

# **REVIEW OF POLICE OVERSIGHT BY THE HON MR ANDREW TINK**

## **SUBMISSION BY THE POLICE INTEGRITY COMMISSION**

### **INTRODUCTION**

1. On 25 February 2015 the NSW Government announced its intention to examine the framework for civilian oversight of the NSW Police Force (“the NSWPF”) and on 21 May released Terms of Reference for the Review which included the following:
  - Options for a single civilian oversight model for police in NSW.
  - Any gaps in the current police oversight system.
  - Functional overlap between oversight bodies.
  - Best practice models from around the world.
  - A recommended model for police oversight including guidance on its design, structure, cost and establishment.
  - Implications for the oversight of the NSW Crime Commission.
2. This document is the submission of the Police Integrity Commission (“the Commission”) to the Review.

### **SCOPE OF SUBMISSION**

3. It is acknowledged that, internationally, civilian police oversight agencies perform a diverse range of functions depending upon the jurisdictions in which they operate. As a consequence, the term police oversight may be defined in a number of different ways. This submission has been prepared on the basis that the purpose of police oversight in the NSW context, as indicated in paragraph one of the Terms of Reference for the Review, is to prevent, detect and investigate corruption and misconduct by police officers and provide accountability for the exercise of police powers.

4. The Commission has not examined the overseeing or reviewing functions performed by agencies external to the NSWPF for purposes such as:
  - evaluating the efficiency or effectiveness of the performance of the NSWPF
  - determining the causes of deaths that have occurred during police operations
  - assessing the safety of police operations.
5. Agencies such as the Audit Office, WorkCover, the Office of the NSW Coroner and the Office of the DPP, which some have suggested perform a police oversight role, review limited aspects of the work of the NSWPF for specific statutory purposes. Based on the purpose of police oversight stated in the Terms of Reference, the functions performed by these agencies do not appear to be central to the Review.

## EXISTING ARRANGEMENTS FOR POLICE OVERSIGHT

6. Police oversight in NSW is currently performed by the Commission and the Office of the NSW Ombudsman (“the Ombudsman”).<sup>1</sup> Both agencies share a common goal to strengthen the ethical integrity of the NSWPF, albeit through the exercise of different functions and, in the case of the Ombudsman, in conjunction with other goals.
7. According to its *Statement of Corporate Purpose 2013-2018*, the Ombudsman seeks to improve the accountability, integrity, fairness and service delivery of all agencies it oversees, including the NSWPF, through review, oversight, complaint handling, investigation and advice.<sup>2</sup>
8. Under the *Police Integrity Commission Act, 1996* (“the PIC Act”), the Commission is required to detect, investigate and prevent police corruption and other serious police misconduct and, according to its Corporate Plan,<sup>3</sup> aims to contribute to the integrity of

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<sup>1</sup> These arrangements were put in place following the *Royal Commission into the New South Wales Police Service* (“the Royal Commission”) and the creation of the Commission in 1996. Before recommending this model, the Royal Commission considered a number of models for the oversight of police complaints and the investigation of serious police misconduct including the existing framework of the time involving the ICAC and the Ombudsman. See *Royal Commission into the New South Wales Police Service Interim Report*, February 1996, ch. 4 & 5

<sup>2</sup> *Statement of Corporate Purpose 2013-2018, Ombudsman New South Wales*, [https://www.ombo.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0008/13886/NSW-Ombudsman-Statement-of-Corporate-Purpose-2013-2018.PDF](https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0008/13886/NSW-Ombudsman-Statement-of-Corporate-Purpose-2013-2018.PDF)

<sup>3</sup> *Police Integrity Commission, Corporate Plan 2012-2015*

the NSWPF by doing so. In order to discharge its functions, the Commission is authorised to use special or coercive powers and other intrusive investigative methods (such as telecommunications interceptions) and is resourced with physical and technical surveillance capabilities.

9. The PIC Act provides the Commission with broad discretion to perform its functions, including the capacity to take over any misconduct investigation being carried out by the NSWPF, as well as to initiate an own motion investigation (that is, an investigation commenced where no complaint has been made).
10. Insofar as it is required by its legislation to direct its attention to serious forms of police misconduct, the Commission is highly selective in the matters it chooses to investigate and, as a consequence, its focus may be regarded as narrow in scope. In any given year, the number of investigations commenced by the Commission is small relative to the total number of misconduct complaints made against police. In 2013-14 3,390 notifiable<sup>4</sup> complaints were made against police in NSW. During the same period, the Commission commenced 102 preliminary and full investigations (most but not all of which were based on complaints) and oversighted 24 police investigations. The Commission played little or no role in dealing with the complaints it decided not to investigate or oversight.
11. Consistent with the model for police oversight developed by the Royal Commission, the NSWPF investigates or otherwise deals with all complaints the Commission decides not to investigate. In view of the Commission's selective focus on serious misconduct and the small number of investigations it initiates relative to the total number of complaints made, the vast majority of complaints fall to the NSWPF to investigate or deal with.
12. Misconduct prevention is another principal function of the Commission, in addition to the investigation and detection of serious police misconduct. The Commission performs this function by providing advice and recommendations, where appropriate, as to how NSWPF systems and practices might be strengthened (eg the management of different misconduct risks in the NSWPF). For the most part, these are derived from

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

<sup>4</sup> Guidelines are agreed by the Ombudsman and the Commission, in consultation with the NSWPF, in accordance with s 121 and s 122(2) of Part 8A identifying those categories of complaints which ought be, and which ought not be, notified to the Ombudsman. These are known as *notifiable* and *non-notifiable* complaints of police misconduct. The agreement is known as the Class & Kind Agreement.

its research projects into different forms of misconduct and the ways in which they are being managed by the NSWPF. However, advice and recommendations can also be provided to the NSWPF on the basis of information derived from the Commission's investigations. The Ombudsman has no parallel function with regard to the prevention of misconduct in the NSWPF.

