Redfern Legal Centre

25 June 2015

Mr Andrew Tink
Review of Police Oversight
NSW Department of Justice

via email: policeoversightreview@justice.nsw.gov.au

Dear Mr Tink

Review of Police Oversight in New South Wales

We attach our submission to the Review.

We thank you for taking the time to meet with us on 24 June 2015.

We look forward to receiving a copy of the Review Report from the Deputy Premier's office.

Yours faithfully,

Redfern Legal Centre

Joanna Shulman
Chief Executive Officer

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SUBMISSION:

REVIEW OF POLICE OVERSIGHT – 2015

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Redfern Legal Centre

1. Introduction: Redfern Legal Centre 5

2. RLC's work in police misconduct 5

3. RLC's view in summary 5

4. RLC's recommendations 6
Term of Reference 1 6
Term of Reference 5 6
Term of Reference 6 7

5. Responses to specific Issues 7
1. Options for a single civilian oversight model for police in NSW, including identifying measures to improve efficiency and effectiveness of oversight. 7
Recommendation: Transfer the responsibilities, assets and budget of the Ombudsman for Part 8A Police Act matters to the Police Integrity Commission. 8
Recommendation: Do not incorporate the ICAC in to the police oversight structure. 8
2. Any gaps in the current police oversight system. 8
3. Functional overlap between oversight bodies and if that contributes to ineffectiveness, unnecessary complexity, inefficiencies, or impairs transparency or police accountability 9
4. Best practice models from around the world, including the UK Independent Police Complaints Commission and their applicability and adaptability to NSW. 11
5. A recommended model for police oversight including guidance on its design, structure, cost and establishment. Consideration should be given to: 11
a. Eliminating unnecessary duplication, overlap and complexity. 11
Recommendation: Increase efficiency by granting the District and Supreme Courts the power to find that a police officer engaged in unlawful conduct for the purposes of s 122(1)(c) of the Police Act 1990. 12
b. Increasing transparency, efficiency and effectiveness of police oversight. 12
Recommendation: Conduct greater numbers of active oversight investigations in scenarios similar to established cases of unreliable testimony or malicious prosecution. 12
Recommendation: In sustained complaints, the oversight agency should seek the victim's consent to publish relevant excerpts of video on the agency website, with a summary of the investigation findings. 13
Recommendation: The oversight agency should have unfettered (but internally audited) access to the NSWPF body-worn video database. 13

c. Promoting public confidence in policing, police oversight, and the criminal justice system. 13
Recommendation: That the independent oversight body be given the power to make binding findings that conduct under ss 122(1)(c)(d) and (e) has occurred. 14
d. Providing accountability for the powers and discretion exercised by police. 15
Recommendation: Under the current system, s 141(1)(e) of the Police Act 1990 be amended to clarify that civil proceedings against the State of NSW do not constitute a "satisfactory means of redress" against the individual officer. 16
e. Creating a user friendly system for complainants, police officers, and other affected parties. 16
f. The interaction of disciplinary decisions and performance management mechanisms (ie Part 9 of the Police Act 1990) with the recommended police oversight model, while ensuring the Commissioner of Police maintains responsibility and accountability for disciplinary decisions and performance management. 18
Recommendation: Complainants have a statutory right of appearance in the IRC for s 173 and s 181D reviews. 18
Recommendation: the independent oversight body be given the Commissioner's power under s 181D of the Police Act. 19
g. Ensuring the police oversight system does not create processes that would prejudice criminal or coronial processes. 19
Recommendation: Oversight agencies should make their best efforts to keep the ODPP apprised of all information relevant to a current (or potential) prosecution in police misconduct matters. 19
Recommendation: The police oversight body should not be required to provide information to the Coroner. 19
Recommendation: Repeal s 40 of the Police Integrity Commission Act (or equivalent) and provide protection to witnesses equivalent to the Evidence Act 1995 (NSW). 20
6. Any implications for maintaining oversight of the NSW Crime Commission arising from the recommended model of police oversight, while aiming to minimise unnecessary duplication and overlap. 20
Recommendation: That the police oversight body continue to have the existing PIC jurisdiction to investigate complaints in relation to NSWCC activities. 20

1. Introduction: Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

2. RLC's work in police misconduct

RLC has a decades-long history of acting for victims of police misconduct. The systemic abuse of police powers towards the indigenous members of the Redfern community was one of the major catalysts for the creation of RLC in 1977. Most recently, RLC has run a state-wide police misconduct practice staffed by one solicitor and volunteers. Since 2010, this practice has run over 200 police complaint/misconduct matters and given advice on over 500. The only non-statutory organisation that has a greater working knowledge of the oversight system is the Police Association of NSW. RLC is well-placed to present an informed alternative to the vested interests in this Review.

