



PIAC's submission to the Review of Police Oversight in NSW

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1. Introduction

The Public Interest Advocacy Centre (**PIAC**) welcomes the Review of Police Oversight (**the Review**), which will consider whether a single civilian oversight model for police in NSW should be established.¹ PIAC strongly supports the formation of an independent policing oversight and investigatory body that incorporates the functions of both complaint oversight and critical incident investigation. PIAC has repeatedly called for such an independent body to be established. This recommendation is based on many years of experience representing and advising clients in relation to police complaints and in respect of civil claims involving the NSW Police Force (**NSWPF**). PIAC's position also draws on our experience representing families of deceased persons in coronial inquests in circumstances where the death occurred as a result of the actions of police or similar bodies.

The core mission of the NSWPF is to 'work with the community to reduce violence, crime and fear'.² This Peelian principle of policing by consent relies on the community having confidence in the police officers who serve them. Repeated inquiries and reports in recent years have shown that the current system of self-regulation does not secure transparent, timely and neutral or disinterested investigation of allegations of police misconduct. The consequent implications for police accountability and public confidence in police, both in the context of police complaints and in relation to other serious incidents, are clear. The failings of the current police oversight model work only to undermine the relationship between police officers and communities and reform is therefore necessary.

In this submission, PIAC sets out the principles that should guide the establishment of an independent oversight body, as well as the core features of the model we propose. The submission also briefly considers the alternative models that are likely to be considered by the Review. Finally, the submission identifies more simple changes that, at a minimum, would be necessary in the event that the NSW Government opts not to pursue more substantial reform. The recommendations in this submission are based on experience gained primarily through PIAC's legal casework. The submission also evaluates independent oversight models established in other countries and notes the limitations of some of those models.

1.1 The Public Interest Advocacy Centre

PIAC is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the (then) NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from Trade and Investment NSW for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates

¹ *Review of Police Oversight in NSW*, 2015, Terms of Reference available at <http://www.haveyoursay.nsw.gov.au/consultations/review-of-police-oversight-in-nsw/?date=2015-05-21>

² Section 6(1) *Police Act 1990* (NSW).

income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's work relevant to the Review

PIAC has contributed to previous reviews of police oversight. PIAC made a submission to the McClelland Review of Critical Incidents³ and the Ten Year Review of the Police Oversight System conducted by the Committee on the Ombudsman and the Police Integrity Commission.⁴ PIAC has also contributed to a number of consultative processes in relation to other aspects of the criminal justice system, including in relation to bail,⁵ Indigenous justice⁶ and sentencing and diversionary justice.⁷

Through its Homeless Persons' Legal Service, PIAC also works directly with the NSWPF to improve the relationship between people experiencing homelessness and police officers. PIAC was instrumental, for example, in establishing the Protocol for Homeless People in Public Spaces. The Protocol exists to ensure people experiencing homelessness are treated with respect and not discriminated against by police officers and other public office holders.⁸

PIAC's policy work in this area relies on the evidence base of its legal casework. PIAC's clients are disadvantaged, vulnerable or marginalised. Most of PIAC's clients are homeless or at risk of homelessness, young, mentally ill and/or Aboriginal or Torres Strait Islander. For over 30 years, PIAC has assisted individuals to make complaints regarding the NSWPF and, in more serious cases, has represented clients in civil actions. PIAC is currently assisting to run a class action, representing many young people who were unlawfully detained by the NSWPF for breaches of bail conditions that were no longer in force or which had been entered incorrectly into the COPS database.⁹ PIAC has also represented a number of families in coronial inquests¹⁰ and has

³ Goodstone, A *Submission to the Oversight of police critical incidents* (Public Interest Advocacy Centre) (11 October 2013), available at <http://www.piac.asn.au/publication/2013/10/oversight-police-critical-incidents>.

⁴ Moran, S and Smith, C *Submission to the Ten Year Review of the Police Oversight System in NSW* (Public Interest Advocacy Centre) (15 May 2006), available at <http://www.piac.asn.au/publication/2006/05/sub-re-ten-year-review-police-oversight-system-nsw>.

⁵ See, for example, Bailey, B *Review of the Law of Bail in NSW: submission to the New South Wales Law Reform Commission*, 26 July 2011, Public Interest Advocacy Centre, available at <http://www.piac.asn.au/publication/2011/07/review-law-bail-nsw>.

⁶ See, for example, Farthing, S *PIAC's submission to the Finance and Public Administration Committee inquiry, Aboriginal and Torres Strait Islander experience of law enforcement and justice services*, 30 April 2015, Public Interest Advocacy Centre, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Legal_assistance_services/Submissions.

⁷ See, for example, Schetzer, L *Value of a justice reinvestment approach to criminal justice in Australia: a submission to the Senate Legal and Constitutional Affairs Committee*, 18 March 2013, Public Interest Advocacy Centre, available at <http://www.piac.asn.au/publication/2013/04/value-justice-reinvestment-approach-criminal-justice-australia>.