13. The Ombudsman's functions with regard to police oversight, consistent with its corporate aims of improving accountability, integrity, fairness and service delivery within the NSWPF, may be regarded as broad in scope. The Ombudsman monitors the police complaints system to evaluate whether it is functioning in a fair and effective manner and reviews a large proportion of individual misconduct complaint investigations conducted by the NSWPF. In 2013-14 the Ombudsman reported it had oversighted 1,742 notifiable complaints, more than half of all such complaints made in that year.<sup>5</sup>
14. Unlike the Commission, the investigation of misconduct complaints is not a primary role for the Ombudsman. The investigations it does conduct tend to be concerned with complaints about police processes and decision making which arise from day-to-day policing, as distinct from serious police misconduct. During 2013-14 the Ombudsman reported it closed one investigation.<sup>6</sup>

## **THE POLICE COMPLAINTS PROCESS**

15. The following overview of the NSW police complaints process focuses primarily on the Commission's role and how it relates to the roles performed by the NSWPF and the Ombudsman.
16. The handling of police misconduct complaints by the NSWPF, Ombudsman and the Commission is principally governed by Part 8A of the *Police Act 1990* (Part 8A), together with relevant parts of the PIC Act and the *Ombudsman Act 1974*.
17. A police complaint under Part 8A is best understood as new information indicating possible police misconduct. It may be based on an allegation made by a person or

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<sup>5</sup> *Ombudsman NSW 2013-14 Annual Report*, p 42

<sup>6</sup> The Ombudsman's Annual Report includes the number of investigations closed but does not report the number of investigations opened or 'on foot' during the year.

derived from another source for which there is no complainant in the conventional meaning of the word (eg the results of an audit of computer accesses).

18. All complaints received by the NSWPF are registered and managed on the NSWPF's electronic complaints system, the Customer Assistance Tracking System, c@ts.i. The Ombudsman and the Commission must refer complaints they receive to the NSWPF to be dealt with under Part 8A unless they form the view that it is not in the public interest to do so. Under the provisions of Part 8A, the Commission and the Ombudsman both have unrestricted remote access to this system.
19. The Commission's interest in new police complaints on c@ts.i is for the purposes of performing its functions of detecting and investigating serious police misconduct. The Commission examines all new complaints registered on c@ts.i on a regular basis to identify new matters that could possibly merit a Commission investigation. Those selected are subject to two further assessment stages, the aim of which is to assist the Commission in selecting matters for investigation that are both serious and, as far as can be determined at those stages, credible.
20. Under s 70 of the PIC Act the Commission is authorised to take over the investigation of any complaint from the NSWPF. The effect of this is that the Commission has full discretion to investigate any police complaint that has come to the attention of the NSWPF.
21. Complaints of police misconduct are also received directly by the Commission (for example, from members of the public). So as to maintain its focus on the most serious forms of misconduct, the Commission is authorised to exercise a high level of discretion as to the course of action it takes with these matters: it may decide to investigate them or refer them to the NSWPF to be dealt with under Part 8A.
22. In a small number of cases, the Commission elects to oversight a police investigation of a complaint, whether identified from the police complaints system or received by the Commission directly. The Commission generally oversights complaints by reviewing a final NSWPF investigation report.
23. In relation to complaints it has decided not to investigate or oversight, be they from the police complaints system or received directly, the Commission plays no further role, other than, in a small proportion of cases, obtaining final investigation reports which it

reviews for information purposes only. These matters are dealt with by the NSWPF and the Ombudsman under Part 8A. As noted, the Ombudsman oversees a large proportion of misconduct investigations conducted by the NSWPF. Its powers with regard to NSWPF complaints and oversighting complaint investigations are set out in Part 8A.

## **CONTEXT FOR POLICE OVERSIGHT**

24. An organisation's environment or the context in which it operates consists of factors external to the organisation that can influence its performance and direction. These factors vary but may include such things as: technology, legislation, public perception and socio-economic matters.
25. The context in which the Commission and the Ombudsman perform their functions in oversighting the NSWPF are, in some respects, subject to change. Advances in technology, for instance, have created new misconduct risks (eg opportunities for divulging confidential information through social media), new methods for members of the public to record and document possible instances of misconduct (eg recording on smartphones of instances of police use of force) and new methods for detecting illegal drug use by police (eg the introduction of hair testing).
26. There are, however, some fundamental aspects of the context in which police oversight is performed in NSW that are unlikely to undergo significant change. It is relevant that these be noted before turning to the Terms of Reference.
27. It is the Commission's view that the risk of serious police misconduct is ongoing. Though officers may be deterred from engaging in wrongdoing as a result of the Commission performing its functions and the NSWPF investigating and dealing with complaints, the risk of serious misconduct cannot be eliminated through any investigative or preventative strategy available to either agency. This is the experience of police organisations and oversight agencies worldwide.
28. It is inevitable that police misconduct will sometimes occur in the exercise of police powers. Opportunities for wrongdoing are inherent in policing work. Both the Commission and the NSWPF continue to uncover instances of serious police misconduct, where officers have, amongst other things, committed criminal offences,

misused their official positions as police, formed close and improper associations with criminals and made unauthorised disclosures of confidential police information.

29. It is relevant to note here that the impetus for an independent capability in the form of a stand-alone agency to combat serious police misconduct came from the Royal Commission. Having uncovered systemic police corruption in the NSW Police Service (as it was then known), the Royal Commission concluded that a new approach was needed that would not only deal with officers found to be engaged in serious misconduct but would deter the resurgence of the kind of serious misconduct revealed by it.
30. The Royal Commission found that earlier attempts, including those by the NSWPF and the Independent Commission against Corruption (“the ICAC”), to deal with serious police misconduct had failed. Its recommendation that a standing, independent external oversight agency be established formed a key part of a series of measures aimed at disrupting the recurring of corruption it found had been present throughout the history of policing in NSW.
31. Claims that there is no longer any problem of police misconduct in NSW must be treated with great caution. Such claims are built on the assumption that all conduct of this nature is readily discoverable. The secretive nature of corruption means it is not possible to measure or chart the nature and extent of police misconduct. Further, the types of indicators often used to buttress the claim that misconduct rates have fallen, such as complaint statistics, are unreliable and can be misleading. Equally, the absence of highly publicised police corruption scandals, such as those exposed by the Royal Commission, should be considered a poor measure of the true extent of serious police misconduct.
32. It is the Commission’s submission that a key aspect of the context in which police oversight is performed in NSW is that there is a continuing risk of serious police misconduct in NSW, it cannot be eliminated, and historically, and in the absence of effective external mechanisms to deal with it, has undergone resurgences.
33. As already noted, while the Commission exercises a highly selective approach to choosing complaints and other matters for investigation, the NSWPF is responsible for investigating and otherwise dealing with all misconduct complaints the Commission has assessed and decided not to investigate. It is, consequently, a feature of the

arrangements in NSW for responding to police misconduct that most complaints of wrongdoing by police officers are investigated by other police and managed within a system operated by the NSWPF. When a member of the community makes a complaint against a police officer, including a complaint containing serious allegations, the probability is very high that it will be investigated by another police officer.

