – the IPCC reviews the circumstances of the matter and refers it back to the police force to be dealt with as it considers appropriate.⁴⁷⁴

The IPCC can, at any time, re-determine the mode of investigation.⁴⁷⁵

While there is an option in England and Wales to have an independent civilian oversight body (the IPCC) investigate all critical incidents, in practice it seems it rarely happens. The IPCC only independently investigates a small fraction of those matters referred to it. For example, in 2012-13, of the total number of referrals received by it, including complaints and mandatory referrals of death and serious injury where no complaint was made, ‘about 94% [were] in fact referred back to be dealt with by the police themselves, sometimes with a degree of oversight by the IPCC.’⁴⁷⁶ The IPCC reports that any death in custody is initially dealt with as an independent investigation, and that in ‘cases where police action, or failure to act, may have contributed to the death’, all attempts are made to conduct fully independent investigations.⁴⁷⁷ The Commission noted in a recent report that it has ‘been open about the limitations that our resources have placed on our capacity to investigate some cases independently’.⁴⁷⁸

In conducting an ‘independent investigation’, the IPCC will still involve police during the investigation process. The IPCC reports that ‘[i]n an independent investigation, IPCC investigators take responsibility for direction and control of the scene – for example, deciding the extent of any forensic examination of the scene and what, if any, specialist forensic scientists are required to attend. The actual forensic examination is carried out by police crime scene examiners under our direction.’⁴⁷⁹

As I noted in chapter 6, the IPCC is currently being significantly overhauled following scathing observations in a House of Commons Home Affairs Committee report which found that the IPCC lacked the necessary resources and skills to effectively oversight the police forces. Of greatest concern is the committee’s criticism of the IPCC’s independent investigative capability, including:

- failure to locate evidence and propensity to uncritically accept police explanations for missing evidence

⁴⁷⁴ Independent Police Complaints Commission, Deaths during or following police contact: Statistics for England and Wales 2013/14, Research and Statistics Paper 27, p 15.

⁴⁷⁵ *Police Reform Act 2002* (UK), Schedule 3, Part 3, s 15.

⁴⁷⁶ Deborah Glass, *Towards greater public confidence – A personal review of the current police complaints system for England and Wales* (‘Review of police complaints system for England and Wales’) March 2014, p 8, available at <http://www.ipcc.gov.uk/sites/default/files/Documents/speeches/A-review-of-the-complaints-system-by-Deborah-Glass-March-2014.pdf>.

⁴⁷⁷ Review of police complaints system for England and Wales, p 35.

⁴⁷⁸ Review of police complaints system for England and Wales, p 35.

⁴⁷⁹ Review of police complaints system for England and Wales, p 37.

- lack of ‘investigatory rigour’ and ‘thorough investigation’
- slowness in responding to complaints and conducting investigations
- reliance on scene of crime officers from the force under investigation
- failure to critically analyse competing accounts, even with inconsistencies between officers’ accounts or a compelling account from a complainant.⁴⁸⁰

Given that all but one of these concerns arose from inquests, it suggests that the IPCC is struggling to fulfil its role as an independent investigator of critical incidents involving death. Accordingly, I do not believe that the IPCC approach to critical incidents is appropriate for New South Wales.

Northern Ireland

Many submissions suggested that the model for critical incident investigations in Northern Ireland could be applied in New South Wales.⁴⁸¹ The OPONI receives all complaints against police in Northern Ireland. While minor complaints can be referred back to the police for resolution, the Office of the Police Ombudsman is required to independently investigate all serious complaints and all critical incidents, which includes:

- all discharges of police firearms (including those used in riot situations)
- all fatal road traffic collisions involving police officers
- any death that may have occurred as a result of the actions of a police officer.⁴⁸²

Even if direct investigation of police-related deaths/injuries by an external body was considered appropriate, it would be difficult to replicate the OPONI model in New South Wales due to the size and scale of policing in this state. The Northern Irish Police Service has 6,780 officers⁴⁸³ and services an area of 13,843 square kilometres. In 2013-14, the Northern Ireland Ombudsman received 3,734 complaints.⁴⁸⁴ In contrast, even though the NSW Police Force has over twice the number of police officers (currently 16,636), it services an area 57 times larger than Northern Ireland (801,600 square kilometres). Further, in 2013-14 the NSW Police Force received 4,995 complaints against police, the NSW Ombudsman received 3,390 complaints and the PIC directly received 396 complaints against police.⁴⁸⁵ As such, I do

⁴⁸⁰ Home Affairs Committee, House of Commons, *Report HC 494 on the Independent Police Complaints Commission*, 29 January 2013, pp 5-6.

⁴⁸¹ Public Interest Advocacy Centre submission, p 11; Women’s Legal Services, p 2; Inner City Legal Centre (ICLC), NSW Gay and Lesbian Rights Lobby and ACON submission, p 4.

⁴⁸² Office of the Police Ombudsman for Northern Ireland, *The Police Complaints System in Northern Ireland*, p 5, <http://www.policeombudsman.org/getmedia/02508825-5b89-4148-9b3c-58b939261d65/The-Police-Complaints-System-in-Northern-Ireland.PDF>.

⁴⁸³ Police Service of Northern Ireland, *Workforce Composition figures*, http://www.psni.police.uk/index/updates/updates_statistics/updates_workforce_composition_figures.htm.

⁴⁸⁴ Northern Ireland Police Ombudsman, *Annual Report 2013/14*, p 4.

⁴⁸⁵ Lenny Roth, NSW Parliamentary Research Service, *External Oversight of Police Conduct*, Briefing Paper no. 6/2015, pp 14-15.

not believe that the Northern Ireland model for critical incident investigations is suitable for New South Wales.

New Zealand

In New Zealand, the Commissioner of Police is required by legislation to advise the Independent Police Conduct Authority (IPCA) of all instances where a police employee acting in the execution of his or her duty causes, or appears to have caused, death or serious bodily harm to any person. The notification is to be in the form of a written notice setting out particulars of the incident in which the death or serious bodily harm was caused.⁴⁸⁶ Once advised of an incident, the IPCA has an 'own motion' power to investigate injuries or deaths as a result of police conduct.⁴⁸⁷

However, the Chairperson of the IPCA advised me that generally, while the IPCA would have an investigator present at the crime scene and during the investigation, particularly in the case of a death, the IPCA operates 'on the premise that it is Police business to investigate any crime and they should be allowed to get on with that. It is no business of our staff member there to direct Police operations or to give advice about how the Police investigation should be conducted.'⁴⁸⁸

Maintaining police responsibility to investigate critical incidents

After considering the submissions and examining the management of critical incident investigations in other jurisdictions, I am of the view that the NSW Police Force is best placed to effectively investigate critical incidents. The Police Force has the necessary expertise and resources 24 hours a day, 7 days a week, to attend and investigate a critical incident scene quickly, and has the authority and resources to control the area and preserve evidence. As observed by the NSW Coroner, following a fatal critical incident:

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 ... An independent expert agency with authority to monitor and overview these investigations as they occur with a mechanism for quickly addressing shortcomings is highly desirable.⁴⁸⁹

Moreover, I am not persuaded that the number of critical incidents in New South Wales justifies a stand-alone civilian agency to investigate critical incidents. Indeed, one issue arising here is whether the number of critical incidents involving deaths would be sufficient to allow such an agency to maintain its homicide investigation skills.

⁴⁸⁶ Independent Police Conduct Authority Act 1988 (NZ), s 13.

⁴⁸⁷ Independent Police Conduct Authority Act 1988 (NZ), s 12(b).

⁴⁸⁸ Email from Sir David Carruthers, IPCA Chair to the Review Secretariat, 6 July 2015.

⁴⁸⁹ NSW Coroner submission, p 1.

