
PANSW Submission

Review of Police Oversight in NSW



Executive Summary

[1] The need for a single, effective and fair police oversight agency is widely accepted in New South Wales. The fundamental failures of the current multi-agency system involving the Police Integrity Commission, the NSW Ombudsman and the Independent Commission Against Corruption have brought about the necessity of this Review. This was acknowledged by the Legislative Council Select Committee on the conduct and progress of the Ombudsman's Inquiry "*Operation Prospect*", which stated in its Final Report¹:

7.51 The committee accepts the thrust of the submissions from within and outside the NSW Police Force that a single well-resourced oversight body would be a far preferable structure to the current system of multiple agencies with overlapping responsibilities. The fact that the allegations arising from Operation Mascot more than 15 years ago have failed to be addressed by the current system is clear evidence of its dysfunction. It is important to note that the delays and lack of resolution impact as seriously on police, who are the subject of unresolved allegations and inordinately delayed investigations, as they do on the public. Both the public and police have a right to expect that if a complaint is made against police then it will be dealt with quickly, fairly and independently. The existing system largely fails on all three of these measures.

[2] Recent developments involving highly critical reports on oversight agency investigations and the outcomes of litigation have also resulted in consideration of reforming the broader public-sector oversight structure, as well as police-specific systems. All three oversight agencies in New South Wales - the Police integrity Commission, the Independent Commission Against Corruption and the NSW Ombudsman - have faced significant criticism and public concern over the proper exercise of their legislative powers, their adherence to principles of procedural fairness, the quality of their investigations, and the cost to New South Wales for their annual budgets and costly litigation.

[3] The Police Integrity Commission has been subject to numerous critical reports by the Office of the Inspector of the Police Integrity Commission (OIPIC), both in relation to specific investigations, as well as entrenched practices and deficiencies. The PIC findings have been found to be unreliable by multiple stakeholders and have also denied procedural fairness to affected individuals. There have been allegations of leaks of confidential information, causing in 2011 the then Labor Minister for Police to request the OIPIC to investigate the leaks. The PIC has also engaged in costly litigation with the NSW Crime Commission, and media reports in November 2014 have highlighted criticisms by a Queensland magistrate of attempts by the PIC to circumvent its legislative constraints.

¹ Legislative Council Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "*Operation Prospect*", *The conduct and progress of the Ombudsman's inquiry "Operation Prospect"*, Final Report 2015, para 7.51, page119.

[4] The Independent Commission Against Corruption (ICAC) has recently lost an appeal to the High Court, a finding in which the High Court's interpretation of the ICAC's legislative scope differed considerably from the interpretation under which the ICAC itself had operated. This has thrown into doubt a number of ICAC investigations, and but for the Parliament passing validating legislation, would have potentially exposed the ICAC to considerable costs in litigation.

[5] These events have necessitated a thorough review of the ICAC which may recommend a reformulation of the ICAC's functions, powers and scope. The decisions of the ICAC leading to this result, as well as its response to the High Court decision, have drawn significant criticism from the Office of the Inspector of the Independent Commission Against Corruption (OIICAC).

[6] The Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "*Operation Prospect*" found the legality of warrants and the leaking of information should not have been incorporated into the single inquiry "*Operation Prospect*" by the NSW Ombudsman. Evidence provided to the Select Committee also cast doubt over the Ombudsman's adequate investigation of the original complaints, as well as the approach to the welfare of witnesses. This comes after evidence provided to the Review by the Hon Robert McClelland into the *Oversight of Police Critical Incidents*, which indicated the obstacles the Ombudsman's monitoring power caused police investigations and the directions of the NSW Coroner. The McClelland Report made recommendations seeking to rectify these problems.

[7] What has become clear from these developments is:

1. The duplication of oversight functions between multiple oversight agencies has been to the detriment of the effectiveness and fairness of the oversight system;
2. Oversight agencies are consistently operating beyond their intended legislative functions, and clarification is required in order to define the roles and powers of a reformed oversight system;
3. The Police Integrity Commission, with a long history of poor investigative practices and denials of procedural fairness, can no longer play any part in police oversight;
4. Under external scrutiny, the selection of matters for investigation, and the conduct of those investigations, has failed to meet the standards expected of anti-corruption agencies; and
5. The inadequacy of current accountability mechanisms for oversight agencies which utilise extensive Royal Commission-style coercive powers, has allowed these agencies to continue operating with these deficiencies.

[8] The fundamental reform needed to address these deficiencies is to create a single, well-resourced, oversight agency with clearly defined legislative functions and powers, held accountable by a powerful Inspectorate. The Police Association of New South Wales (PANSW) has made numerous submissions outlining the failures of the multi-agency system and why a single-agency model is needed. While this approach – the need for a single police oversight agency – is widely accepted by stakeholders, what shape this new model takes will be determined as a result of your Review.

[9] This Submission identifies the following key features for an effective reformed system:

- A proposed structure for the police oversight agency, which could be implemented in either a model in which the police oversight function is amalgamated into the ICAC, or one in which a new body is established to perform the police oversight function.
- Accountability measures which need to be in place to prevent the new oversight system becoming plagued by the same deficiencies as the current system.
- The Submission will also address the proposed adoption of a model based on the Independent Police Complaints Commission (IPCC) in England and Wales. The IPCC has been assessed by its own Parliament and Government as failing to perform its function and reducing public trust in the police forces and the police oversight system. The push to reform the IPCC continues. Therefore, at the present time, the PANSW considers it would be difficult to consider the IPCC as a viable model for adoption in New South Wales. To do so would mean replacing our broken system with one in an even greater state of disarray. Consideration of the IPCC model has been intrinsically linked with intent to remove complaints investigations and critical incidents investigation from the NSW Police Force, and instead give an external agency the primary role in these functions. The PANSW Submission will provide considerable evidence such an approach would significantly reduce the quality of investigations into complaints and critical incidents and would be highly detrimental for the ethical health of the New South Wales Police Force (NSWPF).

The need for reform

[10] The current police oversight system is no longer meeting the needs of the community or police in NSW. The multiplication and overlap of functions has produced a system in which the roles of agencies are not clear, ambiguity surrounds legislative powers and obligations, and the standards expected of integrity agencies are not being met in regards to investigative quality and adherence to procedural fairness.

[11] Under the current system, a single matter can involve internal review and investigation by the NSW Police Force, external review by the NSW Ombudsman, investigation and hearings by the Police Integrity Commission, review by the Inspector of the Police Integrity Commission, investigation by the Coroner and a Coronial Inquiry, and prosecution by the Department of Public Prosecutions. On top of all of this, WorkCover can also launch an investigation into breaches of work health and safety.

[12] There is also the potential for certain matters to be assessed by some agencies as not warranting further investigation, only for another agency to conduct a full investigation. In such circumstances, significant questions can be raised about the appropriateness of the investigation.

[13] This results in individuals in the community and involved police officers being caught up in an investigation and proceedings for years, causing trauma, expense, and damage to reputations and careers. After all this, the people involved may not receive any closure or justice, as different agencies can make different findings. This is also a wasteful process, with so much duplication the

large annual budgets of these agencies could be directed toward better value for money. The system is simply not delivering reliable accountability for the people of NSW.

[14] Nor is the duplication of functions justifying these deficiencies with high quality investigations and satisfactory outcomes. In fact, the quality of oversight is significantly reduced under current arrangements.

[15] The Police Integrity Commission has faced consistent findings by the Inspector of the PIC of bias, denials of procedural fairness, and even failures to utilise basic investigative practices.

[16] In regards to investigative deficiencies, the Inspector has found the PIC engaged in the following:

- “prejudice and prejudgment on the part of the Commission”²;
- A systematic skewing of the evidence³;
- A persistent pattern of omitting relevant evidence and failing to have regard to the whole of the evidence so as to present that evidence fairly and intelligibly⁴;
- Reliance on, and publication of, witnesses who were acknowledged as unreliable⁵;
- The PIC “spent an enormous amount of time and resources investigating, the sensational claims comprised in the June 2005 anonymous allegation”⁶;
- The PIC “gave credence to gossip and rumours”⁷; and
- “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 to explore relevant issues, and failed to present a fair and balanced account of the evidence”⁸.

[17] For an agency whose primary justification for its existence and budget is its purported capacity as a specialist investigatory body, this is a damning assessment.

[18] In regards to procedural fairness, the Inspector has made the following findings:

- There was “a clear and significant failure to accord procedural fairness to these witnesses”⁹;
- This lack of procedural fairness caused considerable damage to the reputations of the persons involved. The PIC failed to act to limit this damage; and
- There were “substantive problems underlying the practices and procedures adopted by the Commission”¹⁰.

² Inspector’s Report, Pursuant to Section 89(1) of the *Police Integrity Commission Act 1996* Dealing with Complaints made by [REDACTED] arising out of Police Integrity Commission’s Whistler Report, 9 March 2011, para 134.

³ Special Report of the Inspector of the Police Integrity Commission Pursuant to Section 101 of the *Police Integrity Commission Act 1996*, 19 October 2011, para 377.

⁴ Ibid, para 377.

⁵ Ibid, para 383.

⁶ Ibid, para 383.

⁷ Ibid, para 385.

⁸ Special Report of the Inspector of the Police Integrity Commission Pursuant to Section 101 of the *Police Integrity Commission Act 1996*, 2 April 2009, para 10.

⁹ Special Report of the Inspector of the Police Integrity Commission Pursuant to Section 101 of the *Police Integrity Commission Act 1996*, 2 April 2009, para 7.

¹⁰ Ibid, para 6.

[19] The Inspector has said of this bias, lack of procedural fairness, and poor investigation practices:

“The analysis of the Commission’s investigation and Report conducted in the preceding pages of my Report has uncovered a situation so serious and so far removed from what is expected of a law enforcement body invested with very considerable resources and the powers of a Royal Commission as to be well-nigh incomprehensible”.¹¹

[20] These do not represent isolated findings. In 2009 the Committee of the Office of the Ombudsman and the Police Integrity Commission requested the Inspector of the PIC to consider making a Special Report regarding the cumulative effect of multiple critical reports, and whether they amounted to systematic failures by the PIC¹². The Inspector of the PIC found in the resulting report:

In my opinion my Reports when read as a whole, and having regard to the fact that they deal with complaints arising from three separate public Reports made by the Commission to the Parliament, containing adverse opinions damaging to the reputations of those involved, do reveal systemic and substantive problems underlying the practices and procedures adopted by the Commission¹³.

[21] The conclusion these deficiencies are systematic and entrenched was again reached in another report two years later¹⁴. This again demonstrates the problems with the PIC and reinforces the need for a trusted and effective oversight body.

[22] This assessment of the PIC was not confined to the Inspector. In relation to Operation Rani, the Commissioner of Police obtained a review of the PIC’s findings by Senior Counsel. This review concluded: “*none of the specific adverse findings made in the Operation Rani report against either DI [REDACTED] or DSC [REDACTED] were justified*”¹⁵. As a result, the Commissioner did not accept any of the recommendations from Operation Rani.

[23] The PIC has also engaged in conduct intended to boost its profile, to the detriment of its credibility and accuracy of its findings. In February 2011 the then Labor Minister for Police made a written request to the Inspector to ascertain whether the PIC had breached secrecy provisions by leaking information from confidential hearings to the media¹⁶. In his Annual Report, the Inspector stated:

Despite the seriousness of the breach of the Commission’s confidential processes demonstrated by this unauthorised release of confidential information, the PIC

¹¹ Special Report of the Inspector of the Police Integrity Commission Pursuant to Section 101 of the *Police Integrity Commission Act 1996*, 19 October 2011, para 376.

