

REVIEW OF POLICE OVERSIGHT IN NSW

Legal Aid NSW Submission

to

Mr Andrew Tink AM

June 2015

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979 NSW* to provide legal services for people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 women's domestic violence court advocacy services.

The Civil Law Division of Legal Aid NSW provides legal services targeted to disadvantaged clients. This includes clients who attend civil advice rosters and outreach services seeking advice about civil disputes or complaints about the NSW Police Force (Police). The Civil Law Division also includes the Coronial Inquest Unit which provides legal advice, assistance and representation to people at coronial inquests where the matter involves some 'public interest'. This includes matters where people have been killed during Police operations.

As a significant stakeholder in justice issues, Legal Aid NSW is likely to be a regular user of any alternative Police oversight body. Legal Aid NSW values the opportunity to make this submission to the Review Of Police Oversight in NSW which is being conducted by Mr Andrew Tink AM.

For more information please contact Lyn Payne, Solicitor, General Civil Law Specialists on 9219 5896 or at lyn.payne@legalaid.nsw.gov.au.

INTRODUCTION

Legal Aid NSW supports the introduction of a single, independent Police oversight body that handles investigations and complaints fairly, quickly, effectively and in a transparent manner. In this submission, that body will be referred to as the Police Ombudsman.

Legal Aid NSW has identified several issues with the current Police oversight model, including a lack of transparency and independence. This model accommodates real or perceived bias, conflicts of interest, and fear of retribution. It also damages community relationships and confidence in police, particularly amongst people who have frequent interaction with police.

In our view, an exclusively civilian control model would best serve Police and the community. In 2013, Legal Aid NSW advocated such a body in our submission to the Review of the Investigation and Oversight of Police Critical Incidents conducted by the Hon Robert McClelland via the Ministry of Police and Emergency Services. That submission is attached as [Appendix A](#).

The Police Ombudsman should have jurisdiction to intervene when complaints concern police behaviour which, whilst not unlawful, can provoke animosity towards the Police and dissatisfaction with the system. It should also have jurisdiction to deal with more serious complaints which might involve a breach of the *Law Enforcement (Powers and Responsibilities) Act, 2002* (LEPRA) but would be constrained in terms of its jurisdictional limit. Additionally, it should be given the responsibility to investigate deaths which occur during the conduct of Police operations and other critical incidents.

The types of complaints which are likely to be suited to investigation by the Police Ombudsman would involve reports of standalone incident(s), current and ongoing problems regarding police interaction with particular community members, and include those where tortious liability may be an issue.

Due to the breadth of the review and time constraints, our submissions are restricted to areas which most affect our client base. Our submission is divided into two parts:

Part 1: Police Oversight and Complaints Handling, and

Part 2: Investigation of Deaths and Other Critical Incidents.

PART 1: POLICE OVERSIGHT AND COMPLAINTS HANDLING

Legal Aid NSW endorses the comment of the Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect" in saying that "[b]oth the public and police have a right to expect that if a complaint is made against police then it will be dealt with quickly, fairly and independently."

Under the current police oversight system there are two forums for complaints. The first is directly to the Police Commissioner under Part 8A of the *Police Act 1990* and the second is directly to the NSW Ombudsman, under the *Ombudsman Act 1974*. The NSW Ombudsman has jurisdiction to investigate police complaints but largely lacks resources to do so. In the six years from 2009-10 it investigated only 12 complaints. Contrastingly, in the same period, 4,272 complaints were investigated by police and overseen by the Ombudsman. Legal Aid NSW primarily advises complainants to attempt a resolution of disputes through the NSW Ombudsman complaints mechanism.

Legal Aid NSW Clients and Complaints

Legal Aid NSW clients are among the most disadvantaged and vulnerable people in New South Wales. Many of our clients come into contact with police far more regularly than other sections of the community. In some cases, interaction with police began at an early age and have been overwhelmingly negative.

Clients who wish to complain about police often have a number of the following characteristics:

- Social housing residents
- Homeless
- Low income
- Long term unemployment
- Mentally ill
- Aboriginal and Torres Strait
- Young people in out of home care
- Young people from disadvantaged families

We acknowledge that this client group may present challenges for Police, and that in many circumstances Police interaction is necessary and appropriate. Some complaints may be trivial, baseless, or not properly directed towards Police. However, there are many matters that, whilst not necessarily requiring a litigious outcome, are worthy of complaint. These reflect genuine concerns about interactions with Police.

Notably, different clients report the same issues with concerning regularity. There appear to be common areas of complaint which the current oversight model does not adequately address.

Common complaints include:

- Unlawful strip searches
- Excessive bail compliance checks
- Excessive force during arrest or search
- Unlawful arrest – especially in relation to minor offences

- Criminal charges laid without proper basis but which don't meet the threshold for malicious prosecution
- Excessive use of Police to manage difficult behaviour in residential out of home care institutions
- Excessive Police presence in remote and rural Aboriginal communities during community events, including funerals and related 'sorry business'
- Excessive and unlawful stops and searches – this includes situations where individuals are stopped and searched as a matter of course due to being known by Police and not on the basis of a the stop and search power in LEPR, and under the Suspect Target Management Program, and
- Inappropriate comments directed at clients such as swearing at young people, inappropriate references to family circumstances, mocking about disabilities, sexuality or various insults.

Case Study: Stan

Stan is 15 years old and resides in out of home care. Stan has been charged with criminal offences but is attempting to improve his life and attends an alternative education centre.