Recommendation 42

To recognise that only the NSW Police Force has the appropriate investigative skills, and is the only agency that could maintain these skills at a sufficiently high level for a reasonable cost, the NSW Police Force should retain responsibility for investigating critical incidents.

I do wonder, however, if there is merit in creating a specialised internal unit within the NSW Police Force to investigate critical incidents. Rotated officers from Homicide, and perhaps other areas within the Force, could develop important skills in working with the Coroner, WorkCover and the relevant oversight body, and could potentially develop investigation techniques or processes of particular value to critical incidents. While this is a matter for the Police Commissioner, I believe that it is one which is worth exploring.

Although I have advised against the investigation of police critical incidents by a body completely independent of the Police Force, I hope I have made it clear that I nevertheless support transparency around critical incident investigations. If a person is injured or killed as a result of police conduct, the public must be assured that an adequate investigation will take place. As pointed out by Jumbunna Indigenous House of Learning, investigations that are 'rigorous, effective, efficient and independent' are critical, not only for maintaining public confidence, but because failure to do so could potentially compromise future prosecutions.⁴⁹⁰ It is essential that the public have confidence that an appropriate standard of police investigation will occur. I therefore now set out my recommended framework for more effective independent oversight of critical incident investigations.

A new framework for the oversight of critical incident investigations

As noted earlier in this chapter, there are several agencies that can and do become involved in the investigation and oversight of police critical incidents. The resulting overlaps and duplication were highlighted by the NSW Police Force:

[O]versight bodies with overlapping roles and responsibilities for critical incidents have tended to get in one another's way, wasting resources, complicating investigations and

⁴⁹⁰ UTS: Jumbunna submission, pp 6-7 and 11.

frustrating all involved ... It is imperative that judicial processes are not compromised by pre-emptive oversight, however well intentioned.⁴⁹¹

If my recommendation to create a single oversight agency is accepted, then by combining the PIC and the Police Division of the Ombudsman in the new commission, there will be one less agency in the critical incident oversight space and any overlap will be reduced to that extent.

In order to ensure police critical incident investigations are thorough and conducted effectively and transparently, I believe it is essential that the new commission be given legislative authority to monitor police critical incidents.

In regard to the new commission's powers, the PIC argues that, in relation to a critical incident, particularly where a person has died, the power to monitor the police investigation should be 'at least equal to the statutory obligations on police and the powers of the Ombudsman in respect of police complaint investigations, including the power to monitor investigations.'⁴⁹²

This was reinforced in the Ombudsman's submission, which also emphasised the need for the monitoring to be in 'real time':

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.⁴⁹³

I agree that more meaningful accountability is needed in the form of real time monitoring. However, I am also mindful of the concerns police have that such monitoring may lead to the oversight body in some way directing the police investigators. With specific reference to critical incidents, the Police Association said:

A recent matter where the Ombudsman and the Coroner made differing findings about the conduct of the investigation [into the death of Roberto Laudisio-Curti] must surely raise concerns about the conflicting directions the investigators must have been receiving during the investigation with so many masters to satisfy.⁴⁹⁴

⁴⁹¹ NSW Police Force submission, p 16.

⁴⁹² Police Integrity Commission submission, p 11.

⁴⁹³ NSW Ombudsman submission, p 66.

⁴⁹⁴ NSW Police Association submission, p 17.

With this precise problem in mind, I recommend a specific statutory model for the oversight of critical incidents which permits active real time external monitoring, while at the same time making it clear that those doing this monitoring do not have the power to control, supervise or interfere with the police investigation.⁴⁹⁵

Recommendation 43

To ensure high levels of public confidence in the standard of investigation of critical incidents by the NSW Police Force, the new commission should be conferred with a 'real time' power to monitor these investigations.

Recommendation 44

To ensure that the new critical incident oversight function provides accountability and transparency without interfering with the conduct of police investigations, the commission should not have the power to control, supervise or interfere with the police investigation.

To fashion a system that allows for real time monitoring of critical incident investigations, without exerting improper influence on police investigators, is challenging. Nevertheless it seems to me that the NSW Bar Association's submission particularises a workable model that strikes the right balance. That model is as follows:

Whatever independent body is chosen to do the monitoring, it should have the following characteristics:

- a) a positive obligation on the NSW Police Force to immediately notify the independent body of any critical incident as soon as it is declared to be a critical incident;
- b) A power in the independent body to determine whether or not the investigation of the critical incident requires monitoring by it;
- c) The independent body should have the capacity to immediately allocate appropriately trained and experienced officers to monitor a critical incident investigation either as an individual or as part of a team;
- d) The monitoring officers should have the right to attend the crime scene, request and receive reports and information concerning the investigation and its progress, view exhibits, assess police photographs, attend all witness

⁴⁹⁵ NSW Bar Association submission, Attachment A, p 12.

interviews, receive all police communications and written reports and to require a written statement of actions undertaken by police investigators prior to the arrival of a monitoring officer;

- e) The monitoring officers should be empowered to record any relevant observations or events, to make sound recordings of any observations and to take photographs provided that they do so in a manner that does not interfere with any aspect of the police investigation;
- f) The monitoring officers should not have the power to control, supervise or interfere with the police investigation, but should simply monitor what occurs;
- g) Where a monitoring officer observes an apparent departure from appropriate conduct or the Critical Incident Guidelines, he or she should be empowered to draw the apparent departure to the attention of the SCII (Senior Critical Incident Investigator), but not otherwise require or direct a change in police actions;
- h) Where the SCII disagrees with the monitor, the monitor should immediately reduce the observation to writing. If the SCII remains in disagreement and decides against a change that responds with the monitor's observation, written reasons should be provided by that SCII within 24 hours of the observation being communicated to the SCII;
- i) At the conclusion of the investigation, the independent monitoring body should be required to produce a critical incident report to each of the Commissioner of Police, the Minister and, where death has occurred to the Coroner. Where possible misconduct in the investigation has been identified, a body responsible for the investigation of such conduct should be notified;
- j) There should be limitations on the information that may be published by the independent body similar to that provided by s 163 of the *Police Act 1990* in respect of the publication by the Ombudsman of "*police critical information*";
- k) The monitoring officers should be subject to strict confidentiality as to any matter monitored until the independent body's critical incident report has been finalised; and
- l) Except as set out below, the monitoring body and its officers should not engage with witnesses or family members affected by a police critical incident, nor act in any way that would interfere with the ordinary role of the police. Nevertheless, the monitoring body and its officers should be able to:
 - i. Inform family members and witnesses of their presence in a monitoring role;
 - ii. Receive any complaint or observation and communicate that complaint or observation if authorised by the family member or complainant to the senior investigating police officer;

- iii. Inform family members or others of the appropriate body for complaint; and
 - iv. Encourage and facilitate communication between family members and any police officer nominated by the SCII as an appropriate officer for family inquiries.
- m) The monitoring officers should be competent and compellable in the event of future disciplinary, coronial proceedings or criminal proceedings.
- n) A monitoring role is designed to maintain and ensure administrative regularity rather than for the investigation of wrongdoing. For that reason, the Association considers that the independent body responsible for monitoring critical incident investigations should not exercise a role in the investigation of complaints in respect of the critical incident or investigation. That is, the monitoring of critical incident investigations should reside in one body and the investigation of complaints concerning the incident and its investigation should reside in another. Complaints concerning police action in critical incidents should be handled by the PIC.⁴⁹⁶

The Bar Association's proposed model was developed in response to the McClelland review which had a narrower focus than this review, and was not asked to consider the reform of oversight bodies. In this context, I note the Bar Association's final point (n) – that 'the monitoring of critical incident investigations should reside in one body and the investigation of complaints concerning the incident and its investigation should reside in another'. I do not consider this to be a barrier to the new single oversight body adopting the Association's other proposals, although the issue of how to deal with complaints of misconduct in the critical incident context warrants some specific consideration later in this chapter.