¹² Special Report of the Inspector of the Police Integrity Commission Pursuant to Section 101 of the *Police Integrity Commission Act 1996*, 2 April 2009, para 1.

¹³ *Ibid*, para 6.

¹⁴ Special Report of the Inspector of the Police Integrity Commission Pursuant to Section 101 of the *Police Integrity Commission Act 1996*, 19 October 2011, para 377.

¹⁵ Memorandum of Advice of Mr P Taylor SC, para 171.1.

¹⁶ Inspector of the PIC Annual Report 2010-11, para 124.

informed me that it had not itself initiated an internal investigation with a view to establishing how the breach of its security had occurred.¹⁷

[24] The Inspector has also criticised the PIC's practices in relation to publication of certain information regarding the Commissioner of Police's response to adverse findings made by PIC. In its 2009-10 Annual Report the PIC reported Sergeant [REDACTED] had been medically discharged. The Inspector of the PIC found the PIC did so in order to imply the medical discharge related to the Commissioner of Police accepting the adverse findings made by PIC against Sergeant [REDACTED]. This was done despite the PIC receiving no indication from the Commissioner of Police the adverse findings had been accepted. Rather, the PIC had simply obtained information about the medical discharge "from the Police personnel database" and published that information. This was despite the fact previously, the Inspector of PIC had found the PIC had failed to afford procedural fairness, and therefore had no authority to publish the adverse findings, and no reliance should be placed on those opinions and recommendations.¹⁸

[25] The behaviour demonstrated by the PIC falls so far short of the standard of integrity and professionalism required of the police officers the PIC oversights. This has resulted in operations by the PIC being so flawed they could not be relied upon. At the same time they denied the officers involved procedural fairness, damaging their careers and causing them significant personal harm, only for no adverse findings to be made or none acted on by the Commissioner of Police.

[26] An investigative agency which other bodies are consistently indicating is delivering reports with unreliable findings does not provide the people of NSW with proper oversight of police. When public highlighting of its failures appears to result in little or no reform, it raises serious concerns whether the agency is capable of reform. Far from reducing oversight, the creation of a single, wide-ranging anti-corruption body would improve the oversight of police and ensure accountability.

[27] In addition to the poor investigative practices and adherence to procedural fairness, the Police Integrity Commission achieves such a low output in the broader police complaints system and in relation to exposing the most serious cases of criminal conduct or serious misconduct.

¹⁷ Inspector of the PIC Annual Report 2010-11, para 134.

¹⁸ Inspector of the Police Integrity Commission. Annual Report 2010-11, para 94 to 123.

[28] The table below shows the outcomes from finalised full and preliminary investigations for the past 5 reporting years, as reported in the PIC Annual Reports. It is questionable whether an agency which cost the people of NSW \$106.6 million¹⁹ in this period represents value for money with these outcomes:

| Full Investigations resulting in... | 2009-10 | 2010-11 | 2011-12 | 2012-13 | 2013-14 | 5 Year Total |
|---|---------|---------|---------|---------|---------|--------------|
| Referral to DPP for consideration of prosecution action | 4 | 5 | 5 | 4 | 0 | 18 |
| Dissemination of information to the NSWPF | 7 | 15 | 3 | 6 | 5 | 36 |
| Dissemination to other law enforcement agencies | 4 | 4 | | 1 | 0 | 9 |
| No further action | 5 | 8 | 3 | 4 | 2 | 22 |

Source: PIC Annual Reports

| Preliminary Investigations resulting in... | 2009-10 | 2010-11 | 2011-12 | 2012-13 | 2013-14 | 5 Year Total |
|---|---------|---------|---------|---------|---------|--------------|
| No further action | 52 | 42 | 71 | 66 | 59 | 290 |
| Progressed to full investigation | 5 | 10 | 14 | 8 | 13 | 50 |
| Referred to full investigation | | 3 | 2 | 1 | 0 | 6 |
| Dissemination of information to the NSWPF | 5 | 1 | 2 | 7 | 19 | 34 |
| Dissemination to other law enforcement agencies | 3 | 1 | | 1 | 0 | 5 |

Source: PIC Annual Reports

[29] This low number might be justified if the PIC was successfully exposing the cases of corruption and serious misconduct, which resulted in dismissals from the NSW Police Force, and/or criminal prosecutions. Matters which do not result in those outcomes surely do not require an external specialist agency, and could be handled by a NSW Police Force investigation *oversighted* by an external agency.

[30] However, even on this measure, the PIC is not meeting a satisfactory standard. Over the past 5 reporting years, the PIC has contributed to the prosecution of 70 individuals, of which just 40 are police officers (approximately)²⁰, with 24 officers convicted, 11 with matters not yet finalised, and 5 officers not convicted of any offence. This rate again calls into question whether a cost of \$106.6 million²¹ represents value for taxpayer money.

¹⁹ NSW Budget Papers, revised costs 2009-10 to 2013-14.

²⁰ **PIC Convictions:** According to the prosecutions reported on in the past 5 PIC Annual Reports, PIC has contributed to the prosecutions of 70 individuals: 40 police officers, 2 other law enforcement officers, 13 persons not in law enforcement, and 15 persons about whom the PANSW could not find information.

²¹ NSW Budget Papers, revised costs 2009-10 to 2013-14.

Also, over a 5 year period, the prosecutions of police officers to which the PIC has contributed represents less than 12% of the total number of police charged as a result of notifiable complaints²². The vast majority of charges laid against police are achieved through internal police investigations.

[31] While it may be argued the performance of PIC cannot only be measured by prosecutions, but it is also about exposing misconduct, even if there is not enough evidence to prosecute, again the PIC has failed to achieve significant results. The PIC has made only 36 disseminations of information from full investigations to the Police Force over the past 5 years, and 34 from preliminary investigations²³, representing a small proportion of the total number of internal investigations. In regard to exposing police misconduct to the public, in the past 5 reporting years the PIC made 6 investigation reports to Parliament²⁴, compared to 45 by the ICAC²⁵.

[32] The majority of serious misconduct or corruption cases are investigated by the police themselves, not by the PIC. Of those cases in which the PIC has contributed to a successful conviction, a significant proportion fall outside the function the PIC is meant to serve as a specialist investigator of serious police misconduct.

[33] The *10 Year Review of Police Oversight*²⁶ heard from the then Assistant Ombudsman (Police), Mr Simon Cohen: *“almost 95 per cent of the most serious complaints – Category One complaints, including police perjury allegations and complaints about interfering in an internal investigation – are investigated by police commands, including the Professional Standards Command, with direct oversight by the Ombudsman”*²⁷.

[34] Prior to 2007, police misconduct was categorised as either Category 1 or Category 2 misconduct. This categorisation is no longer reported on, making it difficult to assess exactly the proportion of serious misconduct investigated internally by police compared to PIC. However, the volume of complaints handled through internal investigations, and the small number investigated by PIC, means serious misconduct and corruption must still be investigated predominately by police with Ombudsman oversight, simply due to the small workload of PIC. This would seem to be confirmed by the fact prosecutions resulting from PIC investigations are such a small proportion of the total number of prosecutions. Therefore the conclusions reached in the *10 Year Review of Police Oversight* are still likely to reflect the current trends in police oversight.

²² **Police Charged:** Adding up all the prosecutions provided in the PIC Annual Reports for this period (40) amounts to approximately 12% of the total number of police charged, reported on in the Ombudsman Annual Reports. NSW Ombudsman Annual Reports 2009-10 to 2013-14.

²³ **PIC Disseminations:** PIC Annual Reports: 2013-14, 5 full investigations and 19 preliminary investigations resulted in dissemination of information to NSWPF, page 23. 2012-13, 6 full investigations and 7 preliminary investigations resulted in dissemination of information to NSWPF, page 25. 2011-12, 3 full investigations and 2 preliminary investigations resulted in dissemination of information to NSWPF, page 23. 2010-11, 15 full investigations and 1 preliminary investigation resulted in dissemination of information to NSWPF, page 27. 2009-10, 7 full investigations and 5 preliminary investigations resulted in dissemination of information to NSWPF, page 28.

²⁴ **PIC Investigation Reports:** PIC Annual Reports: 2013-14, 1 investigation report to Parliament, p 8. 2012-13, 3 investigation reports to Parliament. 2011-12, 0 investigation reports to Parliament, p10. 2010-11, 0 investigation reports to Parliament, p12. 2009-10, 2 investigation reports to Parliament, p12.

²⁵ **ICAC Investigation Reports:** ICAC Annual Reports: 2013-14, 12 investigation reports to Parliament, page 9. 2012-13, 6 investigation reports to Parliament. 2011-12, 6 investigation reports to Parliament, p11. 2010-11, 12 investigation reports to Parliament, p9. 2009-10, 9 investigation reports to Parliament, p11.

²⁶ Ten Year Review of the Police Oversight System in New South Wales, Committee on the Office of the Ombudsman and the Police Integrity Commission, Report No. 16/53, Nov 2006.

²⁷ Ibid, para 2.2.10.

[35] The prosecutions to which the PIC does contribute do not represent the most serious cases. Of the 24 officers convicted of a criminal offence with the assistance of a PIC investigation in the past 5 years, at least 7 of them received non-custodial sentences and at least 5 were sentenced to terms of imprisonment which were suspended. This indicates these offences were not the most serious cases of misconduct or corruption.

[36] This Submission raises these cases not to undermine the importance of investigating and prosecuting them thoroughly. Rather it questions whether a specialist integrity agency such as PIC can continue to exist, when a considerable proportion of the already low number of police convictions it has contributed to, fall well short of the most serious cases of corruption or misconduct.

[37] It is also questionable whether these less serious cases really required investigation by an expensive external agency, and whether there was any reason why they could not have been investigated by police with an external agency monitoring the investigation if necessary. These matters seem to fall well outside the legislative mandate of the PIC to investigate the most serious matters of police misconduct and corruption. It is therefore difficult to justify the extensive legislative powers and the \$106.6 million²⁸ over the past 5 years the NSW Government and taxpayers have paid to maintain the PIC.

[38] The PIC is detracting from the quality and reliability of police oversight in NSW. The application of the powers and functions afforded to the Ombudsman are also reducing the efficacy of the police oversight system. The exercise of the monitor power creates obstacles for the timeliness and effectiveness of the police investigations may be undermined.

[39] The NSW Commissioner of Police submitted to the McClelland *Review of Oversight of Police Critical Incidents* (the Review): "*these oversight agencies were established at different times to meet various statutory purposes*" and "*oversight agencies collide in a way that was not intended and can at times impede police investigation*".²⁹

[40] One of the major sources of conflict in the oversight system is when multiple agencies are involved in the same matter, especially if these agencies make conflicting findings. The Review found "*the fact that the Ombudsman continued to perform a monitoring role, despite the existence of the Coronial inquest, was a source of considerable tension between the office of the Ombudsman and the Coroner*".³⁰ This same matter was then also the subject of a PIC investigation.

[41] The Review subsequently made Recommendations 5.5, 6 and 7³¹, which sought to resolve some of the difficulties of multiple oversight agencies becoming involved in a single matter.

[42] The Review also heard from the Acting State Coroner: "*duplication (or multiplication) of bodies overseeing such investigations is likely to lead to inefficiency, confusion, conflict and unnecessary expense*".³² The Acting State Coroner also argued: "*if two or more bodies claim*

²⁸ NSW Budget Papers, revised costs 2009-10 to 2013-14.

²⁹ The Hon. Robert McClelland, *Oversight of Police Critical Incidents*, 29 November 2013, p101.
<https://www.nsw.gov.au/sites/default/files/oversight-of-police-critical-incidents.pdf>

³⁰ The Hon. Robert McClelland, *Oversight of Police Critical Incidents*, 29 November 2013, para 7.113, p67.