⁸ Available at <http://www.housing.nsw.gov.au/NR/rdonlyres/A3BD2529-5E0A-4DFF-BAD5-BEA99A91C357/0/Protocol.pdf>.

⁹ For details see PIAC's website, *Access to Justice: False Imprisonment of young people class action*, at <http://www.piac.asn.au/projects/node/64/information-1>.

¹⁰ PIAC, for example, represented the family of Tracy-Lee Brannigan, see 'Drugs problem 'endemic' in prison system: Coroner', *Media Release*, 16 June 2014, Public Interest Advocacy Centre, available at <http://www.piac.asn.au/news/2014/06/drugs-problem-'endemic'-prison-system-coroner>; the family of Mark Holcroft, see Dodd, P *The Holcroft Inquest: prisoners deserve more human prison transportation*, 25 May 2012, Public Interest Advocacy Centre, available at <http://www.piac.asn.au/publication/2012/05/holcroft-inquest>; two members of Tut Nyal's family, see 'Tut Nyal Inquest raises concerns about suicide risk', *Media Release*, 9 September 2011, Public Interest Advocacy Centre, available at <http://www.piac.asn.au/news/2011/09/tut-nyal-inquest-raises-concerns-about-suicide-risk>; the family of Scott Simpson, see 'A mother's fight for justice

contributed to the development of coronial law reform in circumstances where the death occurred as a result of the actions of police or similar bodies.¹¹

2. A need for change

PIAC believes that reform of the current oversight mechanisms is necessary to restore and build the confidence of the community in the NSWPF. The current model, whereby police internally deal with complaints made against them and conduct their own investigations into critical incidents, is fundamentally flawed.

There is no doubt that the job of a NSW police officer is a difficult one, frequently undertaken in dangerous and unpredictable situations. Recognising the importance of this role and the context in which it is carried out, NSW police officers are granted significant powers by the NSW Parliament. They have the ability to stop, search and detain; deprive individuals of their liberty; and use force, including lethal force, against members of the public.

There is almost universal acknowledgement, including by the NSWPF itself, that such extraordinary powers demand effective oversight and accountability – to guard against misuse of these powers, as well as to address and seek to remedy the serious consequences of any misuse. Research has also shown that community confidence in their police force in the context of legitimacy- or consent-based policing will lead to better policing outcomes, leading to safer communities by boosting the capacity of police to control crime.¹²

The fundamental question, therefore, is not whether oversight and accountability are necessary, because in a liberal democracy such as Australia this basal proposition is accepted. Rather, the question is: what changes need to be made to the current system of police oversight and accountability to ensure that it effectively achieves its aim and meets the needs of the community?

The basic underlying problem with the status quo is the risk of apprehended bias inherent in the current system whereby ‘police investigate their own’. To be clear, the notion that the current system gives rise to an unacceptable risk of apprehended bias makes no criticism of actual bias against any individual involved in that system. Instead, it reflects that confidence in this police accountability system – indeed confidence in any accountability system – requires that ‘justice should not only be done, but should ... be seen to be done’.¹³

vindicated’, *Media Release*, 23 September 2008, Public Interest Advocacy Centre, available at <http://www.piac.asn.au/news/2008/09/mother's-fight-justice-vindicated>; and the mother of Jason Szczepek, see ‘Jason Szczepek inquest highlights need for coronial law reform’, *Media Release*, 3 June 2010, Public Interest Advocacy Centre, available at <http://www.piac.asn.au/news/2010/06/jason-szczepek-inquest-highlights-need-coronial-law-reform>.

¹¹ In 1988, PIAC produced several papers advocating law and policy reform of the coronial system in NSW, and in 1989 published *Death in the Hands of the State*, which addressed deaths in custody. In 1991, PIAC produced a guide setting out accessible information on the coronial system in NSW. More recently, see PIAC’s submission to the Western Australian Law Reform Commission’s Discussion paper reviewing coronial practice in that state: Dodd, P *Western Australia: an opportunity to take the lead on coronial law reform*, 24 August 2011, Public Interest Advocacy Centre, available at <http://www.piac.asn.au/publication/2011/09/western-australia-opportunity-take-lead-coronial-law-reform>.

¹² Goodman-Delahunty, J; Verbrugge, H and Taitz, M (2013) ‘Complaining to the police: insights from Psychology’ *Policing* Volume 7, Number 3, pp 280-288; at page 282.

¹³ *Re Sussex Judges; Ex p McCarthy* [1924] 1 KB 256 at 259 per Hewart C.J.

This principle underpins procedural fairness and is one of the foundational principles of the Anglo-Australian legal system. In fact, it goes back further to Roman law: *nemo debet esse iudex in propria causa* or ‘no-one can be a judge in their own cause’. Any reform to the current system of accountability therefore must address this present deficiency.