I believe that it is necessary to include most details of monitoring in legislation, rather than leave it to negotiated agreements between the Police Force and the new oversight body. As the PIC noted, such flexibility would result in a system less rigorous than the existing oversight system that applies to complaints. However, I also acknowledge the monitoring agreement in place between Police and the Ombudsman in relation to complaints investigations, and recognise there may be benefit in providing for negotiated protocols to deal with other operational details that need not be included in statute.

Recommendation 45

To establish a framework that strikes an appropriate balance between accountability, transparency and effective investigation, the Act establishing the new commission should reflect the features recommended by the NSW Bar Association in its submission to this

⁴⁹⁶ NSW Bar Association submission, Attachment A, pp 11-13.

review, including an obligation on the NSW Police Force to immediately notify the new commission of any critical incident as soon as it is declared as one with enough information to allow the commission to determine whether or not to monitor the investigation.

Recommendation 46

To increase public confidence in critical incident investigations and deal with any concerns identified during monitoring by the new commission, when a police investigation has been finalised, the new commission should produce a critical incident report to the Police Commissioner, the Minister, and – where death has occurred – to the Coroner.

I recognise that if this recommendation is adopted there will be significant resource implications, including the need to provide for monitoring officers to be on call 24 hour a day, 7 days a week. There will also need to be a budget to convey them, if necessary, to remote critical incident scenes and accommodate them nearby. That said, however, the costs associated with this would be just a fraction of the costs of financing a stand-alone independent critical incidents investigation body.

Legislative definition

To legislatively anchor down the new critical incident oversight system, it will be necessary to define ‘critical incident’ in the new legislation. Otherwise administrative changes to the current definition, which is found in the Critical Incident Guidelines, could erode the scope of the new monitoring scheme. I note that the PIC submitted that there should be a statutory definition of ‘critical incident’.⁴⁹⁷

Any new definition of ‘critical incident’ should also be consistent with sections 23 and 27 of the *Coroners Act 2009*. Under those sections, the Coroner must hold an inquest concerning the death or suspected death of a person if it appears that the person has died (or that there is reasonable cause to suspect that the person has died) while – among other things – being held in custody, escaping or attempting to escape from custody, or as a result of (or in the course of) police operations.⁴⁹⁸ However, like the Critical Incident Guidelines, the *Coroners Act* does not define the term ‘police operations’. Reporting to the NSW Government on 15 March 2014, the Coroner referred to a circular issued by his office that

⁴⁹⁷ Police Integrity Commission submission, p 10.

⁴⁹⁸ *Coroners Act 2009*, ss 23(a),(b) and (c) and s 27.

sought to describe potential scenarios involving deaths likely to have been caused ‘as a result of, or in the course of, a police operation’, as referred to in section 23, as follows:

- any police operation calculated to apprehend a person(s)
- a police siege or a police shooting
- a high speed police motor vehicle pursuit
- an operation to contain or restrain persons
- an evacuation
- a traffic control/enforcement
- a road block
- execution of a writ/service of process
- any other circumstance considered applicable by the State Coroner or a Deputy State Coroner.⁴⁹⁹

In his submission to this review, the Coroner contended that the imprecision of the scope of section 23, and of the categorisation of critical incidents deaths in the guidelines, puts at risk the coordination of critical incident investigations and coronial investigations. The Coroner further noted that the lack of definition in section 23 made it difficult at times to determine whether a death fell within that section.⁵⁰⁰

Accordingly, the Coroner recommended that the *Coroners Act* and the Critical Incident Guidelines be amended:

... so that deaths which are connected to police action, inaction or custody and in which inquests are mandatory are consistently and comprehensively defined in both instruments. The precise terms should be arrived at following consultation between the state coroner and the Commissioner NSWPF.⁵⁰¹

The NSW Bar Association proposed that the current definition of ‘critical incident’ in the guidelines, which it describes as ‘a good definition’, should be incorporated as part of the new legislative scheme.⁵⁰² In that regard, I understand that the guidelines are currently being updated and are close to being finalised.

Subject to further consultation with the Coroner and the Police Commissioner, I agree that clear and consistent definitions of ‘police operation’ and ‘critical incident’ are essential, and recommend that they be included in the relevant legislation.

⁴⁹⁹ Report by the NSW State Coroner into deaths in custody/police operations for the year 2013, p 11; State Coroner’s Circular No. 24.

⁵⁰⁰ NSW Coroner submission, p 2.

⁵⁰¹ NSW Coroner submission, p 2.

⁵⁰² NSW Bar Association submission, Attachment A, p 16.

Recommendation 47

To ensure a consistent approach by the NSW Police Force, the Coroner and the new commission, statutory definitions of ‘critical incident’ and ‘police operation’ should be developed in consultation with the Coroner and the Police Commissioner, and included in the legislation governing the new oversight body and the *Coroners Act 2009*.

I also endorse Mr McClelland’s recommendation, made in 2013, that the NSW Police Force publicly release its Critical Incident Guidelines, as soon as a revised version is finalised. I understand that the guidelines contain information that could be sought and released under the *Government Information (Public Access) Act*, and therefore consider it preferable that such an important summary of policing policy be generally accessible.

Recommendation 48

To promote transparency and public confidence in critical incident investigations, the Critical Incident Guidelines should be proactively released by the NSW Police Force as soon as a revised version is finalised.

Concerns about dual roles of monitor and investigator

In the interests of being satisfied that there is no conflict of interest in the dual roles of critical incident monitor and complaints investigator, I will briefly touch upon the different types of complaints that might be made in relation to critical incidents under a single oversight model.

I foresee three relevant categories of complaints that might arise under such a model:

- complaints against the oversight body for failing to monitor properly
- complaints against the investigating police (the CIIT) around inadequacies in their investigation
- complaints against the police who killed or severely injured the person.

I will deal with each in turn.

Complaints about oversight body failing to monitor properly

I do not see this as a potential conflict issue under a single oversight body. A complaint of this kind can be dealt with by an Inspector. If any person made an allegation about the new

commission failing to exercise its critical incident investigation monitoring powers lawfully or appropriately, the Inspector would be able to consider whether that allegation had merit.

Complaints against investigating police about their investigation

Under a single model with a standing oversight role in relation to critical incidents, I believe the risk of complaints being made about the critical incident investigation itself is lower. In my view, the additional transparency around the CIIT's work will mean few, if any, of this category of complaints will be generated. Even if they are, the risk that the oversight body would be conflicted from further consideration of those allegations simply because it oversighted the investigators' work is remote. The new oversight role I have proposed does not make the new commission responsible for the conduct of the investigators or confer on it power to direct those investigators. At most, there is a risk that in dealing with a complaint, the oversight body may be less rigorous than if it had not been involved in the matter. I am confident, however, that any perception of conflict in a particular case may be adequately managed internally by assigning different oversight officers – perhaps even different Deputy Commissioners – to deal with the complaint. In the event that complaints about the CIIT are made in a case where the commission has elected not to monitor, then the complaint should be able to be investigated.

Complaints against police involved in the death or serious injury of a person

Any investigation by oversight bodies or the police into complaints about the critical incident itself should be suspended while the critical incident is investigated and is being monitored. I see no public interest in requiring both a monitored critical incident investigation and a formal complaints investigation to proceed simultaneously. Concurrent investigations of this kind may interfere with coronial and criminal processes, which is one of the specific matters for consideration under my terms of reference. This does not mean that concerns raised in a complaint should not be able to be considered by the new oversight body and/or the CIIT. Indeed, it may be that complaints from family members and other interested persons (such as other police) could bring to light information that is vital to the critical incident investigation.