³¹ *Ibid*, pages xviii and xix.

³² *Ibid*, para 7.113, p67.

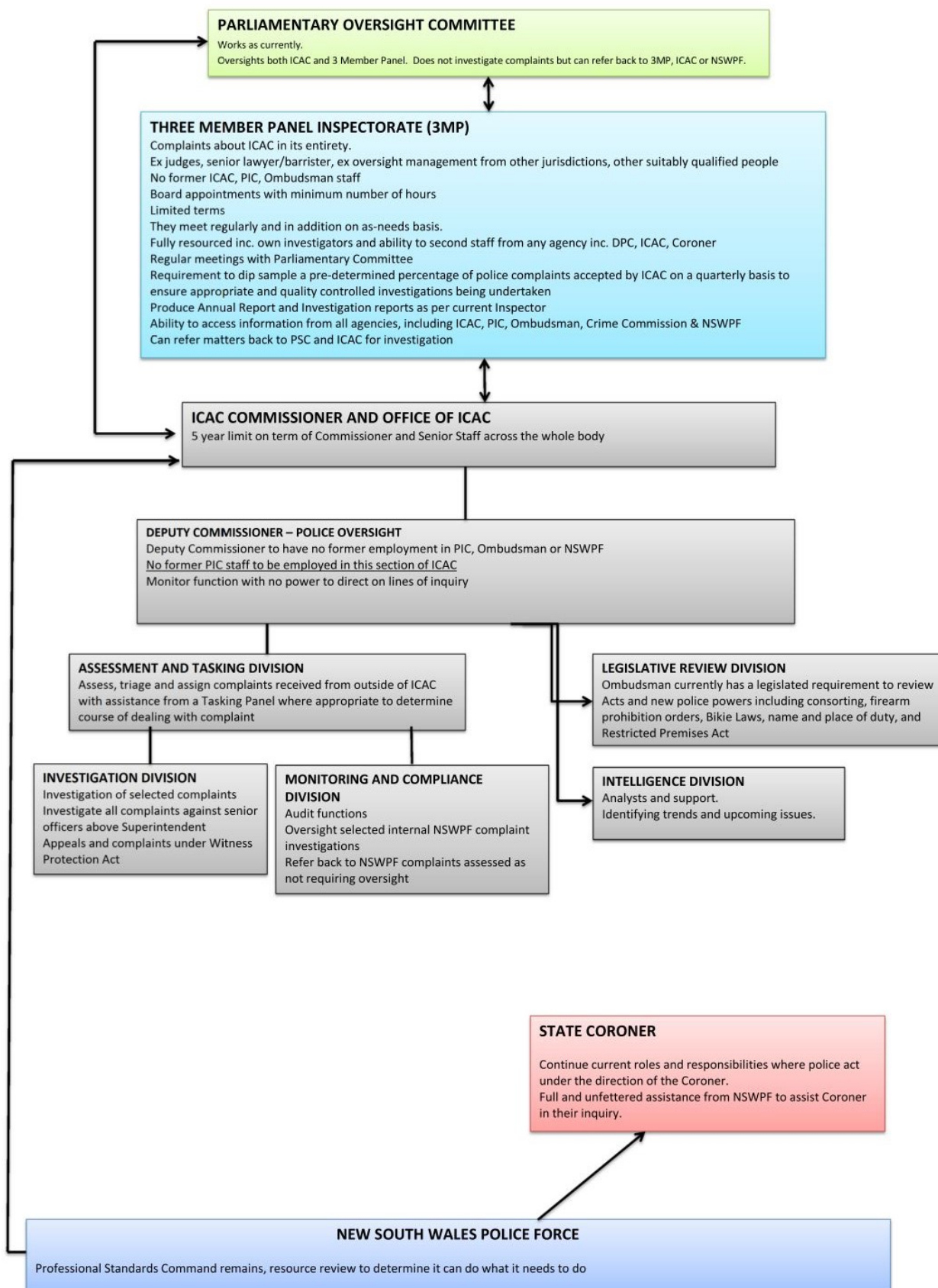
*oversight of a critical incident investigation, there is a significant potential for differences of approach and views which may in turn reduce public confidence in the system for no benefit*³³.

[43] The reform needed to rectify these deficiencies is to create a single oversight agency with:

- Clearly defined legislative functions and powers;
- All powers necessary to perform all the appropriate oversight functions;
- All resources necessary; and
- Strong accountability measures imposed on the oversight agency.

³³ The Hon. Robert McClelland, *Oversight of Police Critical Incidents*, 29 November 2013, para 7.114, p67.

Proposed Oversight Model



Proposed Structure of Police Oversight

[44] In the above proposed model, the police oversight functions of the Police Integrity Commission and the NSW Ombudsman are transferred to a new division of the ICAC which is devoted to police oversight. If this Review recommends the creation of a stand-alone agency instead of incorporation into the ICAC, the PANSW model could still be implemented by excising the proposed Division of the ICAC and applying it to a stand-alone, devoted police oversight agency.

[45] The major reform needed is to create a single oversight agency which properly exercises its functions and is itself rigorously held accountable for its performance and outcomes. A system is needed in which a single oversight agency can perform all the functions currently divided or duplicated between the Police Integrity Commission and the NSW Ombudsman, including:

- Receive complaints, either directly or through access to the NSWPF c@ts.i system;
- Triage complaints, and decide what course of action will be taken, including:
 - Audit the handling of complaints by the NSWPF;
 - Report on the quality and impartiality of the investigation where required;
 - Conduct independent investigations into serious cases where required; and
- The agency is held accountable for performance of its legislative functions and adherence to proper principles and procedures by a properly resourced Inspectorate and Parliamentary oversight.

Process

Receipt of Complaints

[46] The NSW Police Force and the independent oversight agency should both be empowered to receive complaints. 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.

[47] A framework for mandatory referral criteria could be established where the oversight agency is notified of all complaints meeting certain criteria set by Parliament.

[48] There should also be the capacity to handle certain complaints through local management where appropriate, for example complaints arising solely out of customer service issues.

[49] This process means the independent oversight agency can receive complaints directly, as well as being notified of any complaints received by the NSWPF meeting set criteria. This ensures the agency receives all complaints relevant to the police oversight function conferred on it by legislators.

[50] Having received these complaints, the agency then must decide which of its legislative powers it will utilise to handle the complaint. These options should include:

Audit of NSW Police Force handling of a complaint

[51] Refer the matter back to the NSWPF for local management action, informal resolution, or investigation, which can then be reviewed or audited by the oversight agency.

Monitor a NSW Police Force investigation

[52] Referral back to the NSWPF for investigation which will be monitored by the external agency to ensure proper procedure and standards regarding quality and impartiality of investigation are complied with.

[53] The monitoring power should not include any ability to direct or influence the police investigation. The monitoring power under the current legislation and Monitor Agreement enables the Ombudsman to exert influence over the investigation, which in many investigations has been an obstacle to the timely and effective investigation of the matter, and created tension between the Ombudsman, police investigators and the NSW Coroner. In the new oversight system, the monitoring power should be amended to remove the ability of the Ombudsman to exert influence on the investigation (more detail on pages 16-17 of this Submission).

Conduct an independent investigation

[54] The agency should have the resources and powers (including Royal Commission style powers if needed) to conduct an independent investigation. The scope of the agency's investigative powers should be clearly defined, to ensure the selection of matters for investigation meets the intended purpose of a specialist integrity agency. This power should be utilised in matters in which potential or perceived conflicts of interest in the NSW Police Force cannot be managed, or if other circumstances demand, such as a public interest consideration.

[55] The agency should also be empowered to conduct own-motion investigations to ensure it is able to act on intelligence it obtains independent of a formal complaint.

Matters in which a death has occurred

[56] When a death has occurred, the NSWPF investigation is carried out under the direction of the Coroner. The Coroner's function is vitally important in identifying the cause of death, as well as any changes to procedure or equipment which could prevent repeats of these tragic incidents. The role of the Coroner should therefore be given primacy over oversight agency functions.

[57] Currently, unclear boundaries on oversight powers and inappropriate influence by the Ombudsman in police investigations, have created obstacles to the effective investigation of these matters, and resulted in considerable tension between the Ombudsman and the police investigators under the direction of the Coroner. The then Acting State Coroner said of this conflict in functions:

"We think that duplication (or multiplication) of bodies overseeing such investigations is likely to lead to inefficiency, confusion, conflict and unnecessary expense".³⁴

And,

"[T]here is a significant potential for differences of approach and views which may in turn reduce public confidence in the system for no benefit".³⁵

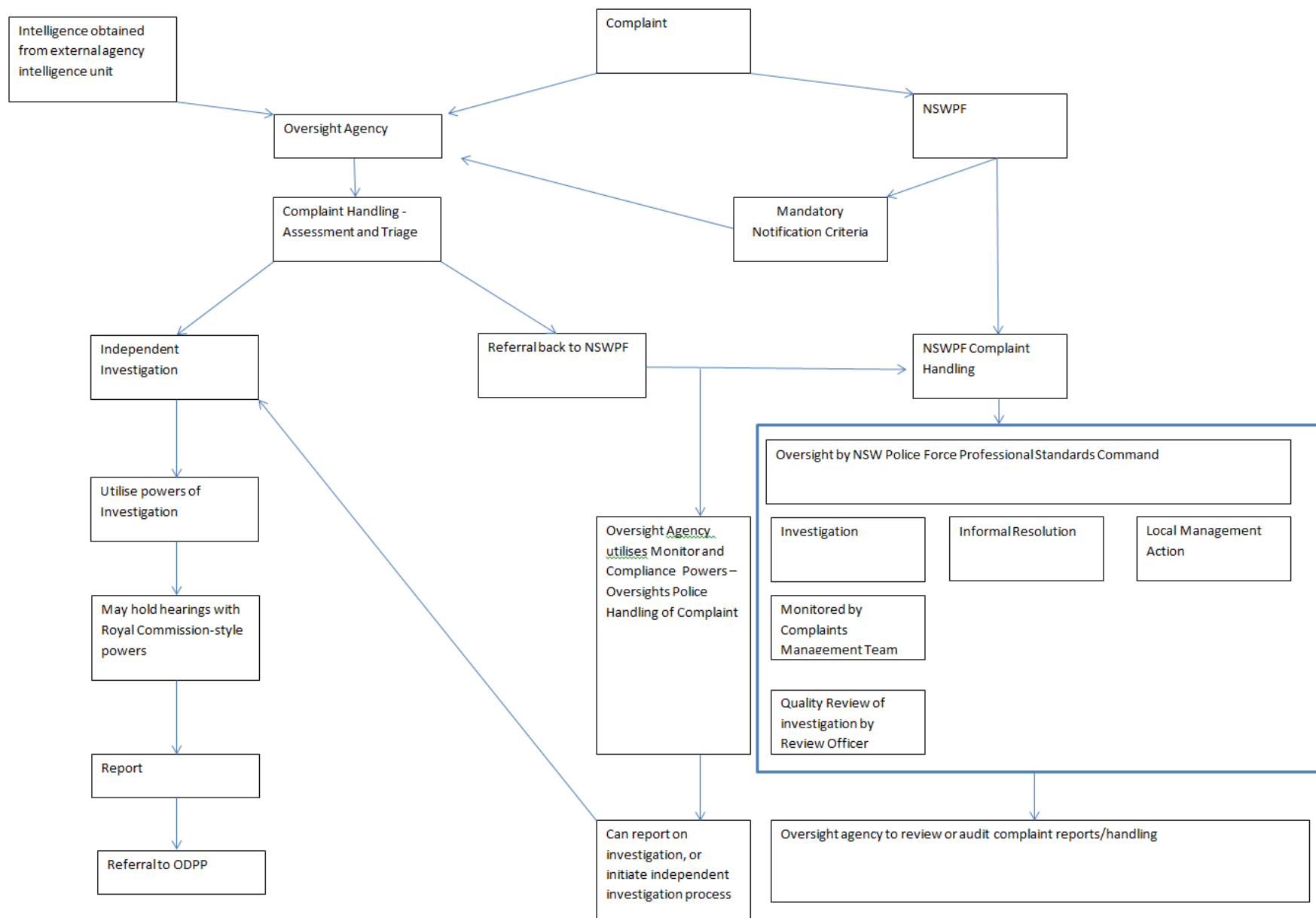
³⁴ The Hon. Robert McClelland, *Oversight of Police Critical Incidents*, 29 November 2013, para 7.113, p67.