2.1 Critical incidents

In recent years, the flawed police investigations into the deaths of Adam Salter and Roberto Laudisio-Curti have demonstrated that transparent, thorough and effective investigations are not being delivered by the current system of oversight. In June 2013, the Police Integrity Commission (PIC) found the police investigation into Mr Salter’s death was flawed and that the four officers involved in the shooting knowingly gave false evidence.¹⁴ The PIC concluded that the critical incident investigation was not conducted rigorously, thoroughly and with complete impartiality.¹⁵ The PIC stated:

If critical incidents were investigated by a body that was independent of the NSWPF, then there would be greater public confidence in the integrity of the investigations and less risk of the investigations failing to be properly conducted.¹⁶

In February 2013, the NSW Ombudsman criticised the police in relation to their investigation into Mr Curti’s death. Mr Curti died shortly after 11 police officers used physical force, OC spray, multiple Taser discharges, handcuffs and a baton during an attempt to arrest him following the theft of two packets of biscuits.¹⁷ In his review of the police investigation into the incident, the NSW Ombudsman cited a number of serious failings. Perhaps most significant was the finding that the police investigating the critical incident did not understand the purpose of the investigation they were conducting, which was to ‘examine the lawfulness of police action and the extent of police compliance with relevant guidelines, legislation, internal policy and procedures’ as set out in the NSWPF *Critical Incident Guidelines*.¹⁸ The Ombudsman found that the investigators relied on the coronial process to determine the lawfulness and reasonableness of police officer conduct in the context of critical investigations. This is problematic for a number of reasons, not least because it delays prosecutorial and disciplinary proceedings commencing against police officers involved in the incident.¹⁹ The Ombudsman concluded

The failure to take timely and appropriate action means that the NSW Police Force is abrogating its responsibility to address foreseeable risks to the community and the organisation.²⁰

¹⁴ NSW Police Integrity Commission, *Report to Parliament: Operation Calyx*, June 2013, available at

¹⁵ NSW Police Integrity Commission, above note 14, at p 268.

¹⁶ Above, note 14, at p 269.

¹⁷ Ombudsman NSW, *Ombudsman monitoring of the police investigation into the death of Roberto Laudisio-Curti, a special report to Parliament under s 161 of the Police Act 1990*, February 2013, available at <http://www.theioi.org/downloads/5sngu/NSW%20OM%20Report%20on%20Police%20Investigation.pdf>. At page 1.

¹⁸ See the NSWPF *Critical Incident Guidelines*, cited by the NSW Ombudsman, above note 17, at page 39

¹⁹ Above, note 17, at p 43.

²⁰ Above, note 17, at p iii.

The Ombudsman also found significant flaws in the steps taken in the investigation process, such as the failure to interview key witnesses and a failure to investigate the lawfulness of the multiple use of the Taser.²¹

These reports have no doubt called into question community confidence in the justice system. They have also caused the broader community and relevant institutions to consider whether it is in fact appropriate for police to investigate serious incidents involving other police. The crux of the matter is the risk of apprehended bias adverted to above.

In addition, PIAC's experience of the coronial system is that it will not always deliver the recommendations for systemic change that should arise out of investigations into a death during the course of a police operation. The first issue, again, is that coroners are reliant at least in part on the police's own investigation into a critical incident.

Further, in PIAC's experience, a coroner's ability and willingness to make recommendations that would lead to long-lasting systemic change is limited by the parameters of the governing legislation. In some cases, families and their legal representatives have been prohibited by coroners from raising matters that are seen as too remote from the immediate 'manner and cause of death'.²² Similarly, coroners are often reluctant to make recommendations considered too remote from the immediate and direct cause of death. In *X v Deputy State Coroner of NSW*,²³ for example, O'Keefe J found that the making of such recommendations was not one of the 'primary duties' of a coroner in NSW.

2.2 Police complaints

The current system of oversight is also proving insufficient to ensure that transparent, timely and robust responses to police complaints are taking place. The vast majority of police complaints made to the NSW Ombudsman will be referred back to the police station where the officers subject to the complaint are located. The NSWPF are only required to notify the Ombudsman of certain complaints indicating serious misconduct.²⁴ The Ombudsman's role is limited to reviewing the reviewers.

Again in the context of police complaints, the issue of apprehended bias arises. In a number of matters in which PIAC has assisted clients, there has been a close connection between the officer investigating the complaint and the police officer who is the subject of the complaint. The connections often arise because officers at the centre of the complaint are from the same station as those investigating the complaint. PIAC has experienced practical problems that arise from this situation – for example, police officers sometimes appear to take statements from witnesses they prefer, such as other police officers, rather than witnesses suggested by the complainant. In such circumstances, PIAC believes that it is common for a perception of bias or lack of clear impartiality to arise in these investigations.