Stan complains that he cannot walk through his local shops without being stopped by police officers and required to empty his pockets, and wait while they do a radio check for warrants or bail compliance. This happens when he is with school friends who have no knowledge of his history with Police. Police officers will often make inappropriate references to his mother who has been in trouble with Police and who Stan no longer lives with. Stan is humiliated when this occurs, and doesn't want to leave the house or attend school because he might be pulled up by police officers.

Positive relationships with Police benefit the community: they encourage compliance with law, and reduce the potential for reoffending and the associated costs to the community. The Police Youth Strategy (2013 – 2017) notes that respectful treatment and the maintenance of the rights of a youth demonstrates to youth the need to respect the rights of others and can promote a greater appreciation for the law. Stan, in the case study above, is a vulnerable person with significant risk factors. Currently no independent oversight body exists that can investigate complaints such as Stan's in a quick, fair and independent manner.

In other cases, community confidence in the police is damaged where community members believe that serious charges are laid without proper basis.

Case Study: Tom

Tom is the father of John, who is 27 and has autism. John was charged with indecent assault. Tom thinks John was charged because officers saw him on CCTV footage in the area and assumed John was the perpetrator as his appearance was unusual due to his mental illness.

John was interviewed for over two hours without a support person. John was very confused as to why he was charged or what the charges meant. The charges were ultimately withdrawn before hearing.

The experience was extremely stressful for John and his family, who had never had any involvement with police or the criminal justice system before. Tom does not think that the prosecution was malicious, but does feel that John was unfairly targeted and the case was not properly investigated before charges were laid. No independent body exists that can review whether the charges were based on sound evidence, or whether John was unfairly targeted due to his appearance and disability.

Issues in the Current System

Lack of Independence: police investigating police

There are many reasons why it is inappropriate for police to investigate their colleagues.

It may result in perceived and actual biases, or conflicts of interest which prevent impartiality in complaint handling. This reduces public confidence in Police, and may harm ongoing relationships between Police and the community. People may view Police decisions or complaint handling as biased or wrongful, even where they are not, simply by virtue of the complaint being handled internally.

Additionally, people may be deterred from making complaints if they fear that they will be interviewed by the alleged perpetrator's colleagues or friends.

Where issues of credibility are involved, police are put in a situation where they must choose whether to believe their colleague with whom they have an ongoing working relationship, or a complainant. This is particularly problematic where there are allegations of violence or serious wrongful conduct. This is not conducive to positive working relationships or impartiality in decision making.

Case Study – Reynold

Reynold is 16. Reynold was arrested late one evening in relation to minor offences. Once he arrived at the police station, a police officer called his mother so he could be collected and taken home. Reynold states that before his mother arrived he was pushed roughly against the wall and assaulted by police officers.

Reynold had red marks on his body where he was assaulted. His mother said that when she picked him up he was suffering symptoms of a panic attack. Reynold's mother took photos of the injuries and made a complaint to the Ombudsman the next morning. She was then contacted by a police officer from the police station where the alleged assault had occurred. He told her he was investigating the matter but he didn't think the photos of the red marks were relevant as Reynold might have got them earlier in the evening. The officer wanted Reynold to come to the station to be interviewed for the investigation. Reynold was distressed about returning to the police station where the alleged assault had occurred, and believed he was being "set up". Reynold did not attend an interview but gave Police a written statement.

Some time later, an officer contacted Reynold's mother by telephone and said they didn't believe an assault had taken place and that the complaint would be finalised. Reynold's mother was disappointed by the process and the outcome. She felt as though the outcome was determined before the process began.

Lack of Transparency

At present, very little information is provided regarding how complaints are investigated. Complainants are not given access to the police investigatory report, if a report produced. The complainant is not informed why a particular outcome is seen as appropriate, what evidence was before the police or what material was taken into account, even when this is adverse.

Case Study – Stan (continued)

In the above example concerning Stan, Legal Aid NSW made a complaint on his behalf to the NSW Ombudsman. We were advised in a telephone call from police that they considered police were acting appropriately and that the complaint would be closed. Some aspects of the complaint were not investigated. The Legal Aid NSW solicitor expressed concern at the outcome. Police advised they would report to the Ombudsman. Legal Aid NSW were not contacted again in relation to the complaint. Eventually Legal Aid raised the complaint with the NSW Ombudsman where the complaint was initially lodged. The Ombudsman informed us that Police had advised that Legal Aid NSW was satisfied with the outcome.

In the case study above, Legal Aid NSW committed resources to submitting the complaint and following it up. Police and NSW Ombudsman also committed resources to the complaint. However, the situation remain unchanged. An opportunity was missed to build a positive relationship with a vulnerable young person who was making efforts to rehabilitate.

Recommended Model

For a complaint system to be effective, it must have powers available to detect, investigate, oversee, and recommend various remedies appropriate to the complaint. Remedies could include disciplinary action, specific performance agreements (that either compel or restrict behaviour), and/or compensation. Legal Aid NSW supports the creation of an independent body which includes the following as minimal requirements:

1. Refer complaints back to police to resolve, monitor outcome, and contact complainant before finalising the complaint.

Legal Aid NSW accepts that there may be complaints made to a Police Ombudsman that are appropriate for referral to the Local Area Command where the incident occurred, to resolve directly with the complainant. However in these cases the Police Ombudsman should oversee the management of these complaints, including direct contact with the complainant to check that they are satisfied with the outcome. If the Police Ombudsman does not take an active role in engaging with the complainant to ensure the complaint is resolved to both parties satisfaction then there is risk that the current system will be replicated.

Legal Aid NSW recognises that there is some value in Police dealing internally with complaints about their officers and maintaining responsibility for operational matters. However this needs to be balanced against the broad compulsive powers of police that, if used improperly, can infringe fundamental civil liberties. Active oversight, including contacting the complainant before the complaint is finalised, may assist in achieving this balance.