3. RLC's view in summary

It is our position that all of the core agencies currently involved in police oversight - the NSWPF, the Ombudsman and the Police Integrity Commission – need cultural change. We propose a series of reforms to better protect the public interest in NSW. We provide our model for police oversight in NSW, including the division of responsibilities and powers. We recommend the expansion of the PIC to take over the responsibilities of the Ombudsman.

Our model is based on our experience of the gaps, overlaps, inefficiencies and failures of the current system and the current approaches to that system. We provide case studies to illustrate that these problems are real, not hypothetical. We provide recommendations to show how they can be fixed.

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

We consider the use of technology in police oversight, especially in coming years. We urge action to combat the increasing perception that police officers are willing to give false evidence in everyday prosecutions.

We encourage a fresh approach to the release of information about sustained complaints,

so that the public can be confident that the NSWPF is taking action against wayward police.

We want to break the oversight deadlock by giving the oversight body the power to make binding findings of misconduct that the Commissioner cannot ignore. We also recommend legislative innovation to allow judges to make findings about police misconduct in limited circumstances.

We make specific recommendations about how to make Police Integrity Commission hearings more constructive for all involved.

We give detailed consideration to the implications of these changes to disciplinary action under Part 9 of the *Police Act 1990*. We recommend a place for victims of serious misconduct within that system, and the ability of the police oversight body to initiate dismissal proceedings.

Our view is practical and purposeful. We give balanced consideration to the many facets of the public interest. We welcome the opportunity to give this complex issue a fresh perspective.

4. RLC's recommendations

Term of Reference 1

Recommendation: Transfer the responsibilities, assets and budget of the Ombudsman for Part 8A Police Act matters to the Police Integrity Commission.

Recommendation: Do not incorporate the ICAC in to the police oversight structure.

Term of Reference 5

Recommendation: Increase efficiency by granting the District and Supreme Courts the power to find that a police officer engaged in unlawful conduct for the purposes of s 122(1)(c) of the Police Act 1990.

Recommendation: Conduct greater numbers of active oversight investigations in scenarios similar to established cases of unreliable testimony or malicious prosecution.

Recommendation: In sustained complaints, the oversight agency should seek the victim's consent to publish relevant excerpts of video on the agency website, with a summary of the investigation findings.

Recommendation: The oversight agency should have unfettered (but internally audited) access to the NSWPF body-worn video database.

Recommendation: That the independent oversight body be given the power to make binding findings that conduct under ss 122(1)(c)(d) and (e) has occurred.

Recommendation: Under the current system, s 141(1)(e) of the Police Act 1990 be amended to clarify that civil proceedings against the State of NSW do not constitute a "satisfactory means of redress" against the individual officer.

Recommendation: Complainants have a statutory right of appearance in the IRC for s 173

and s 181D reviews.

Recommendation: the independent oversight body be given the Commissioner's power under s 181D of the Police Act.

Recommendation: Oversight agencies should make their best efforts to keep the ODPP apprised of all information relevant to a current (or potential) prosecution in police misconduct matters.

Recommendation: The police oversight body should not be required to provide information to the Coroner.

Recommendation: Repeal s 40 of the Police Integrity Commission Act (or equivalent) and provide protection to witnesses equivalent to the Evidence Act 1995 (NSW).

Term of Reference 6
Recommendation: That the police oversight body continue to have the existing PIC jurisdiction to investigate complaints in relation to NSWCC activities.

5. Responses to specific Issues

1. Options for a single civilian oversight model for police in NSW, including identifying measures to improve efficiency and effectiveness of oversight.

There is no doubt that improvement in police oversight is needed. There is clearly significant antipathy between many of the current players in the oversight system. There are also entrenched issues in the way that vulnerable members of the community are dealt with by police. We, like many in the community, have been disappointed by the allegations raised by those involved in and affected by Operation Prospect. Moreover, we have repeatedly been disappointed by the complaint handling of the NSWPF, the Ombudsman and the PIC. Importantly, we also have experience of situations where the existing system has worked. We want to make those cases more common, and we have a series of practical suggestions as to how police oversight can be improved.

We recognise that other stakeholders will make submissions detailing other alternatives. We look forward to the opportunity to read those submissions and comment on other proposals.

We propose that the functions currently performed by the Ombudsman and the PIC be performed by one agency. It should not be ICAC, for the reasons enumerated at length by the Wood Royal Commission as to the unique nature of police misconduct.[1] Nor should it be the Ombudsman. It is on the basis of our casework that we have formed the view that the Ombudsman does not have the organisational culture necessary to detect and deter police misconduct.