Recommendation 49

To establish an efficient framework for responding to complaints about critical incidents and their investigation, complaints about such matters should be handled in the following way:

- i. complaints about how the new commission conducted itself while engaged in critical incident monitoring should be made to the Inspector;

- ii. complaints about how the Critical Incident Investigation Team conducted an investigation should be made to the new commission, with any conflict arising from a previous monitoring role being managed internally;
 - iii. complaints about the conduct of police involved directly in a critical incident should be able to be made at any time, and notified to the oversight body, but there should be no obligation to progress the complaint while a monitored critical incident investigation is active.
-

Legislative ‘hierarchy’ for oversight of critical incident investigations

In his 2013 review of critical incidents, the Hon. Robert McClelland recommended that the Commissioner of Police, the PIC, the Ombudsman, the Coroner and WorkCover form a ‘framework for cooperation’ to delineate roles and responsibilities and prioritise investigations so as to avoid the overlap and duplication.⁵⁰³ He further stated that if these agencies are unable to form such an agreement, then consideration could be given to amending legislation to suspend the jurisdictions of oversight bodies during the course of a coronial inquest.⁵⁰⁴

While I am sympathetic to this view, and would seek to avoid the confusion and duplication that occurred in the recent cases, I am not convinced a legislative hierarchy offers a solution. In such cases, if monitoring by WorkCover or an oversight agency was suspended until the coronial inquest was finalised, any managerial or training issues that could be identified and remedied quickly may not be addressed until years after the event.⁵⁰⁵ This presents a danger to individual officers and the community. WorkCover’s role in identifying procedures to improve work health and safety outcomes and preventing possible future harm is beneficial for both the wider community, the families of injured or killed workers and all members of the Police Force.

Further, as noted by Redfern Legal Centre, in investigations of critical incidents resulting in death ‘the Coroner’s jurisdiction is focused on manner and cause of death, and is not often capable of scrutinising the totality of the police conduct involved.’⁵⁰⁶ I believe it is essential that the Coroner’s powers to direct police officer investigations for the purposes of coronial proceedings or proposed coronial proceedings should remain. However, like the Coroner, I also believe it is essential for the new oversight body to have a statutory right to oversight critical incidents from the outset, as is the case in other jurisdictions. The essential dilemma here is perhaps best summed up by the Police Commissioner’s comments to the McClelland

⁵⁰³ McClelland report, pp xii and 71.

⁵⁰⁴ McClelland report, p 71.

⁵⁰⁵ NSW Coroner submission, p 4.

⁵⁰⁶ Redfern Legal Centre submission, p 9.

review: 'It is not beneficial to have a number of disparate agencies directly involved in a critical incident simultaneously. But neither is it beneficial to have a sequential approach where agencies in effect "line-up"'.⁵⁰⁷

There is no single best approach and the directory rather than mandatory language guiding the New Zealand IPCA in relation to hearings is revealing. In that regard, section 23(3)(ba) of the *IPCA Act* provides:

The authority may, in deciding whether to hold a hearing, have regard to whether any of the following are pending or are reasonably in contemplation:

- i. Civil, criminal, or disciplinary proceedings;
- ii. A coroner's inquest.

I think this approach recognises that we must rely on the good and ethical judgement of oversight bodies and regulatory agencies, not constrain them to wait until a criminal process is finished. That said, WorkCover has noted in its submission that although it currently has a constructive relationship with the NSW Police Force, it is also 'open to developing an agreed operating framework that meets the objectives of both agencies and strikes a balance between protecting the community and NSW Police Force officers.'⁵⁰⁸ As investigative agencies both operating in the criminal law space, but with different public policy aims, I support that proposal.

Privilege against self-incrimination

In its submission, Legal Aid NSW suggests that the decision of the Supreme Court in *Baff v NSW Commissioner of Police*⁵⁰⁹ may have an impact on the ability of the Police Force to thoroughly investigate critical incidents.⁵¹⁰ In summary, the court in *Baff* found that the Police Commissioner could not force an officer to answer questions if he or she claimed privilege against self-incrimination.

Investigations by the NSW Police into police officer conduct are categorised as either 'criminal' or 'non-criminal' investigations. If an officer is subject to a criminal interview, the officer is cautioned and the privilege against self-incrimination applies. Prior to *Baff*, during a 'non-criminal' interview, a police officer could be directed to provide a statement. The court in *Baff* found, however, there was no clear legislative intention in the *Police Act* to abrogate the privilege against self-incrimination.

⁵⁰⁷ McClelland report, p 101.

⁵⁰⁸ WorkCover submission, p 1.

⁵⁰⁹ *Baff v NSW Commissioner of Police* [2013] NSWSC 1205.

⁵¹⁰ Legal Aid submission, p 24.

Appendix A of the Ombudsman's submission to this review included a copy of his submission to an ongoing review of the *Police Act*. In that appendix, he notes the impact of *Baff* but does not support any specific legislative response to close any perceived new gap. He notes, however, that he did not support Mr McClelland's recommendation that, in the context of critical incident investigations, good faith statements made by officers should not be admissible in later criminal or civil proceedings without consent. Otherwise, the only other review participant that raised the issue of *Baff* was the Public Interest Advocacy Centre, which stated that 'police officers should be afforded the same procedural rights as any individual suspected of a criminal offence.'⁵¹¹

I would be concerned if the decision in *Baff* has an adverse impact on the ability of the Police Commissioner to investigate police critical incidents or other police misconduct effectively. I am hopeful, however, that a new oversight framework in the context of critical incidents may help to clarify whether, in practice, *Baff* has created any imbalance between the rights of individual officers and the public interest in the accountability of police officers.

⁵¹¹ Public Interest Advocacy Centre submission, p 13.

11. Crime Commission oversight

The Crime Commission Inspector and the Police Integrity Commission (PIC) have been given concurrent powers to investigate complaints about the NSW Crime Commission. However, the statutes are silent about which office should exercise them on any particular occasion. This 'duality' has been described as 'peculiar' by the current Inspector, who also has a power to veto own motion investigations by the PIC.

Either the Inspector of the new commission, or the new commission itself, should have sole responsibility for overseeing the Crime Commission. The difficulty for the new Inspector, unlike the new commission, is that the inspectorate office will not be resourced with the sophisticated investigative and covert surveillance capability required to target corrupt law enforcement officials.

The overlap in oversight of complaints about the NSW Crime Commission can be addressed by giving sole responsibility for the oversight of the Crime Commission to the PIC, and by abolishing the position of Crime Commission Inspector.

The terms of reference direct me to consider 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.

History and powers of the NSW Crime Commission

The NSW Crime Commission was established in 1986 as the State Drug Crime Commission. As the name suggests, the original focus of the Commission was on drug trafficking, but its functions have progressively expanded, particularly in 1990 when the Commission was conferred with additional functions regarding interests in property related to serious crime related activities under the *Criminal Assets Recovery Act 1990*.⁵¹²

The *Crime Commission Act 2012* sets out the Commission's principal functions as follows:

- to investigate matters relating to a relevant criminal activity or serious crime concern, or relating to the criminal activities of criminal groups, referred to the Commission by the Management Committee⁵¹³ for investigation

⁵¹² David Patten, *Special Commission of Inquiry into the NSW Crime Commission* ('Patten report') 30 November 2011, p 23.

⁵¹³ The Management Committee refers matters to the Crime Commission for investigation. Its role and composition is discussed later in this chapter.

- to provide evidence for a relevant offence arising out of any such matters to the Director of Public Prosecutions, or to the appropriate authority in the jurisdiction concerned
- to reinvestigate matters relating to criminal activities that have been the subject of a police inquiry (being an inquiry referred for reinvestigation to the Commission by the Management Committee) and to furnish its findings to the Committee, together with any recommendations for action the Commission considers should be taken in relation to those findings
- to furnish, in accordance with the Act, reports relating to organised and other crime, which include – where appropriate – recommendations for changes in the state’s laws
- to provide investigatory, technological and analytical services to such persons or bodies as the Commission thinks fit
- with the approval of the Management Committee, to work in cooperation with such persons or authorities of the Commonwealth, the state or another state or territory (including any task force and any member of a task force) as the Commission considers appropriate.⁵¹⁴

The Crime Commission has significant statutory powers to enable it to fulfill these functions – powers which are greater than those exercised by NSW Police. For example, the Commission has the power to summon people to attend hearings and give evidence, and to produce documents, even though doing so may incriminate them.⁵¹⁵ For the first 22 years of the Commission’s existence, however, there was no special provision for its oversight.