2. Investigate complaints, and make a decision on the merits

The Police Ombudsman should have power to access relevant Police information and receive evidence or statements from witnesses. Where the complaint is trivial, or without substance, the Police Ombudsman should have the power, after investigation, to dismiss the complaint. If material is received from Police that is adverse to the complainant, this material should be made available to the complainant for a response.

All decisions should be based on what is fair in all the circumstances, taking into account the applicable law, policy and good policing practice.

Once a complaint is accepted, the Police Ombudsman should have a range of resolution options available, including referral to the Local Area Command, conciliation, or a recommendation that compensation be paid via an ex gratia application, or other means.

3. Conciliate complaints where appropriate

An effective range of resolution options should include the ability to conciliate complaints. This is particularly the case where complaints involve situations where the client is likely to have ongoing interactions with Police. The case studies below highlight situations that may be suitable for conciliation.

Case study 1: Regional NSW

A community member sought advice from Legal Aid NSW on behalf of his remote Aboriginal community. The community complained that whenever they held a community ceremony, Police would organise for additional Police to come from other areas and “flood the town” with officers. Community members did not know why this was occurring, but felt that it was unnecessary, heavy handed and in some cases provocative.

This case may benefit from conciliation by a conciliator with an understanding of Police obligations and powers, as well as Aboriginal culture.

Case study 2: Maggie

Maggie is 16 years old. She suffers from chronic mental illness and engages in behaviour where she puts herself and others at risk. Her home is frequently violent, and she spends periods on the street.

Maggie has a poor relationship with Police. She complained that when officers see her they stop her, tease her about the courts going ‘soft’ and releasing her on bail, make her state where she is going and where she has been, and conduct a bail/warrant check via radio. Police have teased her about a family member who committed suicide, and made derogatory references to her mental health.

Legal Aid NSW wrote to the Local Area Commander and a discussion was had with the relevant Duty Officer. The Duty Officer agreed to send an email to all officers which said that Maggie was a vulnerable young person, attached a photo of Maggie and noted areas she frequented. The email directed police not to approach Maggie unless it was reasonably suspected she was involved in an offence, and to only have contact for a legitimate purpose. The email asked officers to conduct any bail compliance checks at a distance. The email also reiterated the importance of respect and professionalism and emphasised that police should never make derogatory remarks toward people with whom they are dealing. The email was also sent to Legal Aid NSW and the NSW Ombudsman.

An outcome such as Maggie’s has the potential to provide significant benefit to both Maggie and the community. If conflict with officers is reduced, there are significant savings to the community, as well as the benefits of not having mentally ill young people in detention.

Cases such as this are more likely to have a long term effect if the complainant is able to return to the Police Ombudsman within a certain timeframe if the agreement or outcome is not working. It may be appropriate for the Police Ombudsman to contact the complainant after six months to determine whether conciliated agreements have been successful.

4. Recommend or direct disciplinary action against police

Where a decision has been made on the merits of the complaint, a Police Ombudsman should be able to both recommend and direct that disciplinary action be taken against certain police officers.

The Police Ombudsman must be able to ensure disciplinary action occurs where a serious complaint is upheld.

5. Recommend compensation be paid to a complainant

For more serious matters, which might include those where tortious liability arises, ex gratia payments should be available to complainants where their complaint is upheld and a loss can be demonstrated.

While not all complainants are seeking financial redress, a financial payment can have symbolic significance. It shows the complainant that they have been believed, and indicates their loss is regarded as significant by the State. This is particularly relevant where a person has suffered humiliation or indignity, e.g. due to inappropriate strip searches, or unlawful arrests.

Some complainants who might be eligible for an ex gratia payment may also be able to pursue a civil remedy through the court system. If the compensation available through the Police Ombudsman was capped at a particular amount, and the model was deemed fair, quick and effective, many of our clients who have pursued a claim through the judicial process could access this system. There would be a financial saving to Police and Treasury Managed Fund as the State's insurer in avoiding defending a claim through the courts.

6. Identify and investigate systemic issues and make recommendations accordingly

In order to ensure Police is effective, fair and accountable, the Police Ombudsman needs to be able to identify and investigate systemic issues, and make recommendations for systemic change.

PART 2: INVESTIGATION OF DEATHS & OTHER CRITICAL INCIDENTS

Legal Aid NSW strongly encourages that an independent, civilian oversight body be given the responsibility to investigate deaths which occur during the conduct of Police operations and other critical incidents.

This section highlights various deficiencies that have been found in the current critical incident investigation framework. Legal Aid NSW is concerned that, currently, the Police are primarily responsible for investigating such deaths, creating the potential for conflict of interest and undermining public confidence in investigative processes and findings in relation to deaths in Police operations. An independent body would benefit both the public and Police.

We also note that fully independent or hybrid investigative models of critical incident investigation operate successfully in several other jurisdictions.

Criticism of recent critical incident investigations in NSW

There has been significant controversy surrounding investigations conducted by police of several deaths in Police operations in recent years.