While we acknowledge the PIC's record on issues of procedural fairness is not ideal, we believe their work over the past five years demonstrates that, on balance, they are heading

[1] New South Wales, Royal Commission into the New South Wales Police Service, *Final Report* (1997) vol.2, ch.4.

in the right direction. We also believe that they take the issue of police misconduct more seriously than the NSWPF does.

Recommendation: Transfer the responsibilities, assets and budget of the Ombudsman for Part 8A *Police Act* matters to the Police Integrity Commission.

Recommendation: Do not incorporate the ICAC in to the police oversight structure.

We acknowledge that many of the recommendations in this submission can also be achieved if a new oversight body is created. But we are of the position that the creation of a new body is likely to avoid proper engagement with the interagency cultural issues that have brought us to this point. We currently have a system that contains the possibility of working well, but that possibility is rarely realised. Our recommendations are focused on the creation of a set of checks and balances that is tailored to the past successes and failures of police oversight in NSW.

2. Any gaps in the current police oversight system.

In Term of Reference 5, we address ways to ensure that the oversight system is aware of the maximum level of misconduct in NSW.

The largest gap in the current system is the failure to turn the reasonable suspicion of misconduct in to a misconduct investigation. The current system is inept at detecting, let alone efficiently harnessing, the misconduct detection done in the course of criminal prosecutions. 'Assault police officer in the execution of their duty' is a common charge in NSW. Within the subset of unlawful prosecutions, it is particularly common for a fabricated charge of 'assault police' to be brought. But these findings are usually only made years after the event. A Queanbeyan case is the latest example of how the oversight system does not engage until after the conclusion of criminal proceedings against misconduct victims.[2] The situation is even worse for those on remand.[3]

It would be far better if we had a complaint system that allowed for the accelerated commencement of a covert investigation prior to the conclusion of the initial criminal prosecution. If this practice were adopted, even on occasion, it would provide a more powerful deterrent to the giving of false testimony. The criminal justice system is stretched far enough without needing to entertain malicious prosecutions as well.

Again in Term of Reference 5, we detail our suggestion for achieving consistency between judicial findings in police tort cases and misconduct findings in police internal investigations. In the current system, judicial findings of false imprisonment do not necessarily result in equivalent misconduct findings for breaches of LEPRA, even though that is exactly what has been established in court via a more thorough process.

Another set of gaps in the current system relates to the ways in which complaints can be declined for investigation. These are gaps that various Professional Standards Duty

[2] http://www.smh.com.au/nsw/police-face-allegations-of-assault-perjury-and-workplace-bullying-following-dinosaur-car-stop-20150619-ghsnj3.html (accessed 20 June 2015)
[3] For example, the situation in *Zreika v State of New South Wales* [2011] NSWDC 67

Officers in LACs around the state choose to exploit, then avoiding consideration of the merits of a complaint. They are detailed in Term of Reference 5.

3. Functional overlap between oversight bodies and if that contributes to ineffectiveness, unnecessary complexity, inefficiencies, or impairs transparency or police accountability.

Our primary submission is that the overlap that does exist is necessary, and largely driven by police misconduct. We do acknowledge that some efficiency could be achieved if external oversight of misconduct was consolidated in one body, and that is why we have recommended that be done.

The system should continue to allow police to perform internal complaint investigations, especially where the nature of the complaint is unprofessional conduct. It is essential that police be placed in situations where they must examine in detail the problems within their LAC. Cultural change cannot occur within the NSWPF if the oversight structure distances officers from the harmful consequences of police misconduct.

That said, we have seen too many complaints mishandled to suggest that the NSWPF should be the only agency regularly performing complaint investigations. The oversight agency must be better equipped to perform investigations, so that the public interest is protected against inadequate investigations. The cultural change envisaged by the Wood Royal Commission has not been completed. Part of the problem is bad police internal investigations. But part of the solution is good police internal investigations. We cannot take the right approach without overlap.

Overlap also occurs because of the different statutory obligations and tools available to the different agencies. Critical incident investigations, and the oversight of these investigations are a good example. The Coroner's satisfaction with the NSWPF investigation in Laudisio-Curti[4] must be contrasted with the clear and cogent criticism by the Ombudsman.[5] The Ombudsman's primary issue was that the Critical Incident Investigation Team had done its job for the Coroner, but not for the Commissioner or the Ombudsman. So long as there is avoidance of responsibilities, oversight agencies will respond with increased scrutiny of police action. They will also need to produce lengthy public reports to address the damaged public confidence in the ability of police to investigate themselves.