34. The practice of police investigating their fellow officers, however, creates an opportunity for a well-established risk of bias, covering up and officers looking after their own by 'running dead' on inquiries. Even where a police investigation is impartial and rigorous, a perception of a conflict of interest can arise amongst complainants and other interested parties in the community. This can have the effect of undermining confidence in the integrity of the investigation and the credibility of the outcome of the investigation.
35. Likewise, poor investigation standards, excessive delays in initiating or completing investigations and inadequate complaint management systems and practices can serve to undermine community confidence in a police force and its capacity to deal with the conduct of its officers.
36. It is the Commission's submission that the practice of police investigating their fellow officers – the predominant means for the investigation of misconduct complaints in NSW – gives rise to perceptions of conflict of interest and can consequently undermine public confidence in the integrity of police complaint investigations and the police complaints system itself. The oversighting by an external agency of a large proportion of internal misconduct investigations by police provides a degree of assurance that the actions taken by police in resolving the misconduct complaints have been independently evaluated and, if need be, steps have been taken to rectify any deficiencies.

## **RESPONSE TO THE TERMS OF REFERENCE**

### **Options for a single civilian oversight model**

37. It is the Commission's submission that any single agency oversight option must be tailored to the context in which it is to operate. It must, therefore, be capable of:
  - dealing with serious police misconduct



- scrutinising the integrity of individual police misconduct investigations as well as the NSWPF complaints system.
38. In this regard, it is the Commission's view that there are two possible options that could reasonably be considered for a single police oversight agency in NSW:
- Option 1: Combine the police overseeing functions performed by the Ombudsman with the functions performed by the Commission.
- Option 2: Combine the police overseeing functions performed by the Ombudsman and the functions performed by the Commission with the ICAC.
39. There are significant drawbacks associated with Option 2. The ICAC's jurisdiction is extremely broad, encompassing all public sector agencies and employees in NSW. Adding the NSWPF to its jurisdiction could have the effect of diluting the currently specialised focus on police misconduct provided by the Commission. One possible effect of this could be that the ICAC, given the breadth of its jurisdiction, may not be able to provide the same level of scrutiny as is the case under the current arrangement.
40. A scheme similar to Option 2 was in place prior to the establishment of the Royal Commission and was shown by the Royal Commission to be ineffective in dealing with serious police misconduct in NSW.
41. It is widely acknowledged that police officers are in a separate category of public employees in terms of the functions they perform and the powers they have. Their discretionary powers and the powers to deprive members of the community of their liberty and use force, including lethal force, set police apart from other public employees. Many, if not most, of the misconduct risks faced by police are not encountered by other public employees. There are also differences between the methods used to investigate police misconduct and those used to investigate the misconduct of other public sector employees.
42. The corollary of this is that attempts to integrate specialist investigation methods, resources and systems developed over time in connection with serious police misconduct into an oversight agency with a broad public sector-wide jurisdiction could

result in a reduction or blunting of those specialist capabilities. Option 2 is not supported by the Commission.

43. Option 1 would be a consolidation of the police oversighting functions currently performed by two agencies in one agency. The Commission's view is that Option 1 would be feasible in the NSW context. Provided there is no reduction in the resources currently available to the Commission and the Ombudsman's Police Division, a level of police oversight approximately equating to that currently performed by these two agencies from separate organisational structures, should be able to be performed within a single organisational structure. The Commission can see no reason why it would not be possible within a single agency structure to effectively:

- prevent, detect and investigate serious police misconduct
- oversight a large proportion of police misconduct investigations and monitor the police complaints system.

44. There is a risk that if there is a single agency, fluctuations in the volume of complaints and other aspects of the workload currently undertaken by the Ombudsman's Police Division, could put pressure on resources that would otherwise be allocated to dealing with serious misconduct. However, this risk is more readily managed than that posed by integrating police oversight with the ICAC's functions. Under Option 1, there remains considerable scope for specialisation on police misconduct and complaint issues.

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

45. It is the submission of the Commission that there is only one significant gap in the current oversight framework and that is the absence of a legislated power to oversight the investigation of police 'critical incidents'.<sup>7</sup> The framework should include mandatory notification of critical incidents to an independent agency that can oversight investigations, as it sees fit, with the powers and obligations equal to those applicable in the oversight of police complaints. In addition, a definition of the term 'critical incident' and the nature of the matters to be notified ought be set out in legislation.

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<sup>7</sup> A critical incident, in short, is an incident involving police in which a person dies or suffers a serious injury, or the circumstances of the incident are such that an 'arm's length' investigation is necessary in the public interest.

46. In 2013 a review was conducted by the Hon Robert McClelland into the oversight of the investigation of critical incidents. During the review the Commission and the Ombudsman proposed that the NSWPF should be obliged to notify the Ombudsman of all critical incidents and that the Ombudsman should be able to oversight selected critical incident investigations. As a general principle, the external oversight of internal investigations provides an opportunity for the effectiveness, thoroughness and impartiality of the investigation to be scrutinised and possibly challenged. If need be, this can be done publicly. If the oversight of police investigations is rigorous and competent, it can have the effect of demonstrating that specific investigations by police have been impartially conducted and, moreover, that the process can be trusted.
47. There is currently a comprehensive independent oversight framework in place for police complaints. There is no such corresponding framework for critical incidents. While it might be suggested for a critical incident involving a death that the Coroner 'oversights' the investigation, this misconceives the role of the Coroner who is primarily concerned with determining a cause of death and any evidence of police misconduct or evidence of a crime is ordinarily referred to the NSWPF, the Commission or to the DPP.
48. It is clear that the public interest in the integrity of critical incident investigations, particularly those involving the death of a person, exceeds that of many categories of complaint investigation which are the subject of external oversight. It is the Commission's position that the obligations on police officers conducting critical incident investigations and the powers available to the Ombudsman should, particularly in incidents in which a person has died, be at least equal to the statutory obligations on police and the powers of the Ombudsman in respect of police complaint investigations, including the power to monitor investigations.
49. The McClelland Review Report, which was released early in 2014, recommended an oversight model comprising an obligation on the NSWPF to notify the Ombudsman of all critical incidents and a capacity for the Ombudsman to oversight selected critical incidents. The proposed regime, however, is less rigorous than that currently in place for the oversight of complaints. For example, the proposed model places an obligation on the Ombudsman to agree upon oversight arrangements with the Commissioner of Police whereas arrangements are stipulated in legislation for complaints oversight or independently agreed between this Commission and the Ombudsman. Also, in the McClelland model the Ombudsman's oversight of a critical incident investigation