The death of Roberto Laudisio-Curti and NSW Ombudsman's Report

The Police investigation into the death of Roberto Laudisio-Curti was subject to oversight by the NSW Ombudsman. In its report,¹ the Ombudsman identified independence as central to community confidence in the integrity of the investigation process:

...[I]t was in the public interest to monitor the investigation so as to provide reassurance to both Mr Laudisio-Curti's family and the community that there would be a level of independent scrutiny of the investigation and to ensure that the investigation was conducted in an appropriate, accountable and transparent manner. We were also mindful of the community's understandable concern about police investigating the conduct of their fellow officers. *We hoped the knowledge that an independent body would be actively monitoring the investigation might allay some of these concerns.*²

The report concluded that there had been a failure by the Police to 'appreciate and fulfil' its responsibility to 'conduct an appropriate and accountable investigation into any death that occurs during police activities.'³ This included:

- a failure by police to provide any analysis of the lawfulness and reasonableness of the actions of officers involved, and
- a failure to adequately identify and address officer misconduct and improve training and procedures.

The death of Adam Salter and NSW Police Integrity Commission report

Similarly, the NSW Police Integrity Commission (PIC) undertook an inquiry, Operation Calyx,⁴ in response to a complaint made to it about the standard of the critical incident investigation undertaken by Police into the death of Adam Salter. Mr Salter was a mentally ill young man who was fatally shot by a police officer. The inquiry came in the wake of the Coroner's finding that the Police investigation was 'deeply flawed' and that Mr Salter had been unreasonably shot by a police officer.

¹ Ombudsman NSW, *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, p 7 at: <http://www.ombo.nsw.gov.au/news-and-publications/publications/reports/police/ombudsman-monitoring-of-the-police-investigation-into-the-death-of-roberto-laudisio-curti>.

² Ibid, p 1.

³ Ibid, p. 45 at 6.4.4

⁴ NSW Police Integrity Commission, *Operation Calyx*, Report to Parliament, June 2013 at <http://www.pic.nsw.gov.au/files/News/PIC%20Calyx%20Report.pdf>.

The report of Operation Calyx found:

- police officers gave knowingly false accounts of their actions
- the investigating officer effectively assisted the involved officers during walk-through interviews, such as by using leading questions
- the investigating officer did not conduct the critical incident investigation and did not prepare his report with rigour and impartiality. This included misrepresenting and discounting evidence of civilian witnesses that were inconsistent with evidence given by police
- the officer who reviewed the standard of the critical incident investigations came to unjustifiable conclusions in his assessment and did not show any consistent understanding of the purpose of a review of a critical incident.

The death of Rodney Elkass

The Legal Aid NSW Coronial Inquest Unit represented the family of Mr Rodney Elkass who was fatally shot by police. Following evidence revealing deep family concerns about the independence of the police investigation, his Honour Deputy State Coroner Hugh Dillon suggested consideration be given to establishing a body independent of Police to investigate police critical incidents. He stated:

.. for the good of the New South Wales police generally...this is a policy issue that government ought consider. I don't know that establishing a body independent of the New South Wales Police if the emphasis is on establishment is in the government's mind, but I do think it is very necessary to ensure that the New South Wales Police and ... public can have confidence in investigations that they would be independent. Police Officers who are ultimately cleared by an investigation, I think, will take much greater comfort from an investigation and should take much greater comfort from an investigation by a body that is seen to be and actually is independent of them, of their association of their hierarchy and so on, than a body that is not. I do not say that to criticise the New South Wales Police, the Homicide Squad or any particular people involved in this particular investigation. It is the course and I having done some studies of this, years ago in Northern Ireland when British Police investigated Northern Irish Police, I can only say that it added greatly to the confidence of the community that Northern Irish Police, a well known Ulster constabulary were investigated by mainland UK police.

The concerns arising out of the inquest included the lack of independence of police expert evidence relied on at the inquest. Of particular concern was that the police expert failed to countenance views of evidence other than provided by the officers concerned, despite this evidence conflicting with civilian evidence in crucial respects.

This was consistent with one of the problems identified by the Ombudsman in the *Laudisio-Curti* matter, where the Ombudsman concluded:

The objectivity of the officers from the Weapons & Training – Policy & Review Unit who opined before and at the coronial inquest that the use of force and tactical options by the involved officers was reasonable, justified and within the scope of policy/procedure and training practice guidelines must be questioned. Clearly, it is problematic to seek expert opinions on the extent of the involved officers' compliance with guidelines and training from officers who have some responsibility for developing and implementing the guidelines and training.⁵

The Legal Aid NSW experience representing family members in other coronial proceedings into police deaths

Not all critical incident investigations attract the same publicity or intense media interest as the above examples. Legal Aid NSW has had extensive experience representing families at inquests into the deaths of persons killed during Police operations.

The following observations are made on the basis of the experience of practitioners:

- Families often have a strong perception that investigating officers of critical incidents, by virtue of being police officers themselves, have a conflict of interest when investigating the actions of a fellow officer. This perception greatly affects people's faith in and benefit from the coronial process
- A family's perception of a conflict of interest is not necessarily ameliorated by existing measures aimed at ensuring impartiality. These existing measures include the fact that investigating officers of critical incidents are appointed from a different Local Area Command to those involved in the critical incident, and that senior police officers review critical incident investigations
- Family members have complained that they are not adequately involved in the investigation. They have complained of inadequate communication from and with investigating officers, a lack of updates and information about investigations and difficulties raising concerns and providing evidence to investigators. This lack of involvement and transparency encourages the perception that a conflict of interest exists
- Evidence presented at Inquests indicates that interviews conducted by critical incident investigators have sometimes inappropriately involved leading questions and have not been thorough or extensive
- Police officers are often engaged as expert witnesses to provide opinions on the actions of other police officers e.g. in assessing police high speed vehicle pursuits or in the use of firearms and other weapons

⁵ Curti Report (see footnote 1) at p41.

- Internal police expert witnesses are on occasion asked to provide opinions based solely on untested “Police” version of events to the exclusion of alternative accounts from civilian eyewitnesses
- Although Coroners are empowered to direct Police investigations, police officers sometimes take early and significant investigative decisions and steps without direction.