²¹ See Chapter 6 of the Ombudsman's Report, above note 17.

²² Section 3(c) *Coroners Act 2009* (NSW).

²³ [2001] NSWSC 46.

²⁴ Section 130 of the *Police Act 1990* (NSW) provides that the Commissioner must only inform the Ombudsman of 'notifiable complaints'. There is no requirement for the NSWPF to mandatorily notify the Ombudsman of a critical incident. The Ombudsman has recommended that there be mandatory notification: see the Ombudsman's report into the death of Laudisio-Curti, above note 17, at 7.2.

The lack of resolution provided by the current system for police complaints has been put starkly on the public record by the Select Committee on the *Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect'*. The Committee noted that it is

problematic when police have to investigate their own, particularly given the conflict of interest between officers' obligations to their colleagues and the public. Most police complaints are indeed managed internally and the committee believes that this conflict of interest is both inappropriate and counter-productive.²⁵

During evidence to the Committee, NSW Police Commissioner Andrew Scipione noted that he was not averse to the establishment of an independent police oversight body such as the United Kingdom's Independent Police Complaints Commission.²⁶ The Committee ultimately accepted

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... 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.²⁷

Accurate data on how complainants view the internal complaints system is limited. In PIAC's experience, complainants often have difficulty contacting investigating officers and even when they do, the investigating officers sometimes are not forthcoming with information.

The latest annual report of the NSWPF noted that the last survey on complainant satisfaction has been deferred until consultation with the NSW Ombudsman to determine 'how to improve its design and efficacy'.²⁸ In the 2012 NSWPF survey of 100 people with 'customer service type complaints', only 50 per cent were 'satisfied their complaint was understood by the officer handling it', and only 50 per cent stated 'they were adequately informed of the progress of their complaint'.²⁹ 'Customers' exclude police suspects and arrestees.³⁰

In 2013, a research team from the Charles Sturt University Australian Graduate School of Policing and Security, with the support of Community Legal Centres NSW, conducted an independent study of 378 legal practitioners with experience of the police complaints system.³¹

²⁵ Select Committee on the *Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect'*, Final Report, 25 February 2015, at 7.50. Available at http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/8D6B68AC3538A022CA257DF6007A38BF?open&refnavid=CO4_1.

²⁶ In evidence to the Committee on the Conduct and Progress of 'Operation Prospect', above note 25, at para 7.45.

²⁷ Above, note 25 at para 7.51.

²⁸ *2013-14 NSW Police Force Annual Report*, at page 89. Available at http://www.police.nsw.gov.au/about_us/publications/annual_report.

²⁹ *2012-13 Police Force Annual Report*, at page 88. Available at http://www.police.nsw.gov.au/about_us/publications/annual_report/annual_report_archive/annual_report_2012-2013.

³⁰ The *NSW Police Force Customer Service Charter (2009)* states 'Our customers are victims, witnesses, the community and our internal colleagues'. Available at https://www.police.nsw.gov.au/_data/assets/pdf_file/0016/150127/Customer_Service_Charter.pdf.

³¹ Goodman-Delahunty, J; Bekcley, A and Hanckel, B *The New South Wales Police Force Complaints Process: Experiences of Community Advocates and Legal Practitioners* (2012), Report prepared for Community Legal

Key findings included that 76% of respondents were dissatisfied with the process of the complaint; 75% of users were dissatisfied with the outcome.³² Survey respondents who had had complaints finalised in the past 24 months were asked to comment on process outcomes. Reported perceptions of the complaint process included that the complaint procedures were biased; that complaint handlers were discourteous and ignored their viewpoint; and clients mistrusted the process.³³ Of significant concern was the finding that 40% of survey respondents reported that clients received more negative police attention following making a complaint, with repercussions taking the form of unnecessary police visits at their home, more frequent following by police and increased threats by police.³⁴ Consensus from the survey respondents concluded that NSWPF staff involved in the complaints process: did not apply the law consistently; treated certain vulnerable groups more harshly; lack integrity and trustworthiness; protect their policing colleagues rather than being honest about the incident; and displayed low levels of neutrality in dealing with the public.³⁵

Another issue with the current complaints framework is the limited powers the Ombudsman is granted under Part 8A of the *Police Act 1990* (NSW). The Ombudsman can only make requests for information and suggestions for how a complaint should be investigated, which remain in the Commissioner's discretion to acquiesce or ignore.³⁶ This has also been a limitation in broader aspects of the Ombudsman's role. In its latest Annual Report, the NSW Ombudsman notes that the NSWPF has adopted a 'restrictive approach' in the provision of information to assist the review of policing powers and will no longer entertain 'requests for information that provide important background and context to the use of the powers we are required to keep under scrutiny'.³⁷

2.3 A better system for police officers

There is also a need for better oversight of police complaints for police officers themselves. In the past three years, around one third of complaints received by the NSW Ombudsman have come from other police officers.³⁸ An inherent conflict accordingly arises when police officers make complaints or raise concerns about their colleagues. Police officers should be able to raise concerns about the conduct of their fellow officers with the protection that an independent body affords.