cannot adversely impact on the timely completion of an investigation, whereas for a complaint there is no such impediment.

50. The absence of a detailed framework for the oversight of critical incidents is a clear gap in the current police oversight system and there has been no progress in the development of a framework since the finalisation of McClelland's Report late in 2013.

### **Functional overlap between oversight bodies**

51. Insofar as both the Commission and the Ombudsman have the capacity to oversight misconduct investigations conducted by the NSWPF there is a degree of overlap in the functions conferred on these two agencies. However, it does not necessarily follow that this leads to a duplication of effort or that this arrangement has created unreasonable complexity within the complaints system.

52. In the main, the Commission oversees NSWPF misconduct investigations in circumstances where:

- there may be a clear public interest in the Commission performing this role
- it has formed the view that oversight by the Commission is appropriate, due to the seriousness of the complaint
- it has formed the view that it may need to take over the investigation from the NSWPF at some stage
- the investigation by the NSWPF is to be carried out on the basis of information obtained by the Commission through its inquiries and subsequently disseminated to the NSWPF (thereby, given its knowledge of the matter, placing the Commission at an advantage over the Ombudsman in performing the oversighting role).

53. Where the Commission decides to oversight a police investigation, it makes its decision in consultation with the Ombudsman to ensure there is no duplication between the agencies in the performance of this role. The Ombudsman takes no further role in NSWPF investigations the Commission has decided to oversight.

54. One particular matter has been mentioned in arguments about overlapping responsibilities and inefficiency: the numerous investigations associated with the death of Mr Roberto Laudisio-Curti. These investigations include: the critical incident investigation by NSWPF; the oversight of that investigation by the Ombudsman; the conduct of a Coronial Inquest into the death; the police misconduct investigation by the Commission known as Operation Anafi; and the subsequent prosecution of police by the DPP.
55. Laudisio Curti died on 18 March 2012 after being pursued by members of the NSWPF. The circumstances of his death raised issues of significant public interest when it was revealed that he had died after 11 officers used a combination of physical force, Tasers, OC spray, handcuffs and a baton to restrain him. Each of the NSWPF, the Ombudsman, the State Coroner, the Commission and the DPP became involved and played a distinct role in accordance with their obligations and functions.
56. Detectives from the NSWPF Homicide Squad conducted the initial investigation into the death of Laudisio-Curti. The integrity of the police investigation was internally monitored by the NSWPF Professional Standards Command. Because of the exceptional nature of the incident, the police investigation was also monitored by the Ombudsman to provide a level of assurance to the public that the investigation would be conducted appropriately. The State Coroner was required by the *Coroners Act 2009* to determine the manner and cause of death because the death occurred in the course of a police operation.
57. The Commission became involved following a referral by the Coroner after the inquest of allegations that police who had been involved in the pursuit and restraint of Laudisio-Curti had used excessive force against him and that police witnesses at the inquest had committed perjury. The Director of Public Prosecutions became involved when the Commission provided him with an advisory brief and sought advice as to whether there was sufficient evidence to charge any of the officers. On the advice of the Director, four officers were charged with assault or aggravated assault and prosecuted by officers of the DPP.
58. While in this case several agencies became involved in investigations associated with the death of Laudisio-Curti, there was no duplication of effort. Each agency carried out a distinct and specialised function. The NSWPF was the only agency sufficiently resourced to conduct the investigation. The Ombudsman had a recognised statutory

power to monitor police investigations. The Coroner had a well-defined role to fulfil. The Commission responded to allegations of police misconduct. The DPP was the appropriate authority to independently prosecute the matter. It is the submission of the Commission that the involvement of each agency, and the level of independent scrutiny brought to bear, were appropriate in such a sensitive and highly publicised matter.

59. The Commission acknowledges there are perceptions amongst some stakeholders that police oversight in NSW is complex, burdensome and involves multiple layers of up to ten agencies, including not only the Commission and the Ombudsman but also the NSWPF itself, the Coroner, the Crime Commission, the DPP, the Inspector of the PIC, the Coroner, ICAC, and WorkCover.<sup>8</sup> The Audit Office has also been included in such arguments.
60. These perceptions are not new but are not based on fact. The *10 Year Review of the Police Oversight System* by the Parliamentary Joint Committee on the Ombudsman and the Police Integrity Commission found the arguments that overlap occurred were weak and largely based on unsubstantiated premises.<sup>9</sup> The current model was also reviewed in three separate Ministerial Reviews in 2001, 2006 and 2011.<sup>10</sup> In each case, arguments for significant changes in police oversight on the basis of substantial functional overlap and duplication of effort were found not to be persuasive and the current model was endorsed.

### **Best practice models from around the world, including the UK Independent Police Complaints Commission (IPCC), and their applicability and adaptability to NSW**

61. There is a diverse range of approaches to civilian police oversight in Australia and other parts of the world. Each oversight agency is the product of the specific context in which it was established and in which it operates. A range of factors, some of which may be unique to a particular jurisdiction, may play a role in determining what the

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<sup>8</sup> NSW Police Association submission to the Parliamentary Inquiry Into The Conduct And Progress Of The Ombudsman's Inquiry "Operation Prospect", p.15.

<sup>9</sup> *The 10 Year Review of the Police Oversight System*, the Parliamentary Joint Committee on the Ombudsman and the Police Integrity Commission, 2006, pp. vii, 133 - 137.