The current model of critical incident investigation gives rise to both perceived and actual conflict of interest situations. In our experience, this can significantly compromise the standard and outcomes of investigations into deaths occurring in the course of Police operations.

The review provides an opportunity to improve this situation by recommending vesting the responsibility to investigate deaths in Police operations in a civilian body. Should it not be recommended that a civilian oversight body be given the primary responsibility to investigate critical incidents, and should that responsibility remain with Police, it is imperative that a civilian body be given powers to provide ongoing oversight of police investigations into critical incidents, including by attending the initial investigation of deaths and providing independent, ongoing oversight from that time onwards.

Examples of best practice around the world

Legal Aid NSW notes that fully or hybrid independent critical incident investigative models operate in Canada, New Zealand, Wales, Britain, Northern Ireland and South Africa. The Independent Police Complaints Commission in England is an independent civilian body which is given full responsibility for investigating deaths in the course of police operations. In Australia, Queensland's Crime and Corruption Commission provides independent oversight of ongoing critical incident investigations undertaken by the Queensland Police Service from the time of the initial stages of an investigation.

A 2011 report of the Victorian Office of Police Integrity (OPI) invited the government to consider the following principles when assessing and considering the 'optimal' framework for investigating deaths associated with Police contact:

- independence
- effectiveness
- promptness (timeliness)
- next of kin involvement, and
- sufficient public scrutiny (transparency).

The OPI Report canvassed the possibility of establishing an independent agency to conduct critical incident investigations, including a consideration of the resource implications.⁶ The OPI Report highlighted the benefits of independence for both the public and Police on the basis that independence negates any perceptions of potential conflict of interest, and avoids officers being 'tarnished by real deficiencies in investigations and oversights'.⁷

In response to the OPI Report, the Victorian Human Rights Law Centre and Community Legal Centre argued that establishing an independent investigation system in Victoria would be cost effective, transparent, fair and ultimately in the best interest of police officers.⁸ Legal Aid NSW encourages the Review to consider both Victorian reports and experiences in the nominated overseas jurisdictions as examples of best practice.

CONCLUSION

The current model of police oversight lacks transparency, independence and effectiveness. In the experience of Legal Aid NSW, these characteristics have multiple repercussions, including a reduction in community confidence and compliance with laws, deterrence of complaints, accommodation of Police wrongdoing and potentially unfair criticism of Police.

Legal Aid NSW believes that a single, independent Police Ombudsman empowered to resolve complaints and conduct investigations into deaths and critical incidents fairly, efficiently and transparently will improve Police oversight and benefit the Police and wider community.

⁶ Office of Police Integrity Victoria, 2011. 'Review of the investigation of deaths associated with police contact', Issues paper.

⁷ Ibid, p 30.

⁸ Human Rights Law Centre, 2011. 'Effective Transparent Accountable: An independent system to investigate police-related deaths in Victoria'. Report by the Federation of Community Legal Centres (VIC).

APPENDIX A: REVIEW OF THE INVESTIGATION AND OVERSIGHT OF POLICE CRITICAL INCIDENTS



REVIEW OF THE INVESTIGATION AND OVERSIGHT OF POLICE CRITICAL INCIDENTS

Legal Aid NSW submission to the

Hon Robert McClelland

via

Ministry of Police and Emergency Services

October 2013

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Programs.

Legal Aid NSW also has a state-wide specialist service which assists in coronial inquests called the Coronial Inquest Unit (CIU). The CIU provides free legal advice and minor assistance, and may provide legal representation in matter where a police critical incident has occurred.

Legal Aid NSW values the opportunity to make this submission to the review of the investigation and oversight of police critical incidents being conducted by the Hon Robert McClelland. Should you require any further information, please contact Annmarie Lumsden, Executive Director, Strategic Policy and Planning on 9219 6324 or at annmarie.lumsden@legalaid.nsw.gov.au.

INTRODUCTION

Legal Aid NSW endorses the decisions already made by the NSW Government to enhance transparency of critical incident investigations undertaken by police, namely that the NSW Police Force *Guidelines for the Management and Investigation of Critical Incidents* (Critical Incident Guidelines) will be publicly available and the NSW Police Commissioner will advise the NSW Ombudsman of all critical incidents, not just those that are the subject of a formal complaint.

Legal Aid NSW also welcomes the decision of the NSW Government to establish an independent review of the investigation and oversight of police critical incidents (the Review).

However, Legal Aid NSW is concerned that the premise of the Review is that the NSW Police Force should retain responsibility for investigating and reviewing critical incidents, and therefore, that the terms of reference do not include consideration of the issue of investigative responsibility.

Given the importance of that issue, the first part of this submission addresses investigative responsibility for critical incidents. The second part of the submission is the Legal Aid NSW response to the issues the Review will specifically consider on the basis that the NSW Police Force will retain responsibility for investigating and reviewing critical incidents.

INVESTIGATIVE RESPONSIBILITY FOR CRITICAL INCIDENTS

The issue

Legal Aid NSW is concerned that the premise of the Review is that the NSW Police Force should retain responsibility for investigating and reviewing critical incidents, and is of the view that significant value could be added to the outcome if the Review considered the issue of investigative responsibility for critical incidents. Put simply, the issue is whether an agency independent of the NSW Police force should undertake critical incident investigations.