Centres New South Wales, Charles Sturt University. Details of the survey and an Executive Summary available at http://www.clcns.org.au/cb_pages/police_complaints_survey_findings.php.

³² Executive Summary, above note 31, at page 2.

³³ Above, note 31, at page 2.

³⁴ Above, note 31, at page 2.

³⁵ Above, note 31, at page 3.

³⁶ Section 143 of the *Police Act 1990* (NSW) states the Ombudsman may request further information from other persons. Section 143(2)(c) states the provision does not authorise the Ombudsman 'to require persons to provide information'.

³⁷ *NSW Ombudsman Annual Report, 2013-2014*, at page 51. Available at <https://www.ombo.nsw.gov.au/news-and-publications/news/nsw-ombudsman-annual-report-20132014>.

³⁸ In 2013-2014, of the 3390 complaints received by the NSW Ombudsman, 1,250 (37%) were made by police officers. This number has remained over the past three years: NSW Ombudsman Annual Report, above note 37, at page 41.

2.4 International human rights obligations

Under international law, in cases that have considered European police accountability mechanisms, supervision of the police investigation by another authority, however independent, has been found not to be a sufficient safeguard for the independence of the investigation.³⁹

Australia has ratified the *International Covenant on Civil and Political Rights (ICCPR)*.⁴⁰ It is therefore obliged to respect and ensure to all individuals within its territory and subject to its jurisdiction, the right to life (article 6), the right to freedom from cruel, inhuman or degrading treatment or punishment (article 7) and the right to be free from arbitrary arrest or detention (article 9). Those rights each have a correlative right in article 2(3)(a) of the ICCPR, which requires Australia to ensure any person whose ICCPR rights are violated has an effective remedy.

It is well established that for a State to give an effective remedy for a breach or near breach of the right to life, it must initiate an official investigation.⁴¹ The Human Rights Committee, which administers and interprets the ICCPR, has emphasised that '[a]dministrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies'.⁴²

International jurisprudence holds that an 'effective' investigation of the use of force by law enforcement officials must have certain features. It must be independent, and a body separate from the law enforcement agency must conduct it.⁴³ Supervision of a police investigation by an external body is insufficient.⁴⁴ It must be reasonably prompt.⁴⁵ It must involve the affected person or their next of kin, as well as an element of public scrutiny.⁴⁶ It must also rely on appropriate evidence, such as eye-witness evidence and forensic evidence.⁴⁷ For this reason, failure to independently gather evidence shortly after a critical incident occurs can lead to a breach of article 2(3), regardless of an investigation's other features.⁴⁸

3. An independent investigatory and oversight body

For the reasons set out above, PIAC urges the Review to recommend that an independent policing oversight body be set up.

Recommendation 1

That the NSW Government establish a new body to independently investigate critical incidents involving police, robustly oversight police complaints and perform legislative and systemic review.

³⁹ *Ramsahai v The Netherlands* [2007] ECHR 393 (15 May 2007) at 337; *Bati v Turkey* [2004] ECHR (3 June 2004) at 135.

⁴⁰ [1966] 999 UNTS 171.

⁴¹ See, for example, *Isayeva v Russia* (2005) 41 EHRR 38, 841; Human Rights Committee, *Blanco v Nicaragua*, UN Doc CCPR/C/51/D/328/1988 (1994) [10.6]; *McCann v United Kingdom* (1995) 21 EHRR 97 [161].

⁴² Human Rights Committee, *General Comment 31*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [15].

⁴³ *Brecknell v United Kingdom* (2008) 46 EHRR 957 ('*Brecknell*'); *Jordan v United Kingdom* (2001) 37 EHRR 52 ('*Jordan*').

⁴⁴ *Ramsahai v Netherlands* (2007) 46 EHRR 983 [337] ('*Ramsahai*').

⁴⁵ *Brecknell* (2008) 46 EHRR 957.

⁴⁶ *Ramsahai* (2007) 46 EHRR 983.

⁴⁷ *Jordan* (2001) 37 EHRR 52; *Ramsahai* (2007) 46 EHRR 983.

⁴⁸ *R (JL) v Secretary of State for Justice* [2008] 3 WLR 1325; *Jordan* (2001) 37 EHRR 52; *Ramsahai* (2007) 46 EHRR 983.

Below, PIAC sets out a number of key principles and features it considers to be important in any new independent police accountability body. PIAC refers to a number of bodies in other jurisdictions.