<sup>10</sup> A review of whether the policy objectives of the PIC Act remain valid and whether the terms of the Act remain appropriate for securing those objectives has been required to be undertaken by the Minister every five years.

oversighting agency does, where it is located, how it performs its functions and how it is resourced. A former Commissioner and Deputy Chair of the Independent Police Complaints Commission (IPCC), Deborah Glass, wrote:

*(The) systems, and the bodies set up to implement them, are almost inevitably a product of their history, a response to some very significant event that damages public confidence in the police.<sup>11</sup>*

62. In examining best practice models it must be borne in mind, therefore, that what works in one jurisdiction with regard to police oversight will not necessarily work in another.
63. The Commission's response to this term of reference focuses on two police oversight agencies: the IPCC and the Office of the Police Ombudsman of Northern Ireland (OPONI). In comparing the activities and reported outcomes of these two agencies with the current NSW model, however, it should be noted that there may be significant differences with regard to how they compile statistics and define key terms associated with their functions.
64. The IPCC was established in response to concerns about police use of force, deaths in police custody and the manner of the policing of certain minority communities. Its primary functions are:
  - the oversight of the police complaints system – the IPCC determines the broad policies and the processes to be used by police in the management of complaints. It has a very a limited role in the investigation of complaints
  - the investigation of critical incidents – where deaths and serious injuries occur during police operations
  - the consideration of appeals from people who are dissatisfied with the way a local police force has dealt with their complaint.
65. In 2013-14 there were 34,863 complaints of police misconduct in England and Wales.<sup>12</sup> In the same year, the IPCC received 3,176 mandatory referrals of the most

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<sup>11</sup> *Towards greater public confidence*, Deborah Glass Commissioner IPCC, p. 4.

serious complaints and all critical incidents from police forces.<sup>13</sup> The IPCC commenced 109 independent investigations and managed or supervised (ie. an intrusive form of oversight) a further 304 (0.9% of complaints) investigations by police, 141 of which concerned allegations of corruption. The IPCC's Annual Report for 2013-14 does not indicate the proportion of its 109 independent investigations that were commenced into death and serious injury cases, as opposed to other matters. It is likely, however, that the majority were for this purpose. Glass observes that the vast majority of IPCC investigations are carried out into deaths.<sup>14</sup>

66. The IPCC also received 4,079 appeals made by complainants about the handling of their complaint by a police force.<sup>15</sup> However, the vast majority of complaints of police misconduct (about 94%) in England and Wales were dealt with by police, without any oversight by the IPCC beyond stipulation of the broad systems and processes to be used.<sup>16</sup>

67. Unlike the Commission, the IPCC was not established in response to concerns about police corruption. It is notable, however, that the role of the IPCC is evolving in the face of continuing public concern over police investigating allegations of police corruption. Until recently the investigation of corruption has been the responsibility of the police forces. The IPCC is expanding its establishment to investigate more serious complaints and developing a capacity to independently investigate corruption.<sup>17</sup> The establishment of the IPCC has grown from 360 to 560 full-time equivalent positions in two years. However, even if the IPCC's resources are doubled, the majority of complaints will still need to be dealt with by police, without oversight. As noted by the Chair of the IPCC in 2012, it is simply not feasible for the IPCC to investigate all police complaints as the Government would need to "... *take a few billion pounds from police*

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<sup>12</sup> Please note that this statistic only concerns complaints made by members of the public to their local police forces and does not include Death and Serious Injury matters (ie. critical incidents) or internal conduct matters.

<sup>13</sup> Police are required to refer misconduct matters and complaints concerning deaths and serious injuries, serious assaults, sexual offences and corruption to the IPCC.

<sup>14</sup> *Towards greater public confidence - A personal review of the current police complaints system for England and Wales*, Deborah Glass Commissioner IPCC, March 2014, p. 8

<sup>15</sup> IPCC. 2014. *IPCC Complaint Statistics 2013-14*, London, p.7.

<sup>16</sup> All complaints statistics sourced from the IPCC Annual Report and Statement of Accounts 2013/14 and *Towards greater public confidence - A personal review of the current police complaints system for England and Wales*, Deborah Glass Commissioner IPCC, March 2014, p. 8.

<sup>17</sup> IPCC Annual Report and Statement of Accounts 2013/14, p.18, & <https://www.gov.uk/government/speeches/speech-by-the-home-secretary-on-police-integrity>



*budgets and reallocate them to (the IPCC)*".<sup>18</sup> The IPCC employs 560 staff, or 4.4 staff for each 1000 police officers, and has offices in six locations in England and Wales.

68. Glass provides critical insight into the IPCC and the police complaint system in England and Wales in her paper *Towards greater public confidence – A personal review of the current police complaints system for England and Wales*.
69. The police oversight framework in Northern Ireland also consists of a single agency. Like the IPCC, OPONI was not established in response to concerns about police corruption. During the 'troubles', a significant proportion of the population regarded the police as a pro-Unionist militia, routinely accused of discrimination and collusion with Loyalist paramilitaries. Independent investigation of police misconduct, particularly critical incidents, was seen as a key strategy in restoring trust in the police after the troubles.
70. OPONI investigates all critical incidents and a proportion of complaints of misconduct by on-duty police. OPONI does not have a substantive role in the investigation of corruption unless there is a complaint about behaviour by on-duty police, in which case there is an option of a joint investigation with the Police Service of Northern Ireland (PSNI) which has the surveillance powers necessary to support such investigations. Investigations are normally instituted only into complaints of on-duty behaviour that occurred in the previous 12 months, although exceptions are made for "high profile, grave or exceptional cases which are often (but not always) troubles related".<sup>19</sup>
71. In 2013-14 there were 3,734 complaints of police misconduct in Northern Ireland – predominantly "failure in duty" (37%), "oppressive behaviour" (33%) and "incivility" (9%). OPONI commenced approximately 1,500 (about 40%) investigations including four investigations into critical incidents, the remainder either being dealt with informally by police (12.5%) or were ill-founded (4%), withdrawn (5%), outside remit (8%) or closed due to an uncooperative complainant (29%). OPONI does not oversee PSNI investigations into corruption.<sup>20</sup> OPONI employs 151 staff or 21 staff for each 1000 police officers.