³⁵ Ibid.

[58] A reformed system must clearly define the legislative powers and functions of the oversight agency and how they interact with other agencies.

[59] This model ensures all the functions previously performed by the Police Integrity Commission and the NSW Ombudsman would be performed by a single oversight agency, and would clarify the interaction between the functions of the oversight agency, the Coroner and the NSWPF.

(please see diagram on next page)



Key Accountability Components of the Model

[60] The model proposed by the PANSW would afford the oversight agency all the legislative powers appropriate for the police oversight function. The deficiencies of the current police oversight system which need further reform are:

- the ambiguity and duplication of oversight functions;
- the poor standards of investigation;
- denials of procedural fairness; and
- the lack/weakness of accountability measures placed on oversight agencies.

[61] Therefore the PANSW model is appropriately adapted to the police complaints and management systems in NSW, whilst establishing the following accountability measures on the oversight agency to address the deficiencies which gave rise to this Review.

Remove legislative ambiguity

[62] Recent litigation involving the PIC and the ICAC has demonstrated the significant risk in the legislation of these oversight agencies acting outside the powers and practices intended for them by the State's legislators and engaging in conduct which may constitute an abuse of process.

[63] The new system should be underpinned by legislation which clearly defines the agency's powers, the interaction between those powers and the processes of other agencies (such as Coronial investigations and hearings).

This should include:

Remove provisions allowing oversight agencies to influence NSWPF investigations.

[64] If an oversight agency considers it proper to explore lines of inquiry and collect certain evidence and hear from witnesses, it should commence its own investigation and follow the procedures associated with a formal investigation, rather than seek to exert influence on police investigations or those directed by the Coroner.

[65] This is particularly relevant in relation to the use of the monitor power. Section 146 of the Police Act gives the Ombudsman the power to monitor an investigation. This enables the Ombudsman to confer with the investigators. Section 145(1)(b) requires the investigators to have regard to any matters specified by the Ombudsman as needing to be examined or taken into consideration. The application of Sections 145 and 146 is creating conflict in both the investigation and oversight processes, as the right to "confer with those police officers about the conduct and progress of the investigation"³⁶ and to specify matters needing to be examined or taken into consideration by the Investigators, has in effect given the Ombudsman the ability to exert influence over the conduct of the investigation.

[66] This is an inappropriate power for an oversight agency to have. It should either initiate its own independent investigation and be subject to the procedural requirements of that course of action, or it should review the conduct, efficacy and integrity of the police investigation. It should

³⁶ Police Act 1990, s146(2).

not be able to operate in an area of ambiguity between those two options. The Ombudsman is monitoring and assessing the thoroughness and integrity of the investigation. It may ultimately publish a report criticising certain aspects of the investigation. Yet, the Ombudsman has been involved in the very same investigation, conferring with investigators and identifying matters which need to be considered. As has been demonstrated by the recent *Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect"*, when oversight agencies exercise direct involvement in matters which may later fall within their scope of oversight, it creates difficulties in properly fulfilling their oversight functions. The joint operation between the PIC and the NSWPF meant the PIC could not provide resolution when the same joint operation became the subject of complaints. The involvement of the oversight agency must be clearly defined, according to the specific legislative power being utilised.

[67] The monitor power has also created obstacles for the efficacy of police investigations. Police are the experts at investigations and are best resourced to conduct these investigations, so they should be afforded the autonomy to do so. The Ombudsman's ability to influence the investigation under sections 145 and 146 limits this autonomy. This is exacerbated even further when there has been a death, and therefore the investigation is also (appropriately) under the direction of the Coroner. In such a case, the investigators are simultaneously being influenced by police operating procedures, the particulars of the case and the lines of inquiry which develop in the course of the investigation, the direction of the Coroner, and the influence of the Ombudsman. This is a difficult balancing act for investigators to achieve. This is particularly difficult as the Ombudsman may wish the investigators to pursue a line of inquiry which is in conflict with the direction of the Coroner, or deemed not appropriate or effective by the Coroner and/or police investigators (the experts in investigation).

[68] Ultimately this tension, and possibly a decision not to pursue the Ombudsman's line of inquiry, could lead to criticism of the investigation by the Ombudsman. A recent matter where the Ombudsman and the Coroner made differing findings about the conduct of the investigation³⁷ must surely raise concerns about the conflicting directions the investigators must have been receiving during the investigation with so many masters to satisfy. The *Review of Oversight of Police Critical Incidents* identified "the fact that the Ombudsman continued to perform a monitoring role, despite the existence of the Coronerial inquest, was a source of considerable tension between the office of the Ombudsman and the Coroner."³⁸

[69] 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.

A Clearly Defined Scope

[70] The oversight agency should operate under a clearly defined scope, including the identification of an appropriate level of seriousness of conduct which enlivens the agency's jurisdiction.

³⁷ 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*, Feb 2013, and NSW State Coroner report on the death of Roberto Laudisio-Curti, Oct 2012, p20-21.

³⁸ The Hon. Robert McClelland, *Oversight of Police Critical Incidents*, 29 November 2013, para 7.113, p67.

[71] This is essential to avoid a recurrence of problems caused by the recent High Court proceedings which examined the ICAC's interpretation of its scope. The outcome of this costly litigation called into question many of the ICAC's previous investigations and would have attracted further litigation, and potentially cost NSW millions of dollars, but for the introduction of retrospective validation legislation. This also cast doubt over the future direction of the ICAC.

[72] The new police oversight system must not suffer a similar lack of clarity. As established earlier in this Submission, the current scope of the PIC has allowed a trend of PIC investigations not meeting the intended level of seriousness. An agency which is established as a specialist integrity agency should be investigating those matters where actual or perceived conflicts of interest cannot be managed for a police investigation, or when a public interest consideration requires it, and legislation should clearly define its scope to achieve this.

Prosecutions Powers

[73] Individual staff members from both the PIC and the ICAC have launched private prosecutions against persons investigated by those agencies. In the case of the PIC staff member, this prosecution also took place outside of NSW. The Queensland Magistrates Court was, as reported by the *Sydney Morning Herald*, highly critical of the PIC, stating:

*"I am satisfied that the actions of the PIC...is in fact an abuse of process. It is oppressive and will bring the administration of justice into disrepute."*³⁹

[74] A Sydney Magistrate has also recently ruled an ICAC prosecution to be invalid, reportedly stating:

*"I find that the purported prosecutions were invalid as there was no authority for the Court Attendance Notices to be issued."*⁴⁰

[75] These agencies exercise extensive coercive powers in their investigations and hearings. This means evidence obtained by these agencies may not be deemed admissible in criminal proceedings. It is therefore highly important that the decision to prosecute rests with the ODPP after independently assessing the briefs. According to the ICAC website, the ICAC does not have power to prosecute⁴¹, and this is to ensure the DPP is responsible for prosecutions. However, it is clear the ICAC and the PIC are seeking to engage in prosecutions.

[76] Anti-corruption agencies conducting prosecutions without apparent jurisdiction to do so, or in a way which may constitute an abuse of process, should be of serious concern; current practices of the PIC and the ICAC are circumventing proper procedures for referrals to the ODPP, thereby removing key safeguards designed as protections from their coercive powers. The boundaries of these agencies' proper legislative functions are either not currently defined with sufficient clarity, or are being ignored.

³⁹ Mercer, Neil, "Police Integrity Commission Under Scrutiny", *Sydney Morning Herald*, 14 December 2014.

⁴⁰ Wells, Jamelle, "ICAC 'invalidly' launched local court case against former NSW Labor Minister Ian Macdonald, court finds", ABC News, 22 May 2015.

⁴¹ <http://www.icac.nsw.gov.au/about-the-icac/faqs-about-icac>

[77] The legislation in the reformed oversight system should ensure the ODPP has responsibility for prosecutions from oversight findings, remove any doubt oversight agencies have no powers of prosecution, and explicitly address the issue of agency staff commencing private prosecutions.

Ensure Procedural Fairness

[78] The PANSW acknowledges the current roles of these agencies mean normal rules of procedural fairness and evidence, as would apply to a Court, may not be appropriate in their entirety. However, this does not mean those who are investigated, questioned, mentioned or appear at hearings of these agencies can be denied procedural fairness. Indeed, this is acknowledged by all stakeholders. However, as is shown by multiple reports by the Inspector of the PIC, considerable doubt cast on the Ombudsman's *'Operation Prospect'*, and recent ICAC matters, current protections for individuals are inadequate and they are denied procedural fairness by these agencies. Reports have found numerous examples of:

- The publicising of allegations without the opportunity to respond or without the allegations ever being tested;
- Pre-judgement and bias from the outset of investigations;
- Reliance on unreliable sources; and
- Publishing of unreliable findings.

[79] The conduct and outcome of investigations and hearings can cause irreparable damage to individuals in terms of their reputation, career and health and wellbeing. It is important these deficiencies are rectified and the powers of the oversight agency, while extensive and appropriately designed for their purpose, do not allow it to deny procedural fairness to persons involved in investigations as witnesses or affected persons.

Three Member Inspectorate

[80] The people of New South Wales have witnessed scathing reports against the Police Integrity Commission, growing concerns regarding the Ombudsman's *"Operation Prospect"*, and the legal battles engulfing the Independent Commission Against Corruption. These events demonstrate oversight agencies with extensive coercive and covert powers, require strong oversight just as much as the police officers and public servants they themselves hold accountable. In reforming the police oversight system, the adequacy of the Inspectorate role is a vitally important component. This office must have adequate resources, legislative powers and staff to perform its function.

[81] A former Inspector of the PIC, the Hon Peter James Moss, highlighted this to the Committee on the Office of the Ombudsman and the Police Integrity Commission, stating:

The Inspector's role is clearly the critical factor in ensuring the Commission's practices and procedures are open to public review, except of course in those cases where the security of the particular investigation justifies a departure from this vital public-interest principle. If the Inspector is not vigilant in this regard there is no guarantee that this principle of public accountability will at all times be strictly observed. Experience teaches that powerful agencies such as the Commission may find it more convenient and less time-consuming to operate out of the public limelight

unless called to account by an overseeing authority empowered to do so. It is thus a significant factor that such agencies should be conscious at all times that their relevant activities are being scrutinized by the overseeing authority, however irksome that may seem to the agency.⁴²

[82] Currently in NSW, the Ombudsman's office does not have an Inspector and the Inspector of the PIC and the ICAC, for the reasons outlined below, is inadequately empowered and resourced. For agencies with extensive powers, secrecy provisions and protections from liability, this inadequacy is of great concern to police, and has been a source of angst for those involved in investigations.