Then in 2008, after an Assistant Director of the Crime Commission was charged with serious offences relating to the import and supply of drugs, the NSW Parliament stepped in and amended the *Police Integrity Commission Act 1996* to give the Police Integrity Commission (PIC) oversight of the Crime Commission. Among other things, the PIC was empowered to detect or investigate serious misconduct by Commission officers, as well as receive and investigate complaints from the public about possible misconduct by such officers.⁵¹⁶

Following this legislative amendment, the PIC conducted a number of investigations relating to the Crime Commission. These included: Project Rhodium, concerning the Commission’s capacity to identify and manage serious misconduct risks; Project Caesar, into misconduct risks associated with assets confiscation; and Operation Winjana which – among other things – investigated concerns that Crime Commission staff or their associates were or may have been involved in criminal activity or serious misconduct.⁵¹⁷ During Operation Winjana, the Commission sought Supreme Court orders to prevent the PIC from investigating aspects

⁵¹⁴ *Crime Commission Act 2012*, s 10.

⁵¹⁵ *Crime Commission Act 2012*, ss 24 and 39.

⁵¹⁶ Police Integrity Commission Amendment (Crime Commission) Act 2008, Schedule 1.

⁵¹⁷ Patten report, p 186.

of its procedures under the *Criminal Assets Recovery Act*. In the event, the court determined that the PIC was acting within its powers,⁵¹⁸ and in October 2012 the PIC reported to Parliament on Operation Winjana recommending that a former Crime Commission officer be prosecuted for misconduct.⁵¹⁹

Meanwhile, the Commission's former Assistant Director had been found guilty of conspiring to import drugs, participating in the supply of drugs, and conspiring to pervert the course of justice.⁵²⁰ Citing the existence of significant community concern in relation to the Commission's performance, integrity and governance structures, the NSW Government commissioned former judge David Patten to, among other things, inquire into and report on the adequacy of the Commission's accountability mechanisms, including those under the *Police Integrity Commission Act*, and whether alternative or additional mechanisms should be adopted.⁵²¹

In his report dated 30 November 2011, Mr Patten made 57 recommendations to improve the structure, oversight, accountability, and powers and procedures of the Crime Commission, including a key recommendation to appoint a Crime Commission Inspector.⁵²² 'Although not quite unanimous', Mr Patten said, 'I have experienced overwhelming support for the appointment of an Inspector to the Commission.'⁵²³ Mr Patten's proposal included:

- that the Inspector be given a fixed term appointment, not exceeding five years
- that there be provision for staff of an Inspector, with the proviso that the Inspector have the right to make use of the PIC's facilities if required
- that the Inspector be primarily involved in auditing the operations of the Commission to ensure compliance with the law, in assessing the effectiveness and appropriateness of its procedures and in dealing (through reports and recommendations) with complaints of misconduct and conduct amounting to maladministration
- that the Inspector have powers similar to the Independent Commission Against Corruption (ICAC) Inspector contained in section 57 of the *Independent Commission Against Corruption Act 1988* and be required to refer instances of criminal activity or serious misconduct to the PIC.⁵²⁴

After acknowledging that there was no other similar relationship between government agencies as the one he envisaged between the Crime Commission Inspector and the PIC,

⁵¹⁸ NSW Crime Commission v Police Integrity Commission [2011] NSWSC 443.

⁵¹⁹ *Operation Winjana*, Report to Parliament by the Police Integrity Commission, October 2012, tabled in the NSW Parliament on 21 November 2012, p 51.

⁵²⁰ *R v Standen* [2011] NSWSC 1422.

⁵²¹ Patten report, pp 181 and 186-187.

⁵²² Patten report, pp 6-16.

⁵²³ Patten report, p 118.

⁵²⁴ Patten report, pp 12 and 118.

Mr Patten asserted that ‘the two need to complement each other, in a manner that will match accountability mechanisms to risk’.⁵²⁵ Given that some aspects of the Commission’s work involved similar serious misconduct risks to those presented by police, Mr Patten recommended that the PIC retain its jurisdiction over the Commission. However, he recommended that this should be complemented by the Inspector’s primary roles of auditing the Commission’s operations, dealing with complaints and addressing misconduct amounting to maladministration.⁵²⁶

Having emphasised that the Inspector should not be seen as ‘another layer of oversight’ and that the Inspector’s role would be to complement that of the PIC, Mr Patten noted that the PIC’s ‘own motion’ power under sections 23(2) and 24 of the *Police Integrity Commission Act*, to embark on investigations and preliminary investigations even though no particular Crime Commission misconduct is suspected, might conflict with the Inspector’s powers. Accordingly, Mr Patten recommended that the legislation be amended to provide that PIC not exercise its own motion powers ‘without the consent of the Inspector’.⁵²⁷

The NSW Government agreed to the majority of Mr Patten’s recommendations, including his recommendation to appoint a Crime Commission Inspector.⁵²⁸ Based on Mr Patten’s recommendations, in 2012 the NSW Parliament passed the *Crime Commission Act* which, in addition to introducing an independent inspector, included increased oversight and management of the Commission, a stronger independent management committee and oversight by a parliamentary joint committee.⁵²⁹

Oversight and accountability of the Crime Commission

Following the passage of the *Crime Commission Act 2012*, the Crime Commission is now overseen by the following bodies:

- the Management Committee of the Commission
- the Inspector of the Crime Commission
- the Police Integrity Commission
- the Parliamentary Joint Committee on the Ombudsman, the PIC and the Crime Commission
- the NSW Ombudsman.

⁵²⁵ Patten report, pp 119-120.

⁵²⁶ Patten report, pp 119-120.

⁵²⁷ Patten report, pp 121-122.

⁵²⁸ NSW Government response to the Special Commission of Inquiry Into the NSW Crime Commission, http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0020/144209/Approved_Government_Response.pdf.

⁵²⁹ The Hon Greg Smith SC, Second reading speech: Crime Commission Bill, 18 September 2012.

Management Committee

The Management Committee is responsible for referring matters to the Crime Commission, thereby ensuring that a decision to pursue an investigation is made by a broad range of informed parties.

The members of the committee are:

- an independent Chairperson appointed by the Minister
- the Commissioner of Police
- the Chair of the Board of the Australian Crime Commission
- the Commissioner of the NSW Crime Commission
- the Secretary of the Department of Justice or a senior executive of that department nominated by the Secretary.⁵³⁰

The Management Committee has the following functions:

- to refer matters relating to relevant criminal activities and serious crime concerns to the Commission for investigation
- to refer to the Commission, for reinvestigation, police inquiries into matters relating to any criminal activities
- to make arrangements for task forces to assist the Commission in carrying out its functions
- to review and monitor generally the work of the Commission
- to give approvals for liaison with other bodies.⁵³¹

Inspector of the Crime Commission

On 2 May 2013, the NSW Government announced the appointment of the Honourable Graham Barr QC as the first Inspector of the Crime Commission.⁵³²

The Inspector of the Crime Commission has significant oversight functions including:

- auditing the operations of the Crime Commission for the purpose of monitoring compliance with the law
- dealing with (through reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission

⁵³⁰ *Crime Commission Act 2012*, s50(1).

⁵³¹ *Crime Commission Act 2012*, s 51(1).

⁵³² Media release, Michael Gallacher MLC, Leader of the Government in the Legislative Council, Minister for Police and Emergency Services, Minister for the Hunter, 'Graham Barr QC Appointed First Inspector of the Crime Commission', 2 May 2013.