The Coroner has a statutory obligation to hold an inquest where a critical incident death has occurred. The office of Coroner is one which holds great public respect in NSW, and its role in maintaining community confidence in the justice system cannot be underestimated. That said, the Coroner's jurisdiction is focused on manner and cause of death, and is not often capable of scrutinising the totality of the police conduct involved.

CASE STUDY: Police Complaints Not Forming Part of Inquest

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[4] NSW Ombudsman, *Ombudsman Monitoring of the Police Investigation into the death of Roberto Laudisio-Curti* (February 2013), p.12.
[5] Ibid.

Ken approached us after giving evidence at a coronial inquest into a death that occurred from police action in regional NSW. Ken was a witness to the homicide and assisted police in their treatment of the deceased. The police action in this incident was necessary for public safety and the death was unavoidable.

A critical incident investigation was established at the scene of the homicide. Ken and a number of other civilian witnesses were detained overnight, at the scene of a homicide while police conducted their investigations. The police witnesses were not detained.

The coronial inquest properly focused on the circumstances leading to the death. However, there was no consideration as to whether Ken, and other civilian witnesses, was unlawfully detained in the process of conducting the critical incident investigation. This was in part due to Ken being unrepresented.

The passage of time, in large part due to the coronial inquest, meant that this complaint was outside the timeframe for investigation stipulated by the NSWPF Complaint Handling Guidelines.

PIC is not duplicating the role of the Ombudsman in its investigations of police misconduct, as it is utilising its specific statutory powers to implement a different oversight dynamic. PIC's use of telephone intercepts and public hearings would not occur in the course of Ombudsman oversight. This is appropriate, as these powers should be employed primarily against the most serious misconduct, which is often detectable only after an extended period of investigation and oversight. This means that what may appear to be 'duplication' is in fact an important accountability measure that only arises as a result of demonstrable misconduct.

CASE STUDY: Overlap at the LAC level

John was engaging in peaceful protest alone, during a public event, when he was arrested. He defended himself in court and the charges were dismissed because the police actions were unlawful. John made a complaint about the behaviour of the officers involved.

The officers involved in the arrest were from various commands, and were together for the purpose of policing the event. John's complaint was forwarded to each of these commands. As a result, 4 separate investigations into the incident were held. Different results were reached on the same questions. This was an unnecessary overlap within the NSWPF, because the Professional Standards Command declined to take responsibility for the investigation.

The above case study is an example of how accepted practices within an agency can create the sort of duplication that government would find it hard to prevent via legislation.

When consideration is given to the ineffectiveness of the current system, we must acknowledge that 'effectiveness' necessarily involves punishment for misconduct. Effectiveness is currently hampered by the inability of the Ombudsman or the PIC to bind the NSWPF to make findings of misconduct. Some of the most well-publicised misconduct

investigations in recent years (PIC Operations Calyx and Barmouth, to name two) have resulted in the NSWPF simply electing to disagree with the PIC and not take disciplinary action.[6] No oversight body can be properly effective so long as the NSWPF retains the power to ignore their findings.

Despite a statutory inability to compel action from the NSWPF, it is natural and understandable that oversight agencies invest resources (often at the request of the misconduct victim) in attempting to persuade the NSWPF to take action. It would be unfair to call this wasteful. Oversight agencies are tasked with some of the most tenaciously resisted investigations in this state. Reform is needed to ensure that the NSWPF cannot render misconduct investigations futile. We have made specific recommendations on this issue in Term of Reference 5.

As regards complexity, we see this as a hollow criticism. There will always be necessary, overlapping jurisdictions for police oversight. There will sometimes be tension between relevant jurisdictions. It is the same with public interest considerations in all other areas of law. They sometimes overlap, and are sometimes in conflict. But we should not try and make complex public interest issues less complex. That would be a disservice to the community, and that would be the case here – because police oversight is fundamentally a public interest issue.

Caution should be exercised when considering the approaches that may be taken towards efficiency. We note that the sharing of database access by the NSWPF embroiled the most agencies in the oversight system in lengthy litigation involving allegations of software piracy.[7] Police oversight has necessary costs, and we may inadvertently fail to pay them if we focus too much on efficiency.

4. Best practice models from around the world, including the UK Independent Police Complaints Commission and their applicability and adaptability to NSW.

We do not intend to comment on other jurisdictions in the course of this submission. We have given extensive consideration to the best options for NSW, over the course of several years. Our recommendations are made for NSW, based on hundreds of NSW experiences.

5. A recommended model for police oversight including guidance on its design, structure, cost and establishment. Consideration should be given to:

a. Eliminating unnecessary duplication, overlap and complexity.