Resources

[83] The Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "*Operation Prospect*" has further exposed the lack of accountability measures for the current oversight agencies in NSW. As was shown by the evidence of the Hon David Levine, Inspector of the PIC, the Inspector does not have the resources necessary to perform his important role. For example, a review of page 49 of the transcript from 30 January 2015 reveals Mr Levine gave the following evidence:

Mr DAVID SHOEBRIDGE: Did you know at the time that you wrote your critical report on Strike Force Emblems that there were some 30 boxes of material relating to Strike Force Emblems and, indeed, there were about 20,000 pages of material contained on computer disks?

Mr LEVINE: I was inundated at some point with material of that volume.

Mr DAVID SHOEBRIDGE: Did you read it?

Mr LEVINE: No.

[84] Furthermore, a review of page 55 of the transcript from 30 January 2015 shows the Hon David Levine further detail the lack of resources he has to perform his function as the Inspector of the PIC:

Mr LEVINE: To satisfy both of you, at some point I asked—it is the chronology that I do not have clear in my mind. At some point I asked for material relating to Emblems from the Commissioner of Police, the NSW Crime Commission, Mr Tree, who I think was the chief executive officer of the police department, and I think the Police Integrity Commission itself. I received a telephone call from the Commissioner of Police indicating that he would be pleased to assist and the next thing that happened I was inundated with white boxes of white paper. My present recollection of the chronology is that the decision to refer it to the Ombudsman was made in light of that entity having the resources instead of what had been delivered to me. Notwithstanding that that decision had been made, I still decided that it was appropriate for me to report to the Minister. That is the best I can do.

⁴² Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on the Eleventh General Meeting with the Inspector of the Police Integrity Commission*, Answers to Questions on Notice, Question 2, Report No. 14/54 – November 2010, pages 7-8.

[85] Given the fact the primary function of the Inspector of the PIC is to review investigations carried out by the PIC and the ICAC, the PANSW is greatly concerned by this evidence which indicates the Inspector did not have sufficient resources to review extensive investigation materials. The Inspector of the PIC and the ICAC is meant to be able to hold the PIC and the ICAC accountable and to expose any serious deficiencies in the investigative practices and biases. But the Inspector clearly does not have the resources needed to perform this important function.

Legislative Powers

[86] The Inspector of the PIC and the ICAC also lacks sufficient powers to hold these agencies accountable. The previous Inspector of the PIC, despite resource limitations, made repeated findings of serious deficiencies in PIC investigations. However, in many cases the PIC took no steps to rectify those deficiencies. It is alarming that the PIC:

- has been subject to damning findings from the Inspector;
- allowed investigation reports to remain publicly available on their website, unamended, despite the Inspector making findings those investigations denied procedural fairness or were unreliable;
- has failed to undergo any process aimed at rectification of past deficiencies or improvements for future investigations; and
- continues to repeat the behaviours which the Inspector has criticised.

[87] The completely inadequate response from the Police Integrity Commission to the damning findings by the Inspector demonstrates the irredeemable deficiencies of the PIC and also the inadequate powers of the Inspector. Oversight agencies should not be able to act with such impunity to the findings of its Inspector.

[88] Options to increase the Inspector's powers should be explored, and this should include:

- obligations placed on the oversight body to at the very least consider the findings of the Inspectorate and publish a response to those findings;
- any report by the Inspectorate relating to an investigation, hearing or report by the oversight agency should be made publicly available alongside the oversight agency's original report, for example both reports be available on the same page of the agency's website;
- the Inspectorate should be required to perform dip sampling on a set percentage of the oversight agency's investigations each year, with a similar quality-control objective to the audit and review powers which current oversight agencies exercise over the NSW Police Force; and
- the oversight agency should be obliged to report to the Parliamentary Committee on all findings and reports by the Inspectorate.

Structure of the Office of the Inspector

[89] The function of the Inspector would be better served by a three person Inspectorate Panel. This would increase the capacity of the Inspectorate, and also ensure the decision making process has improved accountability measures.

[90] The effective operation of the panel should be ensured by:

- the ability and resources to employ or second investigators;
- adequate support staff;
- obligations to meet regularly and as needed;
- regular meetings with the Parliamentary Committee of the oversight agency;
- the ability to receive and investigate complaints about the oversight agency; and
- an obligation to perform dip sampling on a set percentage of the oversight agency's investigations each year.

[91] The Inspectorate should report to the same Parliamentary Committee as the police Oversight Agency, to ensure the Inspectorate function is being thoroughly performed, and to inform the Committee of the operation of the Inspectorate and any issues with the Oversight Agency.

Parliamentary Oversight Committee

[92] Current Police Oversight agencies are held accountable to the Parliament through the *Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission* (the Oversight Committee). The Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "*Operation Prospect*" questioned the Ombudsman on the powers of Oversight Committee⁴³. The Ombudsman indicated the limitation which prevents the Oversight Committee asking about specific investigations of the Ombudsman is an appropriate limitation. However if the Committee has concerns about the conduct of certain investigations being carried out by agencies within its terms of reference, it should be able to refer the matter to the Inspectorate or other integrity agencies, to ensure those concerns are properly investigated.

5 year limit on term of senior staff

[93] In the proposed model, the Deputy Commissioner – Police Oversight in the ICAC, or the Commissioner of any new devoted body established for police oversight if this model is preferred, should be limited to 5 year terms. This should also apply to senior staff of the agency.

[94] The Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "*Operation Prospect*" heard evidence from a witness outlining their concerns regarding the risks of senior position in anti-corruption agencies becoming jaded and fixated⁴⁴. The PANSW believes this pattern has been demonstrated in the deficiencies identified in the police oversight system. As shown by the repeated findings of the Inspector of the PIC, patterns of bias and prejudgement of investigations have become entrenched, and the opportunity to address this through limited terms of appointment should be examined.

[95] Certainly the NSW Police Force is aware of this risk and therefore ensures the rotation of police officers from certain duty types regularly. The Wood Royal Commission found routine rotation of police officers is an important proactive anti-corruption measure, and therefore the Commission recommended the development of a NSW Police Force tenure and transfer policy which in its

⁴³ Legislative Council Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "*Operation Prospect*", *The conduct and progress of "Operation Prospect"* (Inquiry) Transcript: 3 February 2015, page 17.

⁴⁴ Legislative Council Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "*Operation Prospect*", *The conduct and progress of "Operation Prospect"* (Inquiry) Transcript: 10 February 2015, page 41-42.

application would be used as an anti-corruption measure⁴⁵. The ICAC itself has made recommendations to public service agencies to implement a rotation policy to reduce corruption risks. The same risks exist for the Commissioner and senior staff of an anti-corruption agency with extensive covert powers and secrecy provisions, and therefore these risks need to be mitigated.

Employment from other oversight agencies

[96] Given the deficiencies identified in the Police Integrity Commission's investigative methods, failure to adhere to principles of procedural fairness, and entrenched bias, it would be completely unacceptable to employ any Police Integrity Commission staff in any newly created oversight structure. To do so would end all opportunity of police officers regaining faith in the oversight system, and expose the new agency to the same deficiencies performed continuously by the PIC. This should apply to either a police division of the ICAC, or a newly created stand-alone agency.

[97] The Deputy Commissioner – Police Oversight in the ICAC model, or the Commissioner of a new body if this model is preferred, should not have previously been employed by the Police Integrity Commission, the NSW Ombudsman or the NSW Police Force. The current Review is born out of a failure of the oversight system to properly perform its function, so the reformed system requires a new figure completely free of any of the controversies of the current system.

Wellbeing – exception to non-disclosure orders

[98] The PANSW appreciates the need for confidentiality in oversight inquiries. However, the PANSW is deeply concerned secrecy and restriction on publication provisions are preventing police officers from seeking appropriate medical treatment. Giving evidence at an inquiry held by the Police Integrity Commission, NSW Ombudsman, the ICAC or the NSW Crime Commission can be a stressful and traumatic experience, and can place the mental health and safety of officers at risk. It is entirely appropriate they be permitted to access treatment or support in relation to these issues.

[99] Currently, police officers may be reluctant to utilise treatment options, such as counselling, due to fear of their disclosure to their treating practitioner:

- compromising their position;
- being accused of breaching non-disclosure directions or legislation; and
- waiving a privilege.

[100] A situation in which officers need treatment or support, but do not access such treatment due to these concerns, creates a considerable risk to the welfare of police officers. The PANSW has expressed these concerns to the Police Integrity Commission, the NSW Ombudsman, the NSW Crime Commission and the NSW Police Force.

[101] The response of the Police Integrity Commission, the NSW Ombudsman and the ICAC has only exacerbated the concerns of the PANSW. They 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 counselling in relation to their involvement in the inquiry. If through their legal representative, they are informed of their ability to seek a variation to

⁴⁵ The Hon Justice JRT Wood, Royal Commission into the New South Wales Police Service - Final Report - Volume II: Reform, 1997, para 8.37 page 459, and Recommendations on p463.

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.

[102] The PANSW also submitted this issue to the Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "*Operation Prospect*". As a result of this submission, the Select Committee made the following recommendation⁴⁶:

Recommendation 3 : That the NSW Government amend secrecy provisions to provide for an automatic exemption to non-disclosure directions for publication to a medical practitioner, psychologist, or counsellor for the purposes of medical or welfare assistance, in the following statutes:

- *Ombudsman Act 1974*
- *Crime Commission Act 2012*
- *Police Integrity Commission Act 1996*
- *Independent Commission Against Corruption Act 1988*

[103] The Police Integrity Commission, the NSW Ombudsman and the ICAC have individually indicated they do not support Recommendation 3 of the Committee.

[104] The PANSW seeks a legislative amendment to the Acts referred to in Recommendation 3, to address the concerns regarding officer welfare and access to medical treatment and support services.

Policies and Procedures

[105] Oversight Agencies possess extensive coercive and covert powers to investigate misconduct in addition to potential criminal conduct. Such roles have the potential to bring agency officers into contact with criminals and criminal organisations.

[106] The need for all oversight agencies, their staff and contractors to maintain the highest standard of integrity and accountability is unquestioned.

[107] For example, PIC Investigators exercise many police powers and maintain possession of equipment also carried by sworn police officers.

[108] In light of these powers and responsibilities, it is essential they are subject to the same safeguards as police officers to ensure their integrity and proper usage of potentially deadly equipment.

Procedures relating to Firearms and Appointments

[109] PIC investigators and surveillance officers are permitted to carry semi-automatic pistols and ammunition, anti-personnel spray, batons, handcuffs and body armour vests under section 124 of the *Police Integrity Commission Act 1996*.

⁴⁶ Legislative Council Select Committee on the conduct and progress of the Ombudsman's Inquiry "*Operation Prospect*", The conduct and progress of the Ombudsman's inquiry "*Operation Prospect*", Final Report 2015, Recommendation 3, page xiii.

[110] The PANSW strongly opposes PIC investigators carrying such appointments without a corresponding duty to protect people from harm. It is presumed the PIC gained authorisation for its officers to carry firearms after a detailed risk assessment, for without such an assessment the need for oversight agency officers to carry deadly weapons could not be justified.

[111] Should a new oversight agency be established in the wake of this Review, or indeed the PIC retain a role in police oversight, any agency which authorises their officers to carry guns must be subject to the same safeguards as police officers. These include:

Critical Incident Guidelines

[112] If an oversight agency officer were involved in an incident in circumstances which would equate to a NSWPF 'critical incident', then a critical incident investigation should be established to determine what took place, any potential risks which need to be mitigated to avoid a repeat, and any potential criminal conduct. This would require critical incident guidelines and an equivalent provision to Section 211AB Testing of Police Officers for Gunshot Residue of the *Police Act 1990*.

[113] In the event of a discharge of a firearm during an oversight agency investigation, the difficult question of how such an incident would be investigated must be addressed. Currently, the situation could quickly arise where the NSWPF had to conduct an investigation into the potential criminal conduct of a PIC investigator who was acting in their PIC capacity, and therefore was at the time investigating a NSW police officer. In such a situation it is not clear to whom any person could make a complaint about the conduct of the PIC officer. In addition, it is unclear what the effect of PIC secrecy provisions would have on the investigation.