PIAC notes the concerns that have been raised about the UK Independent Police Complaints Commission (**UK IPCC**)⁴⁹ and agrees that the execution of the UK IPCC has been flawed and problematic for British policing. Problems of the IPCC are well documented: the IPCC has been found by the UK Parliament to be 'woefully under-equipped and hamstrung in achieving its objectives' with 'neither the powers nor the resources that it needs to get to the truth when the integrity of the police is in doubt'.⁵⁰ However, rather than reject an independent model altogether on the basis of this comparator, PIAC urges the Review to consider how a NSW model could build on successful models in other jurisdictions, such as that in Northern Ireland and New Zealand, and draw lessons from the UK experience.

3.1 Functions

3.1.1 Critical incident investigation

An independent body should have the functions of critical incident investigation, removing that function from the NSWPF. Investigations must be effective, transparent and thorough. Critical incidents should be defined to include both deaths and serious injury. Although the current NSW PF *Critical Incident Guidelines* have not been made public, it has been reported that 'critical incident' is defined in the *Guidelines*

as a death or serious injury to a person arising out of the actions of police officers in the execution of their duties.⁵¹

Critical incident investigations should commence as soon as reasonably practicable following the event. As with any crime scene, the scene of the critical incident should be secured immediately following an incident until the investigatory team arrives. Should there be delay due, for example, to geographical distance, initial evidence collection could take place where necessary to support the independent investigation which should be established as soon as reasonably practicable.

It is also vital that the independent body is transparent in its operations. Reports should be made public, as is the case with the New Zealand Independent Police Conduct Authority (**IPCA**).⁵² Investigations and reports must be timely, with clear public communication regarding progress. A key failing of the UK IPCC has been delays in publicly responding to critical incidents in the first instance and lengthy delays in publishing its investigatory reports.⁵³ Responses to recommendations in investigatory reports, such as from the NSW Government or the NSWPF, should be required within a certain timeframe, such as a 12-month period.

⁴⁹ See, for example, the concerns raised by the NSW Police Association, as noted by the Select Committee on the Conduct and Progress of 'Operation Prospect', above note 23, at para 7.46 to 7.48.

⁵⁰ House of Commons Home Affairs Committee (2013) *Independent Police Complaints Commission, Eleventh Report of Session 2012-13* (29 January 2013), available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/inquiries/parliament-2010/ipcc/>.

⁵¹ As cited by Adamson J in *Baff v Commissioner of Police* [2013] NSWSC 1205.

⁵² Under section 34 of the *Independent Police Conduct Authority Act* (1988) (NZ) the IPCA can release public reports on its investigations, in the public interest or in the interests of any person.

⁵³ See House of Commons Home Affairs Committee, above note 50, at page 13.

3.1.2 Complaint oversight

PIAC believes that the function of complaint oversight and critical investigation can be combined within the one independent body, as is the case with the IPCA in New Zealand. Complaint oversight, however, must be robust. PIAC supports the idea that, in some situations, police should respond to police complaints; informal resolution is frequently most effective and most efficient, imposing the lowest financial and emotional cost to complainants and the NSWPF alike. There should, however, be greater scrutiny provided by the independent body to ensure that complaints are being effectively dealt with internally. There are a number of possible models to ensure greater scrutiny. What is important is that the current system of self-regulation is not replicated; the UK IPCC, for example, failed in this regard, with police forces 'too often left to investigate themselves'.⁵⁴

One option that PIAC believes is worth consideration is the model adopted by the Northern Ireland Police Ombudsman, who receives all complaints in the first instance. PIAC supports a model that would provide for all complaints to be directed in the first instance to an independent body. Where appropriate, the complaint could be referred back to the relevant Local Area Command for informal resolution. However where a complaint is considered sufficiently serious, the complaint could be referred to a different Local Area Command within the region for further investigation. Where in the public interest, the independent body should be equipped to investigate the complaint itself.

Additionally, it may be considered appropriate for an independent body to investigate a broader range of complaints than those considered to be 'critical incidents'. For example, complaints by Aboriginal and Torres Strait Islander people, given the systemic issues Aboriginal and Torres Strait Islander people face in the criminal justice system, may be more appropriately investigated at first instance by an independent body.

The Northern Ireland Police Ombudsman, on receipt of a claim, considers whether it is suitable for informal resolution in the first instance, which will occur if the complainant consents and it is not a serious complaint. If the complaint is considered suitable for informal resolution, the complaint is referred to the relevant Chief Constable.⁵⁵ Similarly, the NZ IPCA receives all complaints in the first instance and determines whether it will be independently investigated; referred to police for investigation with either active oversight by the IPCA or a review at the conclusion; or referred to the police to attempt resolution by way of mutual agreement.⁵⁶

Complainants should also have the opportunity to appeal to the independent body if dissatisfied with the manner in which the complaint is resolved by the NSWPF.