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<sup>18</sup> Dame Anne Owers, Chair IPCC, John Harris Memorial Lecture, 3 July 2012

<sup>19</sup> Office of the Police Ombudsman for Northern Ireland Annual Report 2013/14, p. 5.

<sup>20</sup> All complaints statistics sourced direct from OPONI and *Trends in complaints and allegations received – Statistical Report of the Police Ombudsman 2013-14*, p.31, 51.

72. *The Future Operation of the Office of the Police Ombudsman for Northern Ireland: A Consultation Paper*, compiled in 2012 by the Department of Justice for its five year review of OPONI, provides insight into the challenges for that organisation and the oversight model. It also provides a useful comparative discussion on oversight arrangements in neighbouring jurisdictions.<sup>21</sup>
73. For the purposes of comparison, during 2013-14 (as already noted) 3,390 notifiable complaints of police misconduct were made in NSW.<sup>22</sup> In that period, the Commission commenced 102 investigations<sup>23</sup> (most, but not all, of which were based on notifiable complaints) and the Ombudsman closed one investigation. On these figures, approximately 3 per cent of notifiable police complaints were the subject of external investigation. Added to this, as indicated above, the Ombudsman oversighted 1,742 individual misconduct investigations and the Commission oversighted 24. The Commission and the Ombudsman together employ 126 staff for police oversight or 7.6 staff for each 1000 police officers.
74. Returning to the fourth term of reference, the Commission considers that the ... *adaptability and applicability* ... of the IPCC and OPONI oversight models to NSW should be evaluated on the basis of whether or not the functions of these agencies:
- address the gaps that presently exist in the NSW police oversight arrangements
  - would be effective in the NSW context, the key features of which (as indicated above) are that:
    - the risks of serious police misconduct are ongoing and cannot be eliminated
    - there are ongoing risks associated with police investigating police misconduct (eg conflicts of interest).
75. In terms of gaps in the current police oversight framework in NSW, this submission has identified one: the absence of a legislated mandate for an external agency to oversight the investigation of police critical incidents. As noted, both the IPCC and OPONI conduct investigations into critical incidents, while the IPCC also oversights some

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<sup>21</sup> <http://www.dojni.gov.uk/index/public-consultations/current-consultations/oponi-discussion-paper-consultation.pdf>.

<sup>22</sup> The total number of police complaints for 2013-14, including non-notifiable complaints, was 5,288.

<sup>23</sup> This includes both full and preliminary investigations.

police investigations into such matters. However, it is the Commission's view that neither model, as far as its functions connected with critical incidents are concerned, is applicable or adaptable to NSW.

76. For a critical incident investigation to be effective, investigators must be able to reach the scene shortly after the incident has occurred so that evidence is not tainted or lost. The IPCC and OPONI have been resourced, it would seem, with this requirement in mind. The IPCC has offices in six locations throughout its jurisdiction which measures 151,000 km<sup>2</sup>. OPONI has one office in Belfast, but has a vastly smaller jurisdiction of 13,800 km<sup>2</sup>. OPONI also employs well over twice as many staff per 1000 police than the two NSW overseeing agencies combined and more than four times the number as the IPCC.
77. NSW, by comparison, is more than five times the size of England and Wales and more than 58 times the size of Northern Ireland. It may be possible for OPONI or IPCC officers to reach a critical incident scene within a relatively short period of time travelling from Belfast (in the case of OPONI) or one of six locations in England and Wales (in the case of the IPCC). Were a NSW overseeing agency assigned an investigation function with regard to critical incidents, the distances officers from that agency may need to travel, and the time that it may take them to reach a scene, could be far greater. For the reasons outlined above, this in turn could impact adversely on the effectiveness of those investigations. It is the Commission's submission that the IPCC and OPONI models, as far as critical incident investigations are concerned, would not be able to be applied or adapted to NSW without substantial modifications to address these geographical considerations.
78. As to the context in which police oversight is conducted in NSW, based on information presented above, neither the IPCC nor the OPONI model would appear to be suitable:
  - the primary functions of the IPCC do not include the investigation of serious police misconduct (though it is developing such a capacity to independently investigate corruption) while OPONI does not conduct independent investigations into serious police misconduct
  - the IPCC manages or supervises very few police investigations into police misconduct (about 94% of investigations in 2013-14 in England and Wales were dealt with by police without any oversight by the IPCC beyond stipulation of the

broad systems and processes to be used) while OPONI does not, as a matter of practice, supervise individual police investigations, though it has the power to do so.

79. Annexure A includes further details of the oversight arrangements in the three jurisdictions, England/Wales, Northern Ireland and NSW.

### **A recommended model for police oversight including guidance on its design, structure, cost and establishment**

80. The Commission submits that, if a single agency model is adopted:

- the most feasible option, taking into account the NSW context, would be for the functions of the Commission to be combined with the police oversight functions of the Ombudsman in a single organisational structure. To maintain an efficient and effective level of police oversight in NSW, any new agency assuming the functions of the Commission and the Ombudsman would require the same powers currently exercised by both agencies
- there are a number of governance arrangements that would need to be put in place in order for it to be effective, independent and accountable. Consistent with the current governance arrangements that the Commission operates under, it should:
  - have full discretion to exercise its powers
  - not be subject to any form of external direction or management in the performance of its functions (such as an external management board or the appointment of external members to its operational decision-making bodies)
  - report directly to Parliament
  - be subject to oversight by an independent inspector with powers that mirror those of the Inspector of the PIC and by a Parliamentary Committee.
- a significant gap in the police oversighting arrangements in NSW would need to be addressed insofar as there is no currently legislated framework:
  - requiring mandatory notification of critical incidents to an independent agency and

- enabling that agency to oversight NSWPF investigations, as it sees fit, with the powers and obligations equal to those applicable in the oversight of police complaints.

81. Were the combined functions of the Commission and Ombudsman expanded to also incorporate oversight of critical incident investigations within a single agency, the main functions of that agency would, in broad terms, be:

- to prevent, detect and investigate serious police misconduct
- to promote accountability, integrity, fair decision making and effective service delivery with regard to –
  - the administration and performance of the NSWPF complaints system
  - individual complaint investigations conducted by NSWPF
  - individual critical incident investigations conducted by NSWPF.