- dealing with (through reports and recommendations) conduct amounting to maladministration by the Commission or officers of the Commission
- assessing the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.⁵³³

These functions may be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the parliamentary joint committee, a government agency or a member of a government agency.⁵³⁴

The Inspector of the Crime Commission has extensive powers to carry out these functions, including royal commission type powers when conducting an inquiry.⁵³⁵

The Inspector also has an important veto power which is provided in section 23(2A) of the *Police Integrity Commission Act*. Section 23(2A) was inserted in 2012 following the recommendation of Patten in his Special Commission of Inquiry (as mentioned earlier in this chapter). Expressed in the negative, it provides that the PIC must not conduct an investigation in relation to the Crime Commission in circumstances where no particular Crime Commission officer has been implicated and no misconduct of a Crime Commission officer is suspected, unless it has obtained the Crime Commission Inspector's consent. In other words, the Inspector has a veto power over own motion investigations by the PIC into the Crime Commission. To date, the PIC has never sought the Inspector's consent to conduct an own motion investigation.⁵³⁶

Police Integrity Commission

The Police Integrity Commission has the following functions in relation to the Crime Commission:

- to prevent officer misconduct
- to detect or investigate, or manage or oversee other agencies in the detection or investigation of, officer misconduct.⁵³⁷

In this context, 'officer misconduct' means any misconduct of a Crime Commission officer by way of action or inaction:

- whether or not it also involves participants who are not Crime Commission officers
- whether or not it occurs while the Crime Commission officer is officially on duty

⁵³³ *Crime Commission Act 2012*, s 62 (1).

⁵³⁴ *Crime Commission Act 2012*, s 62(2).

⁵³⁵ *Crime Commission Act 2012*, s 64.

⁵³⁶ Inspector of the Crime Commission submission, p 2.

⁵³⁷ *Police Integrity Commission Act 1996 ('PIC Act')*, ss 4 and 13(1).

- whether or not it occurred outside the state or outside Australia.⁵³⁸

Any person may make a complaint to the PIC about misconduct by a Crime Commission officer, which the PIC may investigate or not, as it sees fit.⁵³⁹ As already mentioned, the PIC can also launch own motion investigations into Crime Commission officers, but only with the consent of the Crime Commission Inspector.

In addition, the Ombudsman, Crime Commissioner, Crime Commission Inspector, Police Commissioner and principal officers of other New South Wales public authorities have a statutory duty to report to the PIC any matter that on reasonable grounds is suspected to involve, or which may involve, misconduct of a Crime Commission officer.⁵⁴⁰

During 2013-14, the PIC assessed ten complaints alleging misconduct against current and former Crime Commission officers. Of those complaints, five were made directly to the PIC and four were reported to the PIC by the Crime Commission or NSW Police. An additional matter was generated by the Crime Commission based on information it had independently obtained. The misconduct alleged in these complaints included attempting to pervert the course of justice, improper disclosure of information, misuse of authority for personal benefit, bribery, protection of persons involved in drugs, and improper association.⁵⁴¹

The PIC had a total of four preliminary investigations and one full investigation open into the Crime Commission for all or part of 2013-14. During that same year, three of those preliminary investigations and the one full investigation were assessed by the PIC as requiring no further action.⁵⁴²

Parliamentary Joint Committee

The Crime Commission is also oversighted by a parliamentary committee. The Joint Committee on the Ombudsman, the PIC and the Crime Commission has high level oversight responsibility to:

- monitor and review the exercise by the Crime Commission, the Management Committee and the Inspector of their functions
- report to Parliament on any matter about the Crime Commission, the Management Committee or the Inspector, or connected with the exercise of their functions, which it considers should be brought to the attention of Parliament

⁵³⁸ *PIC Act*, ss 5B(1).

⁵³⁹ *PIC Act*, s 75C.

⁵⁴⁰ *PIC Act*, s 75D.

⁵⁴¹ Police Integrity Commission, *Annual Report 2013-2014*, p 52.

⁵⁴² Police Integrity Commission, *Annual Report 2013-2014*, p 53.

- examine each annual and other report of the Crime Commission and of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report
- inquire into any question in connection with the committee's functions which is referred to it by Parliament, and report back to Parliament.⁵⁴³

NSW Ombudsman

Generally speaking, the NSW Ombudsman has no power to oversee the NSW Crime Commission.⁵⁴⁴ However, the Ombudsman's Office does conduct inspections and audits of Crime Commission documents and operations under the *Telecommunications (Interception and Access) Act 1979*, *Law Enforcement (Powers and Responsibilities) 2002*, *Surveillance Devices Act 2007* and the *Law Enforcement (Controlled Operations) Act 1997*.⁵⁴⁵

Analysis of current oversight system for the NSW Crime Commission

At first glance, the role of the Inspector of the NSW Crime Commission is analogous to that of the ICAC and PIC Inspectors, that is, to deal – amongst other things – with complaints of abuse of power, impropriety and other forms of misconduct. However, it is different in one key respect. While the ICAC and the PIC are themselves oversight bodies, the Crime Commission is not. Rather, it is like the NSW Police Force – an investigative body, albeit with royal commission type powers. What this means is that under the current oversight system, the NSW Crime Commission is answerable to the PIC and to two inspectors: directly to the Inspector of the Crime Commission, and indirectly to the Inspector of the PIC.⁵⁴⁶

To the extent that the complaints page of the Crime Commission's website is a guide, it appears that the Crime Commission Inspector's role has an Ombudsman-style focus, because as the website states, the Inspector's responsibilities are to deal with complaints of misconduct as well as conduct amounting to maladministration. The complaints page also explains, however, that the PIC has a role in preventing, detecting or investigating officer misconduct.⁵⁴⁷

It can be seen from the summary of the respective oversight powers of the Crime Commission Inspector and of the PIC referred to earlier in this chapter, that there is considerable overlap between the two. This overlap occurs precisely because the Crime

⁵⁴³ *Crime Commission Act 2012*, s 71(1).

⁵⁴⁴ *Ombudsman Act 1974*, Schedule 1, cl 19.

⁵⁴⁵ NSW Crime Commission, *Annual Report 2013-14*, p 57.

⁵⁴⁶ *Independent Commission Against Corruption Act 1998*, Part 5A; *Crime Commission Act 2012*, Part 4; *Police Integrity Commission Act 1996*, Part 6.

⁵⁴⁷ *New South Wales Crime Commission*, 'Complaints', www.crimecommission.nsw.gov.au.

Commission Inspector's powers are not deployed to oversight a watchdog, but to oversight an investigative body that is already oversighted by a watchdog, namely the PIC.

In practical terms, it appears that the greatest overlap occurs in the area of complaints, which both the Crime Commission Inspector and the PIC have jurisdiction to receive and deal with. The consequences of this were highlighted in the Inspector's Special Report to the Minister, dated 28 October 2014, which stated:

Having given the Inspector and the PIC concurrent powers to investigate complaints, the statutes are silent about which office should exercise them on any particular occasion ... This duality of responsibility is peculiar.⁵⁴⁸

As recommended by the Parliamentary Joint Committee overseeing the Crime Commission, the PIC Commissioner and Crime Commission Inspector have met and agreed on a way of consultation and resolution to deal with the management of complaints. But as the Crime Commission Inspector has noted, 'these arrangements do not have the force of law. Neither, possibly, would more formal memoranda.'⁵⁴⁹ So over the longer term, the effectiveness of such arrangements will depend in part on just how future PIC Commissioners and Crime Commission Inspectors might get along with each other.