Experience in NSW

NSW Ombudsman's Report

In *Ombudsman monitoring of the police investigation into the death of Roberto Laudisio-Curti*⁹ (the NSW Ombudsman's Report), the NSW Ombudsman identified numerous deficiencies

⁹ Ombudsman NSW, *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, p 7 at: <http://www.ombo.nsw.gov.au/news-and-publications/publications/reports/police/ombudsman-monitoring-of-the-police-investigation-into-the-death-of-roberto-laudisio-curti>

with the critical incident investigation by the NSW Police Force, specifically finding that the police failed to adequately identify and deal with police misconduct.

The NSW Ombudsman's Report identifies independence as central to community confidence in the integrity of the investigation process, stating:¹⁰

*We decided that it was in the public interest to monitor the investigation so as to provide reassurance to both Mr Laudisio-Curti's family and the community that there would be a level of independent scrutiny of the investigation and to ensure that the investigation was conducted in an appropriate, accountable and transparent manner. We were also mindful of the community's understandable concern about police investigating the conduct of their fellow officers. **We hoped the knowledge that an independent body would be actively monitoring the investigation might allay some of these concerns.***

NSW Police Integrity Commission report

Similar deficiencies to those found in the NSW Ombudsman's Report were highlighted in the NSW Police Integrity Commission (PIC) report, Operation Calyx¹¹ (the PIC Report) on the recent inquiry into the death of Adam Salter, a mentally ill young man who was shot dead by police. The inquiry, in which NSW Police Force members were accused of lying to protect their colleagues, was commissioned after a Coroner found the police investigation was "deeply flawed". Key criticisms included the coaching of police suspects by police investigators and omissions of "basic tests" in the collection of forensic evidence.

Recent case conducted by Legal Aid NSW

The Legal Aid NSW Coronial Inquest Unit represented the family of Mr Rodney Elkass who was fatally shot by police. Following evidence highlighting considerable flaws in the police investigation of this critical incident, the Deputy State Coroner, the Honourable Hugh Dillon, recommended consideration be given to the establishing a body independent of the NSW Police Force to investigate police critical incidents. Problems with the investigation acknowledged in the findings by Deputy State Coroner included:

- failure of the review of the critical incident investigation to occur before the inquest, as required under the current guidelines
- failure of police to conduct walkthroughs and give adequate weight to evidence by police and civilians. The investigating officer discounted civilian versions of the evidence that did not match the police version

¹⁰ Ibid, p 1

¹¹ NSW Police Integrity Commission, *Operation Calyx*, Report to Parliament, June 2013 at <http://www.pic.nsw.gov.au/files/News/PIC%20Calyx%20Report.pdf>

- flaws in the police version of events
- the expert's review was of limited assistance.

Conclusions on experience in NSW

The critical incident findings by the NSW Ombudsman and PIC together with the findings of the Deputy State Coroner, the Honourable Hugh Dillon in the case referred to above, raise questions of conflict of interest when the NSW Police Force investigates the potential misconduct of a member of its own agency. For this reason, Legal Aid NSW is of the view that the Review should explore the investigations of critical incidents by an independent body.

Approaches in other jurisdictions

Legal Aid NSW notes that fully or hybrid independent critical incidents investigative models operate in Canada, New Zealand, Wales, Britain, Northern Ireland and South Africa. In addition, Queensland's Crime and Misconduct Commission recently took over the responsibility for investigations of deaths in custody from the Queensland Police Service.

A 2011 report of the Victorian Office of Police Integrity (OPI) (the Victorian OPI Report) invited the government to consider the following principles when assessing and considering the 'optimal' framework for investigating deaths associated with police contact:

- independence
- effectiveness
- promptness (timeliness)
- next of kin involvement, and
- sufficient public scrutiny (transparency).

The Victorian OPI Report canvasses the possibility of establishing an independent agency to conduct critical incident investigations, including a consideration of the resource implications.¹² The Victorian OPI Report highlights the benefits of independence for both the public and police on the basis that independence negates any perceptions of potential conflict of interest, and avoids officers being "tarnished by real deficiencies in investigations and oversights."¹³

In response to the Victorian OPI Report, the Victorian Human Rights Law Centre and Community Legal Centres paper *Effective Transparent Accountable: An independent system*

¹² Office of Police Integrity Victoria, 2011. 'Review of the investigation of deaths associated with police contact', Issues paper

¹³ Ibid, p 30

to investigate police-related death in Victoria,¹⁴ argues that establishing an independent investigation system in Victoria would be cost effective, transparent, fair and ultimately in the best interest of police officers.

Legal Aid NSW is of the view that there would be utility in the Review developing an 'optimal' framework model for investigating critical incident deaths in New South Wales.

SPECIFIC CONSIDERATIONS OF THE REVIEW

(a) Whether the NSW Police Force Critical Incident Guidelines provide adequate guidance and clarity to ensure critical incident investigations are rigorous, timely and objective.

Legal Aid NSW is of the view that the Critical Incident Guidelines do not provide adequate guidance and clarity to ensure critical incident investigations are rigorous, timely and objective. This is comprehensively illustrated in the NSW Ombudsman's report.¹⁵ Legal Aid NSW supports the amendments to the Critical Incident Guidelines recommended in the NSW Ombudsman's report, specifically:

- i. The NSW Police Force amend the Critical Incidents Guidelines to make it mandatory that critical incident investigators conduct question and answer interviews with civilian witnesses who are willing and able to provide information about the actions of police officers involved in critical incidents.*
- ii. The NSW Police Force seek legal advice from the Solicitor General to clarify the issue of whether critical incident investigators are able to direct involved officers to participate in walk-through interviews or re-enactments.*
- iii. The NSW Police Force amend the Critical Incident Guidelines to provide guidance on the legal issues and desirability of conducting walk-through interviews or re-enactments with involved officers.*
- iv. The NSW Police Force amend the Critical Incident Guidelines to make it clear that the critical incident investigation team must consider all conduct and systemic issues and take or recommend appropriate action be taken in a timely manner to*

¹⁴ Human Rights Law Centre, 2011. 'Effective Transparent Accountable: An independent system to investigate police-related deaths in Victoria'. Report by the Federation of Community Legal Centres (Victoria).