3.1.3 Legislative review and own-motion inquiry

PIAC believes that critical incident investigation and oversight of the police complaints system should not only provide justice in the individual case, but also ensure that systemic problems are identified and recommendations made to address them. If effectively managed, an independent body in receipt of all complaints would be in possession of relevant data to assist in identifying

⁵⁴ House of Commons Home Affairs Committee, above note 50, at page 4.

⁵⁵ Sections 52 to 53 *Police (Northern Ireland) Act 1998*.

⁵⁶ Section 12 *Independent Police Conduct Authority Act 1988*.

systemic problems, such as the need for further training to better approach members of the public with mental illness. The Police Ombudsman for Northern Ireland, for example, has the power to investigate a practice or policy of the Police where it would be in the public interest to do so.⁵⁷

Accordingly, an independent body should also be responsible for conducting legislative review of relevant legislative provisions that relate to police powers and practices. Additionally, if the independent body identifies relevant systemic issues through analysis of trends and patterns in complaints or from other sources, the independent body should have the ability to initiate its own motion inquiry.

3.2 Structural and operational independence

It is crucial that the independence of an oversight and investigatory body be clearly established in statute. Legislation establishing the UK IPCC, for example, only states that the IPCC only has to maintain an ‘appropriate degree of independence’.⁵⁸ Legislation establishing the New Zealand IPCA requires it to ‘act independently in performing its statutory functions and duties, and exercising its statutory powers’.⁵⁹ PIAC believes that it is important for any establishing legislation to clearly and unequivocally establish the authority’s independence from both government and the NSWPF.

Any independent body should also be adequately resourced. As noted above, many of the failings of the UK IPCC resulted from insufficient funding, which restricted its operation. If any new body is to gain the confidence of both the police and the public, it must be resourced to a level that enables it effectively to carry out its functions.

There should also be structural independence in how the body is staffed. There is an obvious attraction, and indeed need, for an independent body to be staffed by those with police training in investigation. However to avoid continued perceptions of bias there should be a sufficient balance between civilian staff and those of policing background. PIAC does not agree with arguments that civilians are not equipped properly to oversee police operations. In a number of areas of civil society – most notably, in the civil judicial system – experienced judges and other officers of the state apply statute and the common law in assessing the lawfulness of a particular action, often with no particular expertise in the area being considered. PIAC believes the model currently adopted by the PIC for staffing would be appropriate for an independent body. Currently, the PIC cannot employ any NSW police officers or former NSW police officers; members of the AFP or police officers from any other state, territory or country can be seconded to or employed by the PIC.

3.3 Powers

An independent body should have appropriate powers to access relevant information, call witnesses, take witness statements and carry out all investigatory functions. Where necessary, the independent body must be able to compel action by the NSWPF. As noted above, a frustration with the current system of oversight is that all decisions effectively remain in the discretion of the NSW Police Commissioner. The NSW Ombudsman, in responding to the

⁵⁷ Section 60A *Police (Northern Ireland) Act 1998*, inserted by the *Police (Northern Ireland) Act 2003*.

⁵⁸ Section 10 *Police Reform Act 2002* (UK).

⁵⁹ Section 4AB *Independent Police Conduct Authority Act 1988*.

recommendation in the McClelland Review that would weaken the oversight powers of the Ombudsman, stated:

Critical incident investigations examining the death or serious injury to persons during policing activities, more than any other area of policing, should be the subject of robust external oversight, which is only possible when agencies are given appropriate and effective powers.⁶⁰

PIAC considers the independent body, after conducting an investigation into a critical incident or complaint, should be able to make a recommendation to the Director of Public Prosecutions (DPP) if there is evidence of criminal conduct. Decisions about whether to prosecute should remain with the DPP, as fitting the independence of that office. Similarly if there is evidence of misconduct or inappropriate behaviour the independent body should be able to make a recommendation in relation to disciplinary action. There should be parameters in place to ensure recommendations of the independent body have sufficient force, for example legislative time limits to ensure an official and public response to recommendations made. If no response is forthcoming, possible options could include informing the relevant Minister and Parliament, as is the case with the NZ IPCA,⁶¹ or issuing a direction to act, as in the case of the Northern Ireland Police Ombudsman.⁶²

PIAC recognises the challenges that the Supreme Court's 2013 decision in *Baff v NSW Commissioner of Police* poses. Following that decision, NSW police officers are able to resist a direction by their senior officer to answer questions as part of a critical incident investigation process, relying on the principle against self-incrimination.⁶³ PIAC considers that police officers should be afforded the same procedural rights as any individual suspected of a criminal offence. While the *Baff* decision has led to some officers refusing to take part in critical incident interviews,⁶⁴ PIAC notes the response of the Ombudsman that the Supreme Court's decision does not mean that successful investigation will be precluded as a result of the decision:

[P]olice officer witnesses who are not suspected of any criminal offence should not be permitted to hinder any critical incident investigation by claiming the privilege against self-incrimination where the circumstances do not warrant or support the claim.⁶⁵

4. Alternative models

In the absence of an independent body being established, PIAC supports granting appropriate powers to the PIC or NSW Ombudsman to investigate critical incidents. Appropriate resources should be afforded the body identified to undertake these complaints, as well as the requisite additional powers to investigate and report on incidents.