Moreover, as the *Crime Commission Act* does not require office holders to report any suspicion of misconduct by officers of the Crime Commission to its Inspector, almost all such complaints have been reported to the PIC.⁵⁵⁰ As a result, only five complaints were received by the Inspector in the year ended 30 June 2014,⁵⁵¹ and only one complaint was received during the year ended 30 June 2015.⁵⁵²

There is also overlap between the Crime Commission Inspector and the PIC in relation to direct investigations where there has been no complaint or report of suspicious conduct. As noted in the Crime Commission Inspector's submission to this review, 'the Inspector ... derives power at least equal to that which the PIC had (prior to the 2012 amendments [regarding s 23(2A)]'.⁵⁵³

Of greater concern is the confused state of affairs arising from the Crime Commissioner's veto power in s 23(2A) of the *Police Integrity Commission Act* that prevents the PIC from conducting own motion investigations into the Crime Commission without the Crime

⁵⁴⁸ *Special Report to the Minister made under section 67 of the Crime Commission Act 2012*, 28 October 2014, the Hon. Graham Barr QC, Inspector of the NSW Crime Commission [Inspector Barr's Report to the Minister], p 4, tabled in the NSW Parliament on 4 November 2014, p 4.

⁵⁴⁹ Inspector Barr's Report to the Minister, p 4.

⁵⁵⁰ Inspector Barr's Report to the Minister, p 4.

⁵⁵¹ Inspector Barr's Report to the Minister, p 4.

⁵⁵² Inspector of the Crime Commission submission, p 2.

⁵⁵³ Inspector of the Crime Commission submission, p 5.

Commission Inspector's consent. This unwieldy provision and its consequences were described by the Inspector as follows:

Nowhere does the *PIC Act* or the *CC [Crime Commission] Act* limit, prescribe or even guide the Inspector in deciding whether or not to consent to the PIC's investigating where no particular Crime Commission officer has been implicated and no misconduct of (any) CC officer is suspected. The decision is entirely within the Inspector's discretion.

Given the unfortunate history and effects of the PIC's secret investigations of the CC, any prudent Inspector would be likely to deal cautiously with any request for consent to open another. It is difficult in any event to visualize circumstances in which the PIC might be justified in seeking such consent without even a suspicion of misconduct of any Crime Commission officer. None is readily apparent.

Accordingly it is submitted that section 23(2A) of the PIC Act has effectively removed PIC's power to undertake secret investigations of the CC where there is no implication and no suspicion of misconduct.⁵⁵⁴

In summary, the system of overseeing the NSW Crime Commission is complex, due to the issues arising from the Commission being 'a servant of two masters.'⁵⁵⁵

Options for future oversight of the Crime Commission

Had it not been for the serious criminal misconduct of a former Assistant Director, it is most unlikely that the Crime Commission would have come to be overseen by the PIC, or as it is today, by the PIC and an Inspector.⁵⁵⁶

As noted by the Crime Commission Inspector, the current situation has arisen through 'incremental legislative amendment in the face of events.'⁵⁵⁷

However, no one is suggesting that the arrangements that existed up until 2008 should be reinstated. Indeed, to do so would fly in the face of developments at the Commonwealth level where the Australian Crime Commission is now overseen by the Commissioner for Law Enforcement Integrity.⁵⁵⁸ Nevertheless, it is clear to me that there are undoubtedly issues with the current system.

I have therefore considered the following three options for future oversight of the Commission: retaining the status quo, Inspector Barr's model, and my proposed single oversight body.

⁵⁵⁴ Inspector of the Crime Commission submission, p 4.

⁵⁵⁵ Inspector Barr's *Report to the Minister*, p 5.

⁵⁵⁶ Inspector Barr's *Report to the Minister*, p 5.

⁵⁵⁷ Inspector Barr's *Report to the Minister*, p 4.

⁵⁵⁸ Australian Commission for Law Enforcement Integrity submission, pp 1-2.

The status quo

The option to retain the status quo is supported by the PIC, which does not share the Crime Commission Inspector's concerns about the current system of Crime Commission oversight. The PIC stated in its submission to this review:

Similar to the NSWPF oversight framework, the roles of the [Police Integrity] Commission, the Inspector and the [Management] Committee are different but complementary. Each role is clearly defined in the PIC Act or in the *Crime Commission Act 2012*. The [Police Integrity] Commission's focus on officer misconduct distinguishes its role from that of the Inspector and the Committee, neither having the specialist resources or legislative mandate to undertake officer misconduct investigations. The Inspector is concerned with audit and legal compliance by the Crime Commission, roles not applicable to the Commission. The Committee broadly oversees the work undertaken by the Crime Commission and cooperation by the Crime Commission with other agencies, a role not shared with either the Commission or the Inspector of the Crime Commission.

It is the [Police Integrity] Commission's view that the clearly defined roles provide for comprehensive oversight of the Crime Commission. The Commission supports the continuation of the current arrangements for the Crime Commission.⁵⁵⁹

Inspector Barr's model

The PIC's enthusiasm for the status quo is not mirrored by the current Crime Commission Inspector, the Honourable Graham Barr QC, who is critical of the Commission's current management structure due to its 'inherent risk of conflict and inconsistency.'⁵⁶⁰

In his submission to this review, Inspector Barr stood by the oversight model he proposed in his Special Report to the Minister on 28 October 2014. Under that model, the role of the PIC in overseeing the Commission would be repealed with the role then vesting solely with the Inspector. In Mr Barr's words:

It is recommended that the CC [Crime Commission] Act and the PIC Act be amended so as to remove the Crime Commission from the oversight of the PIC and to constitute the Inspector as the only body charged carrying out principal functions of the kind provided for by s62 of the CC Act.⁵⁶¹

⁵⁵⁹ Police Integrity Commission submission, p 25.

⁵⁶⁰ Inspector Barr's *Report to the Minister*, p 5.

⁵⁶¹ Inspector Barr's *Report to the Minister*, p 5.

According to Inspector Barr, this option would remove the risk of disagreement over the exercise of concurrent power, the risk of concurrent and possibly inconsistent investigation of similar matter, and the risk of conflict.⁵⁶²

Single oversight body

A third option is my proposed single oversight body, which would have sole responsibility for oversight of the Crime Commission. Oversight of the Commission could be added as an adjunct role to the new body's primary function of overseeing the NSW Police Force.

Broadly speaking, the new body's provisions applying to the oversight of police personnel would also apply to Crime Commission officers. However, because of the sensitivity of the Crime Commission's work and the historically small number of complaints against it, I would suggest that the initial assessment of such complaints be undertaken personally by the Commissioner of that body.

Assessment of options for future oversight of the Crime Commission

Weighing up the issues canvassed earlier in this chapter concerning the overlapping roles of the PIC and the Crime Commission Inspector, and noting in particular the Inspector's power to veto own motion investigations by the PIC, I agree with Inspector Barr's concerns regarding maintaining the status quo. Accordingly, I cannot accept the PIC's submission that the current arrangements for oversight of the Crime Commission should be maintained.

In relation to Inspector Barr's proposed model, my starting point is that the very small number of complaints against the Crime Commission simply does not justify the creation of a stand-alone oversight body. On the face of it, the creation of such a body would be an inefficient use of public resources, especially if it had to establish the sort of sophisticated investigative and covert surveillance capability required to target corrupt law enforcement officials.

Inspector Barr conceded in his submission that there would need to be some way of providing such capabilities at short notice. Accepting that if the PIC's oversight of the Crime Commission was brought to an end, the PIC would have no obligation to provide such resources, Inspector Barr argues that sophisticated investigative and covert surveillance capabilities could, in effect, be obtained externally on an as needs basis. As he put in his submission to this review:

[T]he NSW Parliament, having created the office of Inspector and having given the office functions and obligations, must provide a means of enabling it to do its job. No single provider needs to be nominated. Subs 66(2) is enough. Several agencies and institutions in Sydney have hearing rooms that can be made available. Many departments and agencies have investigators, solicitors, security officers and other officials who can be co-opted for a

⁵⁶² Inspector Barr's *Report to the Minister*, p 5.

limited time to give their special services. The whole can be co-ordinated by the Inspector and the Department responsible for financing and providing for the office.⁵⁶³

My concern though is that a rogue Crime Commission officer would invariably be familiar with law enforcement methods and likely be skilled at countering them to avoid scrutiny. Therefore any Crime Commission oversight body would need to have immediate access to telecommunications interception, electronic and physical surveillance, controlled operations and assumed identities, among other things.⁵⁶⁴

Such capabilities are not easy to come by from elsewhere in the public service or from the private sector. Even if they were, the time that would be needed to get a specialised team vetted and into the field might of itself negate the effectiveness of a covert operation. Under my proposed single oversight body, however, these capabilities would exist in-house to investigate police and could therefore be deployed without delay against a rogue Crime Commission officer.