¹⁵ Ombudsman NSW, *Ombudsman monitoring of the police investigation into the death of Roberto Laudisio-Curti* Special Report to Parliament, February 2013, p 7 at: <http://www.ombo.nsw.gov.au/news-and-publications/publications/reports/police/ombudsman-monitoring-of-the-police-investigation-into-the-death-of-roberto-laudisio-curti>

address any identified criminal conduct, misconduct or systemic issues before any coronial inquest. This should in all cases include a review of the complaint and use of force histories of the involved officer.

- v. *The NSW Police Force amend the Critical Incident Guidelines to require the Region Commander with responsibility for the critical incident investigation to review the investigation before any coronial inquest to ensure that all conduct and systemic issues have been appropriately identified and addressed. The consideration of conduct and systemic issues, and the opinion of the Region Commander should be documented and recorded.¹⁶*

(b) Whether operational, legal and other barriers exist to the NSW Police Force, publicly reporting on the outcomes of critical incident investigations, and how these might be resolved

Legal Aid NSW is not in a position to comment on whether operational, legal and other barriers exist which prevent the NSW Police Force publicly reporting on the outcomes of critical incident investigations.

However, three recommendations contained in the PIC Report¹⁷ are relevant to this term of reference as they relate to public reporting by the NSW Police Force on the outcomes of critical incident investigations.

Publication of reports and guidelines

The first is the recommendation that all reports of investigations into critical incidents should be published on the website of the NSW Police Force and that the Critical Incident Guidelines should be made publicly available on the website.

Legal Aid NSW notes and endorses the decision already made by the NSW Government that the Critical Incident Guidelines will be publicly available, which implements one aspect of this recommendation.

For the reasons given in the PIC report, Legal Aid NSW supports the other aspect of the recommendation, namely that all reports of investigations into critical incidents should be published on the NSW Police Force website.

Review of media policy

¹⁶ Ibid, p 7

¹⁷ NSW Police Integrity Commission, *Operation Calyx*, Report to Parliament, June 2013 at <http://www.pic.nsw.gov.au/files/News/PIC%20Calyx%20Report.pdf>

The second recommendation in the PIC report that is relevant to this term of reference is that the NSW Police Force should, to the extent to which it has not already done so, conduct a thorough review of its media policy concerning critical incidents.¹⁸

In relation to the investigation into the Situation Reports and statements released to the by NSW Police about the shooting of Adam Salter, the PIC report found:

*Each of the Situation Reports, the media statement and the media release contained a number of statements which were untrue and supplied senior police and the public with a seriously false version of the events which happened at 33 Wangee Road.*¹⁹

The third recommendation of PIC related to the review of the media policy is that a police officer who issues a media release or prepares a Situation Report should be required to make a record of the person or persons supplying the various items of information contained in the media report or Situation Report.²⁰

For the reasons given in the PIC report, Legal Aid NSW supports both of these recommendations concerning the NSW Police Force media policy concerning critical incidents.

In addition, Legal Aid NSW recommends that guidelines be developed to ensure that media reports or Situation Reports are only issued where it is in the public interest and that the contents of true. Public interest considerations would the public interest in the release of the information. However, the guidelines should make it clear that information should not be released where there is a possibility that it will damage the critical incident investigation.

(c) whether improvements can be made to the oversighting of critical incidents to guarantee accountability and transparency, including:

- (i) how and when oversight responsibilities are allocated between different agencies,
- (ii) what gives rise to, and the purpose of, that oversight, and
- (iii) whether there is any unnecessary duplication of roles or responsibilities;

While the three parts of the issue are used as general headings, there is considerable overlap in what is considered below.

¹⁸ Ibid p 270

¹⁹ Ibid, p x

²⁰ Ibid, 272

(i) Allocation of oversight responsibilities are between different agencies

Legal Aid NSW notes and endorses the decision already made by the NSW Government that the NSW Police Commissioner will advise the NSW Ombudsman of all critical incidents, not just those that are the subject of a formal complaint.

Consistent with recommendation (iv) in the NSW Ombudsman's Report, Legal Aid NSW is of the view that the NSW Government decision should be supported by legislation and specifically, the *Police Act 1990* (NSW) should be amended to require the NSW Police force to notify the NSW Ombudsman immediately following all critical incidents involving the death or serious injury of a person during policing activities.²¹

In other words, Legal Aid NSW supports legislated mandatory notification by police to the NSW Ombudsman of all critical incidents involving the death or serious injury of a person during policing activities.

In this context, Legal Aid NSW notes that the timing of such notification is critical to efficient, effective and robust oversight of critical incidents and their investigation, in terms of the taking of first statements from witnesses, control of the scene and preservation of evidence, for example. Immediate notification by police to the NSW Ombudsman is essential.

(ii) What gives rise to and purpose of oversight

What gives rise to oversight by the NSW Ombudsman is the critical incident, and the determination by the NSW Ombudsman that it is in the public interest, because of the identification of any possible misconduct issues, that it is in the public interest to oversee the critical incident investigation.

The purpose of NSW Ombudsman oversight of the critical incident investigation is to scrutinise the investigative process to ensure that the critical investigation team conducts an appropriate, accountable and transparent investigation into the critical incident.