[114] These are problems that must be planned for if police oversight agencies are permitted to carry firearms and appointments.

Training and Procedures for use of appointments, including firearms

[115] Under section 124 of the *Police Integrity Commission Act 1996*, PIC investigators and surveillance are exempt from certain requirements under firearms and weapons legislation, if they are:

- A seconded police officer;
- An approved former police officer; or
- "An appropriately trained officer", meaning the Commissioner has certified in writing they are appropriately trained.

[116] Given this section allows PIC staff to carry firearms and other appointments, the PANSW believes it is essential the PIC, or any future oversight agency afforded such powers, have an appropriate policy on the use of force, extensive formalised initial and ongoing training in the use of these appointments and compliance with the aforementioned policy, and a formalised assessment procedure for the Commissioner to provide the certification for carrying these appointments.

[117] NSW Police Officers are highly trained in the use of force and specific appointments, follow very strict rules about when firearm use is acceptable, and are subject to high levels of scrutiny over

their use. If oversight agencies are to carry firearms and appointments they must be subject to the same standards.

[118] There must also be adequate procedures for the safe storage of firearms, ammunition and other appointments. Anything less would mean oversight officers were being equipped with police appointments, for the purposes of their functions, without adequate safeguards.

[119] In this regard, the PIC should provide their existing policies on these matters to this Review to allow an assessment of current safeguards. This Review could also give consideration to establishing obligations and processes similar to those which apply to police, either through legislation or formal procedures. Such obligations and processes should apply to any police oversight agency afforded these powers.

Drug and alcohol testing

[120] All NSW Police Officers are subject to the NSW Police Force Drug and Alcohol Policy. This requires all police officers to participate in drug and alcohol testing, in the form of:

- Random testing;
- Targeted testing; and
- Mandatory Critical Incident testing.

[121] The purposes of this testing regime includes:

- Awareness and prevention– to ensure all officers are aware of their obligations to remain unaffected by alcohol or legal drugs whilst on duty, and to refrain from taking any illicit substances at all times;
- Affection testing – being affected by drugs or alcohol whilst on duty is a safety risk to the community, other officers and themselves, given police officers are engaged in activities involving driving and use of force; and
- Integrity testing – use of illicit substances means a police officer has committed an offence, interacted with others involved in the supply of illegal drugs, and failed to meet their obligations as a police officer to investigate those crimes. This compromises their position as a police officer.

[122] All these objectives are equally applicable to staff in police oversight agencies. As stated above, officers of the Police Integrity Commission are permitted to carry firearms and other appointments. Any oversight agency afforded these powers should be subject to the same testing regime as police officers, to ensure staff are not affected by drugs or alcohol while they have access to these appointments, or were not affected when a critical incident occurred.

[123] The same applies to the integrity testing objective; police oversight agency staff will potentially interact with criminals in the course of their investigations. Just as this interaction creates an integrity risk for police officers, there is no reason this does not give rise to an integrity risk for oversight investigators. For example, an oversight investigator using illicit substances would compromise their position as a law enforcement officer who is potentially required to investigate drug use or supply.

[124] Therefore, any police oversight agencies should be subject to an equivalent of the NSW Police Force Drug and Alcohol Policy, the testing powers under section 211A and 211AA of the Police Act and Part 5 of the Police Regulations. The results of the testing regime should be reported in the Annual Reports of agencies.

Obligations for Integrity Related Declarations

[125] To ensure the integrity of any police oversight agency, this Review could assess current policies on integrity related disclosures, and create legislative obligations on any existing police oversight agency or new agency established as a result of this Review. These obligations should include:

- Regular financial interest statements;
- Declarable associations;
- Conflict of interest declarations; and
- Gift registers.

[127] Under Part 4 Division 2 of the *Crime Commission Act 2012*, it is a condition of employment with the NSW Crime Commission officers provide the Commission with a financial statement of interests for themselves, as well as their 'family and business associates'. They must also update this statement on becoming aware of any significant change in those interests.

[128] The legislation of other agencies does not directly impose such obligations, instead permitting the creation of such obligations through regulations:

- *Independent Commission Against Corruption Act 1988* Section 110;
- *Police Act 1990* Section 97;
- *Police Integrity Commission Act 1996* Section 138.

[129] The PANSW is not aware of any regulations under these provisions, however, internal policy documents exist in most circumstances. Therefore this Review could assess existing relevant policies of the PIC, Ombudsman, the ICAC, the NSW Crime Commission and the NSWPF, and recommend legislative obligations be imposed on existing oversight agencies and any agency established as a result of this Review.

[130] By way of example, NSW Police Officers are subject to the NSWPF policies on conflicts of interest, declarable associations, and certain duty types are subject to financial reporting obligations.

[131] Where not expressly prohibited due to other legislation, such as the *Privacy and Personal Information Protection Act 1998*, information provided under disclosure requirements should be available to the Inspectorate of police oversight. Where necessary to assist the oversighting of the Agency it should be available in redacted form to any Parliamentary Oversight Committee.

Vetting of Staff

[132] Current agencies that have legislative powers to gather vetting information:

- *Independent Commission Against Corruption Act 1988* Section 104C and Section 104D.
- *Police Act 1990* Section 96B and Section 96C.

- *Crime Commission Act 2012* Section 78A and Section 78B.
- *Police Integrity Commission Act 1996* Section 136A and Section 136B.

[133] Any new oversight system established as a result of this Review should create equivalent provisions and allow the Inspectorate to also gather such information or request it from the oversight agency.

[134] Prospective agency staff should also be subject to fingerprinting, palm printing and DNA testing. Police officers are subject to similar requirements under section 96A of the *Police Act 1990*. The Crime Commission, under the *Crime Commission Regulation 2012* clause 6, and the ICAC, under the *Independent Commission Against Corruption Regulation 2010* clause 8, can require fingerprints for existing or prospective staff. Fingerprinting and palm printing are available in the *Tattoo Parlours Act 2012* Section 13, the *Security Industry Regulation 2007* Clause 28. There is therefore no reason all police oversight agencies should not be subject to these requirements.

Integrity Testing

[135] Agencies tasked with examining the integrity of police officers need to themselves be held to the highest standards of integrity. Therefore they should be subject to at least the same accountability and integrity measures as police officers. This should include integrity testing. All police oversight agencies should be subject to an equivalent of section 207A of the *Police Act*. Integrity testing of oversight staff should be overseen by the Inspectorate, in addition to their quality control through dip sampling function.

The role of the NSW Police Force in the new Oversight System

[136] There is a consensus on the need to create a single oversight system. However, there are some divergent views on what the new oversight system should look like, most notably in relation to the level of involvement of the NSW Police Force. Some stakeholders have advocated for a model in which the involvement of police in handling complaints or investigating potential misconduct or criminal conduct is significantly reduced.

[137] These stakeholders have criticised a system in which police officers investigate police complaints and critical incidents, and therefore considered reforms in which functions relating to complaints and critical incidents are taken from the NSW Police Force and instead performed primarily by an external agency.

[138] This Submission will outline how such a reform would actually reduce the quality of complaint and critical incident investigation and would have a detrimental impact on the outcomes of the oversight system and the ethical health of the NSW Police Force. This Review has been necessitated by the failure of external agencies to properly perform the oversight functions; increasing the role of external agencies in the police complaints and discipline system is not the solution.

Why police must retain the primary role in the police complaints

[139] Police must remain a primary part of the oversight system because:

- **Police are the best investigators** - Police officers have the most experience and expertise in conducting investigations and gathering evidence or intelligence. By contrast, the recent investigative record of oversight agencies in NSW is unsatisfactory at best.
- **The NSW Police Force is the only agency which can perform the task** – Police retaining a primary role is necessitated by the workload generated by complaints and the need to be ready to deploy a fully resourced investigative team 24 hours a day, 365 days of the year, anywhere in New South Wales to respond to a critical incident.
- **It would be detrimental to the professionalism and integrity of the NSW Police Force to remove the internal capacity to address misconduct and corruption** –the engagement of line-managers in the managerial approach to discipline, and the work of the Professional Standards Command, have been crucial factors in the improvement of the professionalism, integrity and ethical culture of the NSW Police Force since the Wood Royal Commission. To remove or reduce these functions would reverse this trend.

Police are the best investigators

[140] One of the primary functions and activities of the NSW Police Force is investigation of potential criminal activity. This involves a vast array of investigative skills, activities and services, and specialist commands. No other agency in NSW, and no other category of individual, has more experience and expertise in investigation than does the NSW Police Force or individual NSW Police Officers. Police are trained to investigate, they spend their careers investigating potential criminal conduct, and they operate in a team and agency with the resources and capacity to carry out investigations.

[141] This investigative expertise translates into effective complaints investigation. Year after year, the vast majority of police complaints are handled by the NSW Police Force satisfactorily. As reported in the Ombudsman's 2013-14 Annual Report, 82% of police investigations into serious misconduct had no deficiencies, and 9% had no deficiency other than timeliness. One of the primary critical reports of a police investigation of other police officers was made by the Ombudsman in relation to a particular incident in 2012-13⁴⁷. That same investigative team was commended by the Coroner, who thanked the team for their thorough and painstaking investigation of the very same incident⁴⁸. Contrary to assertions by some stakeholders, police can investigate police, and do so very well.

[142] Therefore, so long as any perceived conflict of interest issues can be successfully managed, it is desirable to have the best investigators (police officers) carry out an investigation. Every oversight model has potential deficiencies or risks which need to be mitigated, and in the case of NSW police conducting complaint and critical incident investigations, this is achieved through:

- Processes for managing conflicts of interest in complaints handling;
- Complaint recording systems;

⁴⁷ 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*, Feb 2013.

⁴⁸ NSW State Coroner report on the death of Roberto Laudisio-Curti, Oct 2012, p20-21.

- Quality review;
- Supervision by the Complaints Management Team;
- The work of the Professional Standards Command;
- The ability of an external agency to monitor the handling of complaints;
- The ability of an external agency to conduct its own investigation when it deems it necessary to do so; and
- The processes for forming a critical incident investigation team in Critical Incident Guidelines.

[143] Just as there are potential risks involved in police investigating police, which are mitigated with the above measures, there are also risks involved in requiring investigations to be carried out by non-police agencies, such as a poor standard of investigation, inability to attend the scene quickly enough, and poor understanding or compliance with principles of procedural fairness and justice. As demonstrated by the track record of external oversight agencies in NSW (outlined earlier in this Submission), these risks are much harder to mitigate.

[144] Given the track record of external investigative agencies in New South Wales, the PANSW cannot see how the police oversight system would be improved by reducing the capacity of the NSW Police Force to investigate potential misconduct, criminal conduct or corruption, and becoming completely reliant on a non-police agency. As has been shown by the entrenched and systematic deficiencies in the PIC investigations, external oversight bodies in NSW simply cannot provide the requisite standard and expertise to properly conduct investigations of the kind police currently perform. Police are a necessary part of an effective complaints and critical incident investigative system.

[145] Some stakeholders have pointed to models in overseas jurisdictions where external agencies are the primary agency for investigating critical incidents and select complaint categories, as evidence of civilian agencies being capable of performing this function, most notably the Independent Police Complaints Commission (IPCC). However, this overlooks the fact many of these agencies have faced substantial criticisms of their practices, effectiveness and outcomes, similar to the deficiencies of the Police Integrity Commission. Therefore, the PANSW cannot see how these overseas agencies can be held out as some sort of best practice model, capable of taking complaint and critical incident investigation work away from NSW Police.