Our proposal is amendment of the status quo. The PIC will take over the police oversight responsibilities of the Ombudsman, with at least a commensurate increase in budget. The NSWPF will continue to have the capability to perform internal investigations but, in

[6] Police Integrity Commission, *Annual Report 2013-14*, p. 30-33.
[7] 'NSW Police settles software licensing battles', http://www.itnews.com.au/(S(twz0zpeqqeqq0mjozwlwvaex))/News/330010,nsw-police-settles-software-licensing-battles.aspx (accessed 20 June 2015).

practice, more investigations will be done by the PIC than at present. The District and Supreme Courts, and the PIC, will be given the power to make findings that misconduct occurred. Officers will maintain their current statutory rights to review those findings. The PIC will also be given the same power of dismissal as the Commissioner. These mechanisms are designed to curb misconduct and implement cultural change within all members of the police oversight structure.

Our oversight simplification proposal will need some statutory assistance to overcome existing obstacles.

Currently, a victim of police misconduct must take separate actions if they want compensation for their loss and to see the officer responsible disciplined. We accept that it would be inappropriate and inefficient to ask Local Area Commanders to make settlement agreements based on complaint investigations. But the same is not true of judges.

We propose that plaintiffs in police tort proceedings should be given statutory mechanisms to seek declarations from the court that particular conduct, if proved, amounts to conduct under the particular subsection of s 122(1) of the *Police Act*. For any police tort claim to succeed, the plaintiff needs to establish unlawful conduct – which meets the standard for s 122(1)(c). Civil litigation uses the same standard of proof as the *Police Act*. The State also has an obligation to concede these issues of liability, if it knows them to be true. Allowing detailed judicial consideration of police misconduct to streamline the oversight process is a compelling way forward.

> **Recommendation: Increase efficiency by granting the District and Supreme Courts the power to find that a police officer engaged in unlawful conduct for the purposes of s 122(1)(c) of the *Police Act 1990*.**

b. Increasing transparency, efficiency and effectiveness of police oversight.

The effectiveness of police oversight in preventing future misconduct is a function of which types of incidents are given attention. Intense scrutiny of fatalities is necessary because of the cost in human life, but has lesser preventative value. No police officer has a temptation to kill. Greater preventative value is found in scrutiny of more common incidents, like allegations of assault police. This is the true value of Operation Barmouth. This PIC operation examined serious misconduct in a scenario that many police officers are exposed to. We strongly recommend a shift in emphasis in active oversight investigations. We recommend that established cases of malicious prosecution and unreliable testimony be used to guide the new priorities. If everyday misconduct is addressed, more serious misconduct will be prevented from taking root.

> **Recommendation: Conduct greater numbers of active oversight investigations in scenarios similar to established cases of unreliable testimony or malicious prosecution.**

In order for documentary oversight to be effective, review officers must have the ability to quickly and keenly scrutinise police materials. We are able to do so within our practice, and no less should be expected of an oversight agency.

CASE STUDY: Shortcomings in oversight

Helen made a formal complaint before seeking advice from RLC. In her complaints she did not know that certain conduct was unlawful and did not make it a central feature of her complaint.

Helen was asked to come in to the police station when she was able. When she did so she was arrested immediately in the foyer of the station. This was a clear failure to use arrest as a last resort, and was a breach of the legislation. The NSWPF and Ombudsman failed to exercise expert police oversight on behalf of an unrepresented complainant.

The public should not be expected to have the knowledge to highlight the legal issues and insist that the relevant bodies investigate them. It should be enough that oversight bodies scrutinise the incident.

With the increase in use of digital footage, we recommend seizing on this to protect the public interest in police oversight. We suggest that it become standard practice, in sustained complaints, to seek the victim's consent to publish relevant excerpts of video on the oversight agency website, with a summary of the investigation findings. We think this would do much to illustrate that the government is aware of the problems that everyday complainants face, and would provide information about the steps that the NSWPF takes to address this conduct when it is proven.

We consider this a necessary step to mitigate the growing trend in reporting which shows police lying under oath, but then the story goes no further.[8] Without a way to inform the public of the disciplinary action taken, the public perception of police will be increasingly undermined.

> **Recommendation: In sustained complaints, the oversight agency should seek the victim's consent to publish relevant excerpts of video on the agency website, with a summary of the investigation findings.**

Also looking to the rollout of body-worn video by the NSWPF, we recommend that the oversight agency have immediate access to the police video database. It is imperative that the NSWPF is not the gatekeeper for this evidence. This evidence is also likely to significantly improve the triage process for some forms of complaint.