That said, Inspector Barr has identified two concerns about oversight by a general law enforcement body.

The first is 'the unfortunate series of events that followed the PIC's secret investigation of the CC [which] has led to a poor atmosphere that will need to dissipate. Continued oversight [by the PIC] will slow the development of appropriate relations between the agencies'.⁵⁶⁵

This concern would be addressed though my proposal to remove the PIC from the oversight space and replace it with the new commission. The new commission will make it easier to leave the past behind. However, it also needs to be said that past fraught relations between an investigative body and its oversight agency should not drive the design of a new oversight structure to the point where the expense and duplication involved in setting up a separate agency to deal with just a handful of complaints is necessary.

Inspector Barr's second concern is about the potential conflict of interest which could arise if the body overseeing the Crime Commission also oversees police, especially in circumstances where joint operations are being run.⁵⁶⁶ However, the Australian Commission for Law Enforcement Integrity is in this very position, and nevertheless that Commission has apparently been able to function without becoming enmeshed in conflict of interest issues.⁵⁶⁷

Taking all of the above into account, I find that strong external oversight of the NSW Crime Commission remains essential and that the proposed establishment the new commission

⁵⁶³ Inspector of the Crime Commission submission, p 13.

⁵⁶⁴ Australian Commission for Law Enforcement Integrity submission, p 4.

⁵⁶⁵ Inspector of the Crime Commission submission, p 7.

⁵⁶⁶ Inspector of the Crime Commission submission, p 12.

⁵⁶⁷ Australian Commission for Law Enforcement Integrity submission, p 5.

presents an opportunity for the Government to improve that oversight. Accordingly I recommend:

Recommendation 50

To reduce duplication of oversight of the NSW Crime Commission, the position of Inspector of the NSW Crime Commission should be abolished and the new commission should be given jurisdiction to oversight the Crime Commission.

Appendix 1 - Submissions and meetings

Advertisements seeking written submissions were placed in the *Sydney Morning Herald* and the *Daily Telegraph* on 23 May 2015. An invitation to make written submissions was also placed on the NSW Government's website: www.haveyoursay.nsw.gov.au

I also wrote directly to the following people and organisations inviting written submissions to inform my review:

- Commissioner of Police, NSW Police Force
- Integrity Commissioner, Australian Commission for Law Enforcement Integrity
- NSW Ombudsman
- Director of Public Prosecutions, the Office of the Director of Public Prosecutions
- President, NSW Bar Association
- President, Law Society of NSW
- President, Police Association of NSW
- Director, Community Legal Centres NSW
- NSW State Coroner
- Commissioner, Police Integrity Commission
- Commissioner, Independent Commission Against Corruption
- Commissioner, NSW Crime Commission
- Inspector of the NSW Crime Commission
- Inspector of the Police Integrity Commission
- NSW Information Commissioner, Information and Privacy Commission NSW
- Chair, Parliamentary Joint Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission
- Chief Executive Officer, Aboriginal Legal Service
- Chief Executive Officer, WorkCover NSW
- General Secretary, Public Service Association

26 submissions were received from the following organisations, and were published on the website of the Department of Justice. There were five individual submissions. The published submissions from organisations were:

1. Australian Commission for Law Enforcement Integrity
2. Community Legal Centres NSW
3. Council of Social Service of NSW
4. Gay and Lesbian Rights Lobby, Inner City Legal Centre and ACON
5. Information and Privacy Commission

6. Inspector of the Crime Commission
7. Inspector of the Police Integrity Commission
8. Jumbunna House of Indigenous Learning, UTS
9. Law Society of NSW
10. Legal Aid Commission of NSW
11. NSW Bar Association
12. NSW Greens
13. NSW Police Force
14. Office of the Director of Public Prosecutions
15. Ombudsman (NSW) (First submission)
16. Police Association of NSW (First Submission)
17. Police Association of NSW (Supplementary Submission)
18. Police Integrity Commission
19. Public Interest Advocacy Centre Ltd
20. Redfern Legal Centre
21. Shopfront Youth Legal Centre
22. Women's Legal Services
23. NSW Council for Civil Liberties
24. NSW State Coroner
25. WorkCover Authority of NSW
26. Ombudsman (NSW) (Supplementary submission)

The following individuals and organisations were invited to participate in discussions about my Terms of Reference:

- The Hon James Wood, AO QC

- Mr Michael Griffin AM, Integrity Commissioner of the Australian Commission for Law Enforcement Integrity
- Mr Stephen O'Bryan QC, Commissioner, Victorian Independent Broad-Based Anti-Corruption Commission
- Ms Deborah Glass OBE, Victorian Ombudsman
- Mr Bruce Barbour, former NSW Ombudsman
- Professor John McMillan AO, NSW Ombudsman
- Judge Sir David J Carruthers KNZM, Chair, New Zealand Independent Police Conduct Authority (by teleconference)
- The Hon Bruce James QC, Commissioner of the Police Integrity Commission
- The Hon David Levine AO RFD QC, Inspector of the Police Integrity Commission
- Mr Andrew Scipione APM, Commissioner of the NSW Police Force
- Mr Peter Hastings QC, Commissioner of the NSW Crime Commission
- The Hon Graham Barr QC, Inspector of the NSW Crime Commission
- Ms Claire Hodge, NSW Police General Counsel
- Mr Scott Weber, President, NSW Police Association
- Ms Julie Carroll, Manager, Legal Services, NSW Police Association
- Magistrate Michael Barnes, NSW State Coroner
- Mr Peter Gallagher APM, Assistant Commissioner, Professional Standards Command, NSW Police Force
- Mr Steve Turner, Public Service Association of NSW
- Ms Carmel Donnelly, General Manager, WorkCover

In addition to the stakeholders invited to meetings, the following individuals and organisations requested and were granted meetings to discuss my Terms of Reference:

- Mr Nick Kaldas, APM, Deputy Commissioner, NSW Police Force
- Redfern Legal Centre
- Public Interest Advocacy Centre
- Gay & Lesbian Rights Lobby
- Women's Legal Services of NSW
- Law Society of NSW
- NSW Council on Civil Liberties
- NSW Council of Social Service

I was also invited to attend and make introductory remarks at a Public Forum on The Future of Police Accountability hosted by the Redfern Legal Centre and the University of NSW on 30 July 2015. The Forum was Chaired by Mr Bob Debus AM, Professorial Fellow UNSW Law and former Attorney-General of NSW.

The participants for the Q&A Panel for the Forum were:

- Assistant Commissioner Peter Gallagher APM, Commander, Professional Standards Command, NSW Police Force
- The Hon. Trevor Khan MLC, Deputy President and Chair of Committees, Parliament of NSW
- Mr David Shoebridge MLC, Parliament of NSW
- Mr David Porter, Senior Solicitor, UNSW Policing Practice at Redfern Legal Centre
- Mr Alan Beckley, Adjunct Research Fellow, University of Western Sydney and former senior police officer, West Mercia Constabulary, England
- Dr Vicki Sentas, Senior Lecturer, UNSW Law

Appendix 2 -Terms of Reference

REVIEW OF POLICE OVERSIGHT

TERMS OF REFERENCE

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.