PIAC believes that granting these powers to the PIC or NSW Ombudsman is far preferable to the transfer of these functions to the Independent Commission Against Corruption. The focus of

⁶⁰ NSW Ombudsman, *Response to the report Oversight of Police Critical Incidents by the Hon Robert McClelland*, 5 February 2014, at page 13.

⁶¹ Section 29 *Independent Police Conduct Authority Act 1988*.

⁶² Section 59 *Police (Northern Ireland) Act 1998*.

⁶³ [2013] NSWSC 1205.

⁶⁴ NSW Ombudsman Annual Report, above note 37, at page 17.

⁶⁵ NSW Ombudsman, above note 60, at page 17.

investigation into police critical incidents is, in the main, a fact-finding question of whether there has been police misconduct and, if so, whether the incident is isolated or whether there are contributory causes. The functions of identifying corruption are different. Placing policing oversight within ICAC would, at minimum, cause confusion among the public and do nothing to boost community confidence in policing.

Recommendation 2

If an independent body is not established, PIAC recommends that the Ombudsman or Police Integrity Commission be empowered and resourced to conduct critical incident investigation.

5. Other recommendations

PIAC believes that the best way forward for police oversight is for an independent body to be established. If, however, the Review concludes the current system should remain in place, there are a number of recommendations that should be adopted to boost transparency regarding how the system is operating. These include the following.

5.1 Publish the NSWPF Critical Incident Guidelines

Critical incidents involving police are investigated in accordance with the *NSW Police Force Critical Incident Guidelines (the Guidelines)*. The Guidelines are not publicly available; it is, accordingly, very difficult to determine that they provide adequate guidance and clarity to ensure that critical incident investigations are rigorous, timely and objective. As mentioned above, the criticism of the investigations into the death of Adam Salter and Brazilian student Roberto Laudisio-Curti indicate that the Guidelines are not sufficiently robust to achieve these purposes. If they are, they are evidently not being followed or were not followed in these serious cases.

It would also mean that investigation of critical incidents is more transparent. By way of example, the general public is currently not aware of how 'critical incident' is defined, as it is only defined in the guidelines, and not in legislation.

Publication of the Guidelines has been recommended by the PIC,⁶⁶ in the McClelland Review,⁶⁷ and, reportedly, agreed to by the NSW Government.⁶⁸ Because the Guidelines have not been publicly released, it is also difficult to ascertain whether recommendations that the Guidelines be amended have been adopted.⁶⁹ It is noted that Australian Federal Police *National Guideline on Critical Incidents* has been released pursuant to a request made under the *Freedom of Information Act 1982* (Cth).⁷⁰

Recommendation 3

That the NSW Government publicly release the NSW Police Force Critical Incident Guidelines.

⁶⁶ See the PIC Report into *Operation Calyx*, above note 14.

⁶⁷ Recommendation 1: Hon Robert McClelland (2013) *Oversight of Police Critical Incidents, Report to the Hon Barry O'Farrell, Premier of New South Wales, (the McClelland Review)*, available at <https://www.nsw.gov.au/sites/default/files/oversight-of-police-critical-incidents.pdf>.

⁶⁸ As noted in the McClelland Review, above note 67, Recommendation 1 at page xi.

⁶⁹ Recommendations for amendment have been made, for example, by the McClelland Review, above note 67.

⁷⁰ Available at <http://www.afp.gov.au/~media/afp/pdf/ips-foi-documents/ips/publication-list/afp%20national%20guideline%20on%20critical%20incidents.pdf>.

5.2 Publish critical incident reports

Currently, police do not publish critical incident reports. PIAC believes that establishing transparency around serious incidents is vital. Publication of critical incident reports has been recommended by the PIC,⁷¹ the McClelland Review⁷² and by the NSW Ombudsman.⁷³

Recommendation 4

That reports of critical incident investigations be made publicly available.

5.3 Critical incident investigation in statute

PIAC considers that, as is the case in relation to police complaints, which are dealt with pursuant to Part 8A of the *Police Act 1990* (NSW), requirements relating to the investigation of critical incidents involving police should be contained in statute. This is because legislative requirements that are mandatory, set with the authority of the NSW Parliament, cannot be ignored or forgotten and cannot be changed without further consideration by the legislature.

Recommendation 5

That the NSW Government amend the Police Act 1990 (NSW) to include provisions relating to the investigation of critical incidents involving police.

⁷¹ See the PIC Report into *Operation Calyx*, above note 14.

⁷² See above, note 67, Recommendation 1 at page xi.

⁷³ NSW Ombudsman, above note 60, at page 6.