82. Insofar as the Commission does not have access to detailed budgetary and staffing information regarding the Ombudsman police team, it is unable to provide a detailed response to this term of reference on matters such as cost and numbers of staff required to perform particular functions. The observations provided below are, accordingly, of a more general nature.

### **Prohibition on employing current or former NSWPF officers**

83. Under s 10 of the PIC Act the Commission is currently prohibited from employing current or former officers of NSWPF.

84. The Commission's view is that this prohibition should continue if a single agency approach were adopted so as to maintain full independence from the NSWPF, and maintain public confidence that the agency is separate from the NSWPF in every respect, including the staff that it employs.

### **Accommodation**

85. The Commission's accommodation includes a number of purpose-built facilities, including its hearing room and telecommunications interception unit. The costs of relocating these facilities to a new site and restoring the existing premises to their pre-

lease condition are likely to be very high. If a single agency option is adopted, it is submitted that the current accommodation at 111 Elizabeth St should be retained as its principal location.

### **Possible integration of complaint assessment functions**

86. The Commission employs complaints assessors to review complaints and identify possible instances of serious police misconduct for investigation. It is possible that there may be some opportunities for integrating the work it does in this regard with that undertaken by the Ombudsman. Further information on the Ombudsman's complaint assessment process would need to be obtained and considered before a definitive view could be offered on the benefits and risks of integrating these functions.

### **Staffing establishment**

87. As indicated previously in this submission, the Commission accepts that there is limited functional overlap between the Commission and the Ombudsman but maintains that the activities of these two agencies are significantly different and the agencies do not duplicate each other's work.
88. The corollary of this is that there are some, but limited, efficiency savings to be made through establishing a single police oversight agency. It is the Commission's submission that the present staffing establishment of the Commission and the Ombudsman's police team would need to be migrated into the new agency in order that there be no reduction in the level of police oversight in NSW.
89. Additional staffing resources may be required if a single agency is to perform an overseeing role with regard to critical incidents. The nature of this function, once it is settled, will determine the staffing resources needed to perform it.
90. The Ombudsman's police oversight function is performed by a discrete business unit (the police team) that operates within a wider organisational structure which provides various support services, and which would, presumably, remain within the Ombudsman's Office following the establishment of a single agency.
91. If the Ombudsman's police oversight function was merged with the Commission's functions, provision would need to be made for additional support services, including

information management (ICT and registry services) and corporate services (HR and finance).

92. It is the Commission's submission, in summary, that:
- there is some, but limited, scope for efficiency savings to be made through establishing a single agency
  - the total current staffing resources of the Commission and the Ombudsman Police Division would need to be applied within the new agency to maintain effectiveness in police oversight
  - additional staff may be needed if new functions are assigned to the single agency as a result of the Review.
93. The following table seeks to highlight those units within the Commission that may be affected by the creation of a single police oversight agency combining the police oversight functions currently performed by the Commission with those of the Ombudsman. It is noted that this table does not seek to identify the costs associated with units of the Commission undertaking or supporting additional functions under a single agency model.

**This has been deliberately left blank**

**Table 1: Commission units and functional areas affected by creation of single police oversight agency combining police oversight functions currently performed by the PIC and Ombudsman**

Commission units & functional areas	Units and functional areas that could, with adequate resourcing, undertake or support functions not currently performed by the Commission but envisaged under a model that combines the PIC with the Ombudsman's police oversight role	Units and functional areas <u>unlikely</u> to be affected in the functions they perform under a single police oversight agency
Investigations Unit	√	
Covert Surveillance Unit		√
Security and Risk	√	
Intelligence Unit	√	
Electronic Collection Unit		√
Complaint Assessments	√	
Misconduct prevention		√
Registry Unit	√	
IT & Communication Unit	√	
Legal Services Unit	√	
Human Resources	√	
Finance & Administration	√	

### **Implications for maintaining oversight of the NSWCC arising from the recommended model**

94. The Commission's functions include the prevention, detection and investigation of officer misconduct by Crime Commission Officers.
95. The Inspector of the Crime Commission also has a role in overseeing the Crime Commission. The Inspector's principal functions include monitoring the Commission's



compliance with the law, its exercise of powers and the effectiveness and appropriateness of its procedures.<sup>24</sup>

96. There is also a Management Committee for the Crime Commission, consisting of an independent Chairperson, the Commissioner of Police, the Chair of the Board of the Australian Crime Commission, the Chief Executive of the Ministry for Police and Emergency Services and the Commissioner of the Crime Commission.<sup>25</sup> The Committee's principal functions include reviewing and monitoring the work of the Crime Commission.<sup>26</sup>
97. The current oversight framework for the Crime Commission closely follows recommendations made in the *Report of the Special Commission of Inquiry into the New South Wales Crime Commission* by Mr David Patten in 2011.
98. Similar to the NSWPF oversight framework, the roles of the Commission, the Inspector and the Committee are different, but complementary. Each role is clearly defined in the PIC Act or in the *Crime Commission Act 2012*. The Commission's focus on officer misconduct distinguishes its role from that of the Inspector and the Committee, neither having the specialist resources or legislative mandate to undertake officer misconduct investigations. The Inspector is concerned with audit and legal compliance by the Crime Commission, roles not applicable to the Commission. The Committee broadly oversees the work undertaken by the Crime Commission and cooperation by the Crime Commission with other agencies, a role not shared with either the Commission or the Inspector of the Crime Commission.
99. It is the Commission's view that the clearly defined roles provide for comprehensive oversight of the Crime Commission. The Commission supports the continuation of the current oversight arrangements for the Crime Commission.