> **Recommendation: The oversight agency should have unfettered (but internally audited) access to the NSWPF body-worn video database.**

c. Promoting public confidence in policing, police oversight, and the criminal justice system.

Several features of our proposed model are designed to stimulate cultural change within the oversight organisations. This is because each of the agencies has, at one time or another in the past decade used its statutory powers to the detriment of the public interest. The effect on public confidence is seen in the daily struggle that we face to convince any of our clients that a fair investigation is even possible in NSW.

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[8] http://www.smh.com.au/nsw/tasered-for-not-showing-his-ticket-20120630-219m3.html (accessed 26 June 2015).

The ability to give reliable evidence is essential for a police officer to perform their duties. But the public is repeatedly seeing officers fail to do it. They see internal police investigators fail to do it. And what they do not see, but what happens, is that the Commissioner fails to punish it:

"Detective Inspector Russell Oxford: the Commission recommended that consideration be given to reviewable action under s 173 of the Police Act 1990 for the following reasons: Russell Oxford did not conduct the critical incident investigation into the death by shooting of Adam Salter and did not prepare his report of the investigation, with rigour and impartiality. He did not properly take into consideration the accounts of the civilian witnesses and incorrectly asserted that their accounts were consistent with the police accounts. He accepted the account of the shooting given by Sherree Bissett without properly assessing or testing it. On the first night of the investigation, without having sufficient materials to properly form an opinion, he prejudged the outcome of his investigation by deciding that the shooting of Adam Salter had been justified on the basis that Aaron Abela had brought himself into physical contact with Adam Salter. He made a number of other findings in his report for which there was no evidence or which were against the weight of the evidence. In a case where the evidence of an expert in bloodstain pattern analysis was required to properly test the accounts of the police officers, he did not obtain such evidence. In conducting a walkthrough interview with Bissett, he materially assisted Bissett by improperly asking leading questions. The NSWPF conducted its own investigation and found none of the above matters sustained. The NSWPF investigation found that Oxford used leading questions during the walkthrough interview with Bissett and used emotive language when completing his critical incident investigation report. These were described as "performance" issues and not "conduct" issues. No reviewable action was taken against Oxford. NSWPF has advised that Oxford was counselled in April 2014.[9]

The interview in question above was also subject to the following judicial commentary: "I have never seen an interviewing officer so disposed to help a person being interviewed as I have seen in that video".[10] The NSWPF view on misconduct is at odds with the judiciary, and the public. It must be addressed if the police are to carry out the primary functions to the best of their ability.

Transparency without accountability is impunity. In order to stop continuing minimisation of serious misconduct, we recommend that the independent oversight body be given the power to make binding findings that an officer engaged in unlawful or unreasonable misconduct. There should be no binding power as to criminal or corrupt conduct, as that would prejudice the criminal process.

> **Recommendation: That the independent oversight body be given the power to make binding findings that conduct under ss 122(1)(c)(d) and (e) has occurred.**

Also of relevance is the increasing distance between the police and the community on the use of force. This is particularly so on the use of weapons. These incidents receive widespread media coverage, and all too frequently show the use of excessive force on the vulnerable.

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[9] Police Integrity Commission, *Annual Report 2013-14*, p.32.
[10] *Bissett v Deputy State Coroner* [2011] NSWSC 1182 at [33]

In the tasering of the Phillip Bugmy, the NSWPF Taser Review Panel took no issue with the use of the taser.[11] Despite an adverse court decision finding the force used unlawful, the Police continued to defend the use of force on Mr Bugmy.

Misconduct in community policing is another compelling reason to put everyday activities at the front and centre of oversight. We routinely deal with complaints arising from street interactions with police.

CASE STUDY: Simon, part one

Simon came to us for assistance after he was the subject of repeated stops and searches by police. The only reason that he was given by police was that he was in a 'high drug area'. Simon is Aboriginal. No drugs were found on Simon in any of the searches.

We argue that these interactions, which will never be subject to a major oversight investigation, are extremely influential in undermining public confidence in the police, especially in Indigenous communities. Misconduct in discretionary policing has adverse outcomes for community cooperation in more serious investigations. We have direct experience of homicide witnesses not wanting to give statements because of alleged misconduct in discretionary stops.

d. Providing accountability for the powers and discretion exercised by police.

We reiterate our comments about the importance of placing everyday policing activities at the forefront of the oversight of misconduct.

In considering the discretion of police, we must also consider the discretion held in relation to the handling of complaints.

CASE STUDY: Effect of out-of-court settlements

Carla was arrested for the purpose of investigation, which is unlawful. During the police interview, she pointed out to police that they already had the documents that showed that she had not committed an offence. She was released. She later lodged a complaint that was declined on a number of grounds including that the period of time was too long (approximately 2 years) between the events and the complaint. The matter was still within the limitation period and civil proceedings for false imprisonment were being prepared. Carla's desire was to see that the incident is investigated so that similar violations do not occur in the future.