The NSW Police Force is the only agency which can perform the task

[146] The NSW Police Force is the only agency with the capacity to handle the workload generated by complaints, and to deploy extensive investigative resources to critical incidents. The resources an external agency would require to take this function from the NSW Police Force would be considerable.

[147] To be ready to investigate a critical incident, the investigative agency would require a properly resourced team to be available 24 hours a day, 365 days a year, and be able to quickly attend a scene, potentially anywhere in New South Wales. Some advocates of the civilian investigative model have pointed to the importance of “the first ‘golden hour’ after an incident

occurs"⁴⁹, stating an investigative agency must be able to attend a scene as quickly as possible. Asking this of an agency external to the NSW Police Force would be very difficult to achieve.

[148] If an attempt were made to resource an external agency to fulfil these functions, those resources would be further wasted by re-allocating them away from the NSW Police Force budget into a police oversight agency which has a narrow role, and provides no other public value. When police perform this function, they do so as well as other duties. For example,

- a critical incident may, depending on circumstances, be investigated by a NSW Police Force squad, such as the Homicide Squad, with oversight by the Professional Standards Command; and
- A complaint may be investigated by an officer above the rank of the subject of the complaint.

[149] All these police duty types are ready to investigate a critical incident as soon as it happens, or are capable of investigating a complaint, but while there is no demand for them to perform this function they perform their normal policing duties and serve the community. If you take these functions away from police, and give them to an external agency, the agency would require considerable resources to carry out extensive investigations when needed. But with no other functions which serve the community, there would be limited public value when no critical incident investigation is underway.

[150] Some overseas jurisdictions have established civilian oversight agencies which perform these functions. For example in Ontario, the Special Investigations Unit (SIU) “remains one of the few places worldwide that has an independent civilian agency with the power to both investigate and charge police officers with a criminal offence”⁵⁰. The SIU conducts investigations “into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers”⁵¹. The SIU has been subject to criticisms about their ability to respond quickly enough and arrive at scenes promptly. In 2008 the Ombudsman of Ontario published a report about the performance of the SIU⁵². Long delays in attending scenes were identified as a major deficiency in the SIU’s performance, with the Ombudsman stating:

One of the performance measures that the SIU has developed to assess itself is an average response time to an incident of one hour in the Greater Toronto Area, and 1.5 hours in the rest of the province. But a review of the SIU’s statistics from fiscal years 2003-2004 to 2005-2006 suggests that the SIU does not meet this self-imposed standard in a significant number of cases.⁵³

⁴⁹ David Shoebridge, ‘Why police should not be investigating police’, 11 February 2015.

⁵⁰ Director of Special Investigations Unit, Tony Loparco, Director’s Welcome Message, <http://www.siu.on.ca/>

⁵¹ *Police Services Act 1990* (Ontario), s113(5).

⁵² Ombudsman of Ontario, Andre Marin, *Ombudsman’s Report: Oversight Unseen: Investigation into the Special Investigations Unit’s operational effectiveness and credibility*, September 2008.

⁵³ *Ibid*, page 32, para 114.

[151] The Ombudsman made this assessment based on response times between 2003-04 to 2005-06. Average response times since then are compared below for the year 2011-12 (the most recent data available):

Average Response time of the SIU in Hrs:Mins, by region:

| | 2005-06 ⁵⁴ | 2011-12 ⁵⁵ |
|----------------|-----------------------|-----------------------|
| Central | 1:21 | 5:56 |
| West | 2:14 | 4:00 |
| East | 2:40 | 4:49 |
| North | 3:44 | 14:02 |
| Toronto | 1:27 | 3:47 |

Average Response time of the SIU in Hrs:Mins, by incident type:

| | 2005-06 ⁵⁶ | 2011-12 ⁵⁷ |
|--------------------------|-----------------------|-----------------------|
| Vehicle Injuries | 1:24 | 4:18 |
| Vehicle Deaths | 1:23 | 1:41 |
| Sexual Assault | 3:15 | 12:45 |
| Firearms Injuries | 2:12 | 0:58 |
| Firearms Deaths | 1:23 | 0:52 |
| Custody Injuries | 2:06 | 4:45 |
| Custody Deaths | 2:08 | 3:36 |

[152] The SIU has not been reaching the scene in the 'golden hour' of the investigation. The causes for delay cited by the Ombudsman included:

- delay in police notification;
- geographical limitations;
- inability to call out investigators quickly enough to arrive at the scene;
- SIU vehicles being caught in traffic without the ability to utilise flashing lights or bypass traffic;
- Reluctance to utilise the closest available investigator if their involvement would incur overtime costs; and
- Fewer investigators available on weekends or holidays.

[153] These factors demonstrate many of the reasons the NSW Police Force must be the primary investigator of critical incidents; the reasons behind the SIU delay reflect the factors which distinguish a non-police agency from the NSW Police Force, including widely deployed personnel, 24/7 availability, and emergency vehicles. NSW Police Force is the only agency capable of deploying investigative resources all over NSW, at any time of day, at any time of the year.

⁵⁴ Special Investigations Unit, Annual Report 2005-05, page 15.

⁵⁵ Special Investigations Unit, Annual Report 2011-12, page 21.

⁵⁶ Special Investigations Unit, Annual Report 2005-05, page 15.

⁵⁷ Special Investigations Unit, Annual Report 2011-12, page 21.

[154] Some stakeholders have suggested the Independent Police Complaints Commission is an example of a civilian agency which has achieved success in this regard. One article stated the IPCC “has the resources and funding to ensure its own investigators are on the scene of a critical incident in the first ‘golden hour’ after an incident occurs”⁵⁸. This is simply not true: the IPCC is another civilian investigative agency which has failed to investigate promptly and professionally. In 2013, the House of Commons Home Affairs Committee published its report into the Independent Police Complaints Commission⁵⁹. It was scathing of the IPCC’s effectiveness (discussed in more detail on page 37 of this Submission). Amongst its reasons, the Committee stated:

The IPCC owes it to the families of those who die in cases involving the police to get to the truth of the matter—a botched job is an offence to all concerned. When the IPCC does investigate it often comes too late and takes too long. The trail is left to go cold.⁶⁰

To claim the IPCC represents a best practice model is simply not supported by evidence.

[155] The broader complaints system also generates a large workload. In 2013-14, the NSW Police Force recorded 4,995 complaints against police officers, containing 9,150 allegations⁶¹. Through the criteria requiring referral to the Ombudsman, the Ombudsman recorded 3,390 formal complaints against police in the 2013-14 reporting year⁶². Finalised complaints were handled in the following way:

| Action Taken | Number of Complaints Finalised in this way ⁶³ |
|---|--|
| Investigated by police, oversighted by Ombudsman | 579 |
| Resolved by police through informal resolution, oversighted by Ombudsman | 1163 |
| Assessed by Ombudsman as a local management issue and referred back to local commands | 413 |
| Assessed by Ombudsman as requiring no action (eg alternate redress available or too remote in time) | 1093 |
| Ombudsman Report to Commissioner and Minister | 0 |
| Investigated by Ombudsman | 1 |
| Total | 3249 |

[156] The Police Integrity Commission Annual Report records the PIC worked on 36 full investigations and 141 preliminary investigations in 2013-14⁶⁴. These complaints statistics

⁵⁸ David Shoebridge, ‘Why police should not be investigating police’, February 11 2015.

⁵⁹ House of Commons, Home Affairs Committee, Independent Police Complaints Commission, Eleventh Report of Session 2012–13, Published on 1 February 2013 by authority of the House of Commons London: The Stationery Office Limited.

⁶⁰ House of Commons, Home Affairs Committee, Independent Police Complaints Commission, Eleventh Report of Session 2012–13, Published on 1 February 2013 by authority of the House of Commons London: The Stationery Office Limited, para 24, page 10.

⁶¹ New South Wales Police Force, Annual Report, 2013-14, page 90.

⁶² New South Wales Ombudsman, Annual Report, 2013-14, page 41.

⁶³ New South Wales Ombudsman, Annual Report, 2013-14, page 42.

⁶⁴ Police Integrity Commission, Annual Report, 2013-14, page 20.

demonstrate the NSW Police Force handles the vast majority of complaints and investigations, and it would require considerable resource increases to an external agency to take over those functions. As demonstrated by the table above, this is true even if an external agency were only to take over the investigative function in relation to select categories (such as critical incidents involving serious injury or death and complaints meeting certain criteria) and police retained responsibility for local management related issues. As shown by the number of complaints which resulted in a formal police investigation (579), and if the number of critical incidents per year were factored in, this would be a huge increase to the current workload of the Police Integrity Commission.

[157] Therefore, transferring those functions to an external agency would require a huge increase in resources for the agency, well beyond the current combined budget of the Police Integrity Commission and the Ombudsman. As highlighted above, Police utilise those resources for complaints handling as well as other policing functions to serve the community. The NSW 2014-15 total budget allocation to the Police Integrity Commission was \$21.4 million. The NSW Ombudsman received \$29.9 million (although not all of this goes towards police oversight, as the Ombudsman performs other functions). Despite these considerable resources, these agencies combined workload was a fraction of the total police complaints handling process.

[158] Some stakeholders have pointed to the Independent Police Complaints Commission (IPCC) in England and Wales as a potential model for reducing the role of police in investigating police. However, this ignores the fact even under the IPCC system, police still carry out the vast majority of police investigations. The IPCC Annual Report 2013-14 reported the IPCC received 3,176 referrals⁶⁵ out of a total of 34,863 recorded police complaints⁶⁶. Of the 3,176 referrals, 5% were independently investigated by the IPCC, 10% were managed or supervised by the IPCC, 70% were investigated by the local force, and 14% were returned to the force⁶⁷. The IPCC Statutory Guidance states “The great majority of complaints will not need to be referred to the IPCC and will be handled, at least initially, by the appropriate authority (usually forces themselves).”⁶⁸ England and Wales, the very model some stakeholders in NSW point to as an example of independent oversight, has recognised external agencies simply cannot take on the bulk of the workload generated by complaints.

[159] In response to public dissatisfaction with the IPCC and the scathing criticisms by the Parliament (discussed further on page 37 of this Submission), the 2014-15 reporting year is one of reform and expansion for the IPCC. As part of this, more resources will be made available to the IPCC with the view to better equip it to undertake investigations. But, as shown by this comment of the IPCC’s own Chair and Acting Chief Executive:

In order to take on a significant increase in independent investigations, we will need to develop into a very different organisation, both in size and scope. Our change programme is ambitious and involves developing a new

⁶⁵ Independent Police Complaints Commission, Annual Report 2013-14, p11.

⁶⁶ Independent Police Complaints Commission, Police complaints: statistics for England and Wales 2013/14 and 2012/13, p3.

⁶⁷ Independent Police Complaints Commission, Annual Report 2013-14, p11.

⁶⁸ Independent Police Complaints Commission, Statutory Guidance to the police service on the handling of complaints 2013, p30, para 5.1.

operating model and changing the way we are structured and the way we work.⁶⁹

[160] It is clear the jury is still out on the IPCC, and by its own assessment it is not currently performing the function some stakeholders in NSW claim it does. With major reforms of the broken English system only just getting underway, we would be remiss to identify this same system as a model to adopt in NSW.

[161] It would be impractical to implement in NSW a model in which police do not undertake the bulk of the complaints work and critical incident investigations. Nor have stakeholders in New South Wales seen sufficient evidence external oversight agencies can satisfactorily perform the primary investigative function even in relation to select categories of cases, such as ones involving death or serious injury; rather the failures of the Special Investigations Unit and the Independent Police Complaints Commission demonstrate:

1. even this reduced role is difficult to achieve for external agencies; and
2. it is these most serious cases, ones involving death, serious injury or serious misconduct, in which the highest standard of investigation is expected and therefore the experience and expertise of sworn police officers should be preferred over the poor track record of external agencies such as the PIC.