## CONCLUSION

100. In conclusion, the Commission makes the following submissions:

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<sup>24</sup> *Crime Commission Act 2012*, s 62

<sup>25</sup> *Crime Commission Act 2012*, s 50

<sup>26</sup> *Crime Commission Act 2012*, s 51

- a. Maintenance of a strong police oversight framework is essential, not only for dealing with serious police misconduct and managing the inherent conflict in a system where most complaints of police misconduct are investigated by police, but also for deterring the resurgence of the kind of serious misconduct revealed by the Royal Commission.
- b. The lack of oversight of critical incidents remains a serious gap in the police oversight framework. At a minimum, the oversight framework should include mandatory notification of critical incidents to an independent agency that can oversight investigations, as it sees fit, with the powers and obligations equal to those applicable in the oversight of police complaints. Also, a definition of the term 'critical incident' and the nature of the matters to be notified ought be set out in legislation.
- c. The most feasible option for single agency oversight, taking into account the NSW context, would be for the functions of the Commission to be combined with the police oversight functions of the Ombudsman into a single organisational structure. Adequately resourced, a single agency should be able to perform these functions without any loss of effectiveness and with some efficiency gains.
- d. There is no apparent best practice model for police oversight that is readily adaptable or applicable to NSW. Police oversight agencies in other jurisdictions have been designed and tailored to meet particular needs and address specific problems in their respective jurisdictions.
- e. The roles of the Commission, the Inspector of the Crime Commission and the Management Committee for the Crime Commission in respect of the oversight of the Crime Commission are clearly defined in relevant legislation. The Commission supports the continuation of the current oversight framework for the Crime Commission.

## ANNEXURE A

### Oversight arrangements and relevant statistics for 2013/14

	England/Wales	Northern Ireland	NSW Police Oversight Framework	
Oversight Agency/Agencies	IPCC	Office of the Police Ombudsman for Northern Ireland	Ombudsman	PIC
Principal role	<p>Oversees the police complaints system and sets standards by which police should handle complaints.</p> <p>Investigations principally concern allegations of police misconduct related to or resulting in death or serious injury (ie. critical incidents) and other forms of serious misconduct.</p> <p>Considers some appeals from people who are dissatisfied with the way a police force has dealt with their complaint.</p>	<p>Required to secure an efficient, effective and independent police complaints system and public and police confidence in that system.</p>	<p>To assist police improve integrity and effectiveness through review, oversight, complaint handling, investigation and advice.</p>	<p>Prevents, detects and investigates serious police misconduct.</p>
Area of jurisdiction	151,000 sq km	13,800 sq km	801,000 sq km	
Population	55 million	1.8 million	7.5 million	
Police oversighted	127,909 police from 43 police forces <sup>27</sup>	7,200 police from the Police Service of Northern Ireland	16,675 police from the NSWPF	
Offices	Six (London, Sale, Wakefield, Cardiff, Birmingham, Warrington)	One (Belfast)	One (Sydney)	One (Sydney)

<sup>27</sup> <https://www.gov.uk/government/publications/police-workforce-england-and-wales-31-march-2014/police-workforce-england-and-wales-31-march-2014>

	England/Wales	Northern Ireland	NSW Police Oversight Framework	
Oversight Agency/Agencies	IPCC	Office of the Police Ombudsman for Northern Ireland	Ombudsman	PIC
Budget for Police Oversight	A\$81M <sup>28</sup>	A\$19M	A\$3.16M <sup>29</sup>	A\$19M
Staff	560	151	32 <sup>30</sup>	94
Annual pool of complaints	34,863 (complaints only, not including Death and Serious Injury and conduct matters) <sup>31</sup>	3,734	5,288 (3,390 notifiable & 1,898 non-notifiable)	
Complaints referred to oversight agencies	3176 (including complaint, deaths and serious injury and conduct matters, referred from police only) <sup>32</sup>	3,734 (100% of pool)	3,390 (64% of pool)	
Investigations commenced	109 <sup>33</sup>	1500 approx (40%) <sup>34</sup>	1 <sup>35</sup>	102
Investigations oversighted	304 <sup>36</sup>	Nil	1,742	24

<sup>28</sup> Exchange rate as at 24/02/15

<sup>29</sup> This is the figure for recurrent funding only and principally relates to the salaries of staff in the Ombudsman's Police Division

<sup>30</sup> This figure does not include temporary staff employed by the Ombudsman for legislative reviews.

<sup>31</sup> IPCC. 2014. *IPCC Complaint Statistics 2013-14*. London. p. 13.

<sup>32</sup> IPCC. 2014. *Annual Report and statement of accounts 2013/14*, London. p. 11.

<sup>33</sup> IPCC. 2014. *Annual Report and statement of accounts 2013/14*, London. p. 17.

<sup>34</sup> OPONI does not report on the number of investigations undertaken each year. However, 12.5% were dealt with informally by PSNI, 29% were dismissed due to uncooperative complainants, 5% were withdrawn, 4% were ill-founded and 8% were outside remit – Source OPONI email 27/3/15 and *Trends in complaints and allegations received – Statistical Report of the Police Ombudsman 2013-14* p.31, 51.

<sup>35</sup> The Ombudsman Annual Report 2013-14 records investigations 'concluded' rather than commenced.

<sup>36</sup> IPCC. 2014. *Annual Report and statement of accounts 2013/14*, London. p. 18. IPCC is reducing this activity as powers to manage/supervise (ie. 'oversight') are limited.

	England/Wales	Northern Ireland	NSW Police Oversight Framework	
Oversight Agency/Agencies	IPCC	Office of the Police Ombudsman for Northern Ireland	Ombudsman	PIC
Critical Incidents investigated / oversights	Figures not available but it is likely that a high proportion of independent investigations commenced were into deaths and serious injury	Yes, 100% investigated	Rarely, and usually limited to oversight.	Rarely, and usually limited to the investigation of serious misconduct.
'Corruption Investigations'	Not the primary focus of its investigations <sup>37</sup>	No <sup>38</sup>	No	Yes
Appeal Process	Yes. 4079 appeals were made to the IPCC about the handling of a complaint by a police force. <sup>39</sup>	No	No	
Coercive powers to support investigations	No (but recently acquired power to compel police to provide witness statements)	No	Yes	Yes
TI and SD powers to support investigations	SD: Yes TI: No <sup>40</sup>	No	No	Yes

<sup>37</sup> However, IPCC is presently increasing resources to undertake corruption investigations.

<sup>38</sup> However, if there is a complaint of on-duty misconduct, OPONI may become involved in a joint investigation with the PSNI.

<sup>39</sup> IPCC. 2014. *IPCC Complaint Statistics 2013-14*. London. p.7.

<sup>40</sup> A Commissioner of IPCC is not included as an authorised applicant for interception in the *Regulation of Investigatory Powers Act 2000*