For this reason, an appeal was made to the Ombudsman to find that the arrest was unlawful. During the Ombudsman investigation, the NSWPF informed the Ombudsman that the parties had discussed an out-of-court settlement. The Ombudsman declined to make any findings, on the basis that a successful civil outcome meant that the matter was

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[11] http://www.abc.net.au/news/2012-06-26/police-appeal-against-magistrate27s-taser-ruling/4093056 (accessed 26 June 2015).

resolved.. This means that no findings were made against the officers, and no review of the processes that led to the failure in this case. The NSWPF and Ombudsman were both satisfied by the payment of compensation instead of accountability for misconduct.

Recommendation: Under the current system, s 141(1)(e) of the *Police Act 1990* be amended to clarify that civil proceedings against the State of NSW do not constitute a "satisfactory means of redress" against the individual officer.

We also regard it as important that 'everyday' complaints are used as a feedback mechanism to improve police practice. The NSWPF should embrace this as a key step in the development of a professional police force.

CASE STUDY: Simon, part two

During another search, Simon was told that he was being searched because police thought he was about to enter a Housing NSW building to buy drugs. We pointed out that the officer would have been better off to wait until he exited the building, if he wanted the best chance of finding drugs.

e. Creating a user friendly system for complainants, police officers, and other affected parties.

Some commentators point to the approximately 30% of complaints made by police as a sign of the health of the current system. The current proportion of complaints made by officers is admittedly a function of the integrity of some of the 16,000 NSWPF officers. It is also a function of:

1. The fact that Part 8A conduct includes poor policework, not just unlawful or immoral conduct; and
2. The widespread reluctance of members of the public to make complaints that will be investigated by another officer from the same LAC.

If independent investigations were performed, we anticipate that there would be a significant increase in the volume of complaints over the medium term. We anticipate that in the short term, a particularly high volume of historical complaints would be lodged. Some of our recent cases illustrate the difficulties currently faced.

CASE STUDY: Incorrect complaint information

Katie was sleeping rough. One night, she woke to an officer kicking her bed, and demanding that she get up. The officer used force on Katie, leaving her with an open head wound. In order to treat her injuries, Katie required injections and stitches on her head.

Katie attended the local police station to make a complaint about the officer who assaulted her. The desk sergeant advised her that he could not assist her with any complaint as the officers in question were from his station.

There is no prohibition on the officer taking a complaint in these circumstances. He also failed to inform her that any formal complaint against a police officer must be in writing.

It is important to note that this unmade complaint would not form part of the official statistics. It is likely that similar incidents number in the hundreds on an annual basis. It is

reasonable to assume that police complaints are significantly underreported.

Disheartening treatment by oversight agencies can also lend unwarranted legitimacy to statistics about the strength of the complaints that are made.

CASE STUDY: Failure to consider complainant's situation

Jane was the victim of a serious domestic violence matter involving firearms. Jane made complaints about police handling of investigation, including the manner in which evidence was obtained from her home.

Jane sent a complaint to the Ombudsman, which was declined. The Ombudsman regarded the criminal prosecution of her ex-partner as an 'alternative and satisfactory' forum for Jane to raise her concerns. This response suggested that a victim of domestic violence assist in the defence of the offender by pointing out issues with the police investigation.

The manner in which a complaint is declined can also have an effect on whether that person will ever make another complaint. There are major problems with the ways in which the statutory power under s 141 of the Act is used:

1. It is an unfettered discretion;
2. It is often poorly explained;
3. It has an inappropriate limitation period;
4. It appears to be used to decline investigations for workload management purposes by both the NSWPF and the Ombudsman;
5. It is used to avoid consideration of bystander evidence; and
6. It is so broad that it damages the public interest more than it protects it.

We have dealt with cases where police have been provided with video evidence of misconduct, but used s 141 to decline the complaint because it was lodged by a person other than the person assaulted in the video. We argue that this use of the section damages the public interest and the NSWPF. It forces other oversight agencies to conduct reviews from the outset, which should be unnecessary where video evidence is presented.

Again, this is primarily a cultural issue. We should not need statutory amendments in order for agencies to act in the public interest. That said, we consider that NSW has reached the point where the best solution is to fund an independent oversight body which can efficiently conduct complaint triage and has the capacity to make binding findings of misconduct. They are more likely to give complainants a fair hearing.

As regards ease of use by subject police officers, under Term of Reference 5(g) we provide a proposal to remove the PIC power to compel oral evidence.