[162] An effective oversight system is one in which police handle complaints and critical incidents, with the oversight agency monitoring when needed, and where the oversight agency has the ability to investigate cases in which conflicts of interest cannot be managed for a police investigation or public interest demands external investigation.

It would be detrimental to the professionalism and integrity of the NSW Police Force to remove the internal capacity address misconduct and corruption.

[163] Police currently play a primary role maintaining the integrity of the NSW Police Force and investigating potential misconduct or corruption because the Wood Royal Commission recommended police involvement was essential to building an ethical culture in the NSW Police Force. The extract below from the Royal Commission Report highlights this:⁷⁰

⁶⁹ Dame Anne Owers, IPCC Chair, and Amanda Kelly, IPCC Acting Chief Executive, Chair and Acting Chief Executive's foreword to Annual Report 2013-14, p6.

⁷⁰ The Hon Justice JRT Wood, Royal Commission into the New South Wales Police Service - Final Report - Volume II: Reform, 1997, p481, para 9.6-9.7.

A. EXTERNAL OVERSIGHT OF THE SERVICE

9.6 In its First Interim Report, this Commission highlighted the importance of establishing a model in which:

- the Service retained a direct responsibility to combat corruption within its ranks; and
- an external agency, staffed by skilled lawyers and investigators independent of the Service, assumed an overseeing role and a capacity to undertake direct investigations into selected cases.¹¹⁴⁹

9.7 Retention of a role within the Service to respond to corruption was seen as essential, otherwise there was a risk that it might abandon all responsibility and interest in maintaining high standards of integrity. On the other hand, external oversight was seen as advantageous in enhancing police accountability, guaranteeing independent and aggressive pursuit of serious corruption, and increasing public confidence in the Service.¹¹⁵⁰

[164] Since the time of the Royal Commission, this approach has seen the integrity, professionalism and ethical culture of NSW Police Officers reach the highest standards. It is crucial to maintain this positive culture. A move to reduce police involvement in the complaints process would reverse this trend.

[165] The Wood Royal Commission made recommendations for reform at a time when corruption amongst NSW police was unfortunately present. The NSW Police Service required major reform to its complaints handling practices, discipline system and culture. Trust in the NSW Police was low. Even in this context of corruption, Justice Wood recognised the NSW Police needed to retain a primary role in maintaining integrity and investigating misconduct and corruption, in order to build the professionalism and ethical resilience of the then Service. The crucial factor for maintaining integrity is to build a positive culture amongst police officers, in which:

- police officers demand the highest professional and ethical conduct from each other and themselves;
- managers and supervisors are responsible for the discipline and performance management of their officers;
- mistakes or performance issues are acknowledged and rectified rather than covered up; and
- police accept the standards demanded of them and the rigorous enforcement of those standards.

[166] Ultimately the professionalism and integrity of the NSW Police Force will be determined by individual police officers, their attitudes, culture and commitment to ethical standards. No matter what external watchdogs or limitations are placed on them, ultimately it is the police officers who either act ethically or not; who either uphold the values of the NSW Police Force or not.

[167] As we have seen from the comparisons such as the Independent Police Complaints Commission in England and Wales or the Special Investigations Unit in Ontario, all models of oversight will face potential scandals and criticism. Contrary to claims by some stakeholders, there is not one specific model which can be considered 'best practice' in police oversight - they all have strengths and weaknesses. Ultimately their success depends on not only the powers, resources and rigorousness of the external agency, but the commitment of the police force itself. Therefore it is

crucial the NSW Police Force retain a primary role in maintaining integrity, with the external watchdog present to ensure accountability.

[168] The Royal Commission acknowledged this dynamic, finding the emphasis on an internal police culture which promoted ethical behaviour would be the more successful approach, rather than the short-sighted approach of becoming completely reliant on an external oversight agency, stating:

It would, however, be as naïve to attribute all the problems seen to this culture, as it would be to find a solution in excluding police from any internal investigative role...

The use of the culture in a constructive way is likely to be more beneficial than excluding police from investigations. The conditions are ripe for change, and that might be best encouraged by the Service maintaining a significant role, rather than succumbing to any current temptation to give up and pass the responsibility to an external agency.⁷¹

[169] Even at a time when the NSW Police was in turmoil, when corruption was present, and when the trust in police investigations was low, the Hon Justice JRT Wood knew internal police culture would be the crucial driver of ethical standards and behaviour. In 2015, the police officers in NSW perform at the highest standard of professionalism and integrity. In part, this can be attributed to the cultural change brought about since the Wood Royal Commission, in particular through the change from a punitive, inflexible discipline system to a managerial approach based on improving performance. The need to reform the current oversight system and create single agency model is not justification to disregard Justice Wood's warning by "succumbing to any current temptation to give up and pass the responsibility to an external agency."⁷²

The Independent Police Complaints Commission

[170] The PANSW notes the Legislative Council Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "*Operation Prospect*" has made reference to the Independent Police Complaints Commission (IPCC) in England and Wales as a possible source for a new oversight model in New South Wales. Overseas models may offer a potential source of information and ideas for reform, and if evidence shows those models to be effective, then it is worth considering whether they are applicable to a local context. However, the PANSW is concerned by the reference to the IPCC as being an ideal model to adopt in New South Wales; there is simply no evidence to suggest the IPCC is operating satisfactorily, let alone is a model of best practice. In fact, the IPCC has been found by its own Parliament and Government to have significant deficiencies. Adopting an IPCC-style model in New South Wales would mean replacing our broken oversight system with a model in an even greater state of disarray.

[171] Given the Legislative Council Select Committee specifically identified the IPCC as a model of reform, the PANSW felt it necessary to specifically address the major flaws in this course of action.

⁷¹ The Hon Justice JRT Wood, Royal Commission into the New South Wales Police Service –Interim Report, February 1996, page 51, paragraphs 3.13-3.15.

⁷² Ibid, page 51, para 3.15.

[172] In 2013, the House of Commons Home Affairs Committee published its report into the Independent Police Complaints Commission⁷³. The report is scathing of the effectiveness of the police complaints and oversight system. In the 'Conclusions and Recommendations' section of the Report, the Committee stated:

The public do not fully trust the IPCC and without faith in the Commission, the damaged public opinion of the police cannot be restored. Unfortunately, too often the work of the Commission seems to exacerbate public mistrust, rather than mend it.⁷⁴

[173] The Government's response to the Report is one of almost universal agreement with the Committee's criticisms⁷⁵. Only recently has the Government taken steps seeking to rectify the deficiencies, but with those reforms yet to take effect and with the oversight system in England and Wales being assessed so poorly as recently as 2013, we should be extremely reluctant to consider this as a model of good oversight which should be implemented in NSW. The PANSW does not understand how some can consider an overseas model to be best practice when its own country finds it completely unsatisfactory.

[174] The deficiencies in the English system are also reflective of the broader problems facing their police services. For example, the Independent Police Complaints Commission reported in *Public Confidence in the Police Complaints System*, only 66% of people were happy with the way police treated them during contact with police⁷⁶. In addition, 35% said they were not confident police would deal with complaints fairly⁷⁷, and 21% identified police harassment or other consequences as a deterrent to making a complaint, rising to 32% for those from ethnic minorities⁷⁸.

[175] This is not the case in NSW, where the vast majority of police officers act with the upmost integrity. Since the Wood Royal Commission, the NSW Police Force has undergone major change, both culturally and in managerial approach, and it is now a Force with high professionalism and integrity. Year after year, the majority of police complaints are handled by the NSW Police Force satisfactorily. As indicated earlier the Ombudsman's 2013-14 Annual Report, indicated 82% of police investigations into serious misconduct had no deficiencies, and 9% had no deficiency other than timeliness. Also, the *National Survey of Community Satisfaction in Policing 2013-14*, found 80-89% of persons surveyed were satisfied with their most recent contact with a NSW Police Officer (compared to the 66% reported in England), and 84-90% reported confidence in the Police⁷⁹. The differences in systems employed in NSW and England are in part explained by the differing levels of trust in the police forces.

[176] Recent consideration in NSW of the IPCC has been intrinsically linked with an examination of the role police officers should play in the investigation of police complaints and critical incidents.

⁷³ House of Commons, Home Affairs Committee, Independent Police Complaints Commission, Eleventh Report of Session 2012-13, Published on 1 February 2013 by authority of the House of Commons London: The Stationery Office Limited.

⁷⁴ Ibid, point 3, page 35.

⁷⁵ The Government Response to the Eleventh Report from the Home Affairs Committee, Session 2012-13, April 2013.

⁷⁶ Harvey, Shepherd, and Magil, Ipsos MORI – Social Research Institute, commissioned by the Independent Police Complaints Commission, *Public Confidence in the Police Complaints System*, July 2014, table 3.3, page 12.

⁷⁷ Ibid, para 5.2, page 22.

⁷⁸ Ibid, table 4.2, page 17.

⁷⁹ NSW Police Force, Annual Report 2013-14, page 19.

Some have assumed a move towards a system more closely resembling the IPCC model would improve the oversight system in NSW. However, given the fundamental failures of the IPCC to perform its function, and the similar trend of external oversight agencies in NSW, such a move would not represent a positive reform for the accountability or ethical health of the NSW Police Force. The quality of work from external agencies such as the IPCC, the SIU in Ontario, or the PIC and Ombudsman in NSW, has not satisfactorily fulfilled the complaints and critical incident investigation functions. At the same time police forces subject to these oversight system are stripped of their capacity to conduct internal investigations, adopt ownership of ethical standards, and develop a culture of professionalism and integrity.

[177] The current reforms to the IPCC have seen resources ripped from the police forces' internal complaints work and the equivalents of Professional Standards Command, and diverted into the IPCC. Managerial handling of complaints and the work of the Professional Standards Command (PSC) in NSW is an integral part of the NSW Police Force ethical culture, and a similar approach in NSW to the current IPCC reforms would be highly detrimental to this internal capacity for ethical development.

[178] To follow the English reform – reducing the capacity of internal complaints investigations and the PSC-equivalents and redirecting those resources and work towards an external body – would place the NSW Police Complaints system in a precarious position.

[179] While currently England is experiencing a reform trend away from police handling complaints, not long ago it was experiencing the exact opposite trend. In 2012, major changes were made to the police complaints system in the *Police Reform and Social Responsibility Act 2011*. According to the IPCC Statutory Guidelines which were amended in response to this change, one of the purposes of the reform was to “ensure that complaints are handled at the lowest appropriate level”⁸⁰. In other words, it was directing complaints back through local management and internal processes.

[180] If NSW were to move towards the current IPCC model, thereby significantly reducing the complaints workload of NSW Police Force Commands and the Professional Standards Command (and presumably the resources allocated to this work), what would we then do when the external complaints authority failed to adequately perform the function, as it has done in England? We would not be able to re-engage internal police expertise as the NSW Police Force would have been stripped of its capacity to deal with complaints. It is necessary the police retain a primary role in the complaints system.

Conclusion

[181] The PANSW thanks you for the opportunity to contribute to this Review and looks forward to a constructive process. This Submission has outlined the PANSW position on reform of the police oversight system. The PANSW also notes the Terms of Reference for this Review were released on 21 May 2015. The PANSW will shortly provide an additional submission to this Review addressing any terms of reference not dealt with in this initial submission.

⁸⁰ Independent Police Complaints Commission, *Statutory Guidance to the police service on the handling of complaints* 2013, p8, para 1.16.