What gives rise to oversight by the Coroner is the death arising from the critical incident. The purpose of the Coronial Inquest is to examine the circumstances of the critical incident in order to determine manner and cause of death.

What gives rise to oversight by PIC is police misconduct, which may or may not arise from a critical incident. The purpose of PIC is to determine whether a police officer has engaged in

²¹ Ombudsman NSW, *Ombudsman monitoring of the police investigation into the death of Roberto Laudisio-Curti* Special Report to Parliament, February 2013, p 7 at: <http://www.ombo.nsw.gov.au/news-and-publications/publications/reports/police/ombudsman-monitoring-of-the-police-investigation-into-the-death-of-roberto-laudisio-curti>

misconduct, or not, and to make recommendations about the appropriate response to any misconduct for that the particular police officer.

(iii) Any unnecessary duplication of roles or responsibilities

The purpose of oversight by the NSW Ombudsman and the role of the Coroner and PIC as it applies to the critical incident investigation is set out in (c)(ii) above.

It is the view of Legal Aid NSW that there is no unnecessary duplication of roles or responsibilities of the NSW Ombudsman or the Coroner or PIC.

The Victorian OPI Report referred to above²² noted that unnecessary duplication of roles and responsibilities can be avoided by introducing statutory provisions that assign specific responsibility for various stages of the investigation.

While Legal Aid NSW does not see any unnecessary duplication of roles or responsibilities of the NSW Ombudsman, the Coroner or PIC, if the Review considers this to be problematic, it could explore whether improvement could be made to the statutory allocation of roles to assist with unnecessary duplication of roles and responsibilities in NSW.

Other improvements to the oversight of critical incidents

Deaths related to police operations

Legal Aid NSW has encountered problems where the Critical Incident Guidelines may not be considered to be technically applicable, but the actions of police come under close scrutiny and criticism during the coronial inquest.

In a recent matter conducted by Legal Aid NSW the Coroner and police determined at an early stage that a death did not occur during a police operation and therefore did not arise from a critical incident to which the Critical Incident Guidelines applied. The matter was investigated by the OIC who was a work colleague of the police officers involved in the police operation. During the inquest the actions of police came under close scrutiny and criticism, one being a failure to appropriately categorise as serious and act on a matter repeatedly brought to the attention of police during the night when the person died.

Legal Aid NSW is of the view these criticisms and failings could have been avoided the Critical Incident Guidelines applied to deaths that may have occurred during police operations.

Appropriate powers for NSW Ombudsman oversight

²² Office of Police Integrity Victoria, 2011, 'Review of the investigation of deaths associated with police contact', Issues paper

For the reasons given in the NSW Ombudsman's Report, Legal Aid NSW supports the implementation of recommendations (vii) of the Report, being:

The NSW Parliament consider amending the Police Act 1990 to provide the NSW Ombudsman with appropriate powers to effectively oversight critical incident investigations involving the death or serious injury of person during policing activities.

Baff v New South Wales Commissioner of Police

Legal Aid NSW suggests that the Review to investigate the impact that *Baff v New South Wales Commissioner of Police [2013] NSWSC 1205* may have on critical incident investigations. In that case, the Supreme Court decided that the NSW Police Commissioner can not force a police officer to answer questions about their conduct on duty if the officer claims privilege against self-incrimination. This decision may create obstacles for an oversight agency reviewing a critical incident. It would be useful for the Review to provide some analysis of the impact this case may have on critical incident investigations, and how such problems may be addressed.

CONCLUSION

Legal Aid NSW endorses the decisions already made by the NSW Government that the Critical Incident Guidelines) will be publicly available and the NSW Police Commissioner will advise the NSW Ombudsman of all critical incidents.

However, Legal Aid NSW is concerned that the premise of the Review is that the NSW Police Force should retain responsibility for investigating and reviewing critical incidents, and is of the view that significant value could be added to the outcome if the Review considered the issue of investigative responsibility. Evidence in NSW outlined in this submission indicates numerous deficiencies with the critical incident investigation by the NSW Police Force and raises questions of conflict of interest when the NSW Police Force investigates the potential misconduct of a member of its own agency. Fully or hybrid independent critical incidents investigative models operate in other jurisdictions. Independence benefits both the public and the police, negating perceptions of conflict of interest, and avoiding officers being tarnished by deficiencies in investigations and oversights. There would be utility in the Review developing an 'optimal' framework model for investigating critical incident deaths in NSW.

The Critical Incident Guidelines do not provide adequate guidance and clarity to ensure critical incident investigations are rigorous, timely and objective, and those objectives could be better achieved by adopting the amendments recommended in the NSW Ombudsman's report.

In terms of public reporting by the NSW Police Force on the outcomes of critical incident investigations, the recommendations in the PIC Report should be adopted, specifically, that all reports of investigations into critical incidents should be published on the NSW Police Force website, that the NSW Police Force should conduct a thorough review of its media

policy concerning critical incidents, and that a police officer who issues a media release or prepares a Situation Report should be required to make a record of the person or persons supplying the various items of information contained in the media report or Situation Report. In addition, guidelines be developed to ensure that media reports or Situation Reports are only issued where it is in the public interest and that the contents of true.

Improvements that can be made to the oversighting of critical incidents to guarantee accountability and transparency include applying the Critical Incident Guidelines to deaths that may have occurred during police operations, amending the Police Act 1990 to provide the NSW Ombudsman with appropriate powers to effectively oversight critical incident investigations, and providing some analysis of the impact *Baff v New South Wales Commissioner of Police [2013] NSWSC 1205* may have on critical incident investigations, and how such problems may be addressed.