There will always be a limit to how user-friendly a system can be made for complainants. They are making allegations of police misconduct. These allegations are often fought tooth and nail. It is no exaggeration to say that officers who engage in violent misconduct often bring charges against their victims so as to preemptively discredit any complaint that may be brought. The best thing that can be done for complainants is to give them access to an

independent advocate. Under the current system, an investigator, even an independent one, does not provide support and expertise to a complainant. Only advocates do that, and police misconduct issues will continue to be underreported until the oversight system is more amenable to the involvement of advocates like RLC.

f. The interaction of disciplinary decisions and performance management mechanisms (ie Part 9 of the Police Act 1990) with the recommended police oversight model, while ensuring the Commissioner of Police maintains responsibility and accountability for disciplinary decisions and performance management.

The statutory disciplinary mechanisms set out in Part 9 of the *Police Act 1990* affect the functioning of every other part of the police oversight system. It is not possible to overstate their significance. Changes to Part 9 could fix many of the shortcomings of the oversight system. When Part 9 is considered closely, it becomes apparent that victims of misconduct are ignored in the disciplinary context. It is also clear that the Commissioner has *no* accountability for disciplinary actions, except to the officers disciplined.

CASE STUDY: Reversal of decision without reasons

Michelle and her son were the victims of an assault. Michelle made a complaint about police handling of the investigation, including concerns about the inadequacy of police action with her son, who was a minor.

At first instance, the complaints against the officer were sustained and action was taken to address the associated conduct. The Commander then returned from leave, reversed this decision and a finding of 'not sustained' was issued. There were no substantive reasons given for the reversal of this decision, which also contradicted the findings of other decisions in the matter. Under s 173(11), there is an unfettered power to revoke disciplinary action.

We argue that complainants (or victims of misconduct) should have a statutory right of appearance in Industrial Relations Commission reviews of s 173 or s 181D decisions. This is necessary because police misconduct is one of the most serious forms of conduct that is not prosecuted. In IRC reviews, there is no independent prosecutor - the Commissioner is obliged to factor in the public interest, but is also acting in his own interest as the employer of the officer. Compromises are reached which are not in the interest of the victim, or of the public. The IRC, in determining whether action was harsh, unjust or unreasonable, should have the opportunity to consider evidence from the complainant and be addressed on what disciplinary action would best serve the public interest.

Recommendation: Complainants have a statutory right of appearance in the IRC for s 173 and s 181D reviews.

We have also seen officers found by courts to be wholly untrustworthy witnesses, but only be ordered to have 'counselling', by the Commissioner.[12] The Commissioner fails to act in the public interest by dismissing officers who have clearly lost the confidence of the judiciary. We argue that in the most severe cases of misconduct, the power of dismissal protects the public from repetition of that misconduct. That power should not reside solely

[12] Police Integrity Commission, *Annual Report 2013-14*, p. 30-33.

in the NSWPF, because they have failed to appropriately wield that power in the public interest. We argue that the s 181D power should also be able to be triggered by the head of the independent oversight body. All of the current review powers would remain.

> **Recommendation: the independent oversight body be given the Commissioner's power under s 181D of the *Police Act*.**

g. Ensuring the police oversight system does not create processes that would prejudice criminal or coronial processes.

When discussing prejudice caused by police oversight, attention is usually given to the Ombudsman or the PIC preempting or disagreeing with judicial decisions. Attention is not properly given to police prejudice.

. It is difficult, if not impossible to prevent prejudice. The best that can be done is to detect it prior to the criminal and coronial hearings.

As discussed above, oversight can fulfill different functions. Those different perspectives should all work in favour of the public interest. We are of the view that where a criminal investigation is on foot, oversight agencies should disclose their investigations to the ODPP. This would allow the ODPP to make the best case against the officer in question.

> **Recommendation: Oversight agencies should make their best efforts to keep the ODPP apprised of all information relevant to a current (or potential) prosecution in police misconduct matters.**

We do not consider that the police oversight body should be under an obligation to disclose to the Coroner. The Coroner is themselves required to suspend an inquest in order to avoid prejudice to criminal proceedings.[15] The primacy of the criminal justice system is clear.

Our experience of the coronial jurisdiction is that its 'truth-finding' function is liable to prefer transparency to accountability, at least in terms of non-culpable misconduct. The nature of the jurisdiction means that the overriding concern is whether conduct contributed to the death. We take the view that non-culpable misconduct is better left to oversight bodies whose primary concern is the professional standards of the NSWPF.

> **Recommendation: The police oversight body should not be required to provide information to the Coroner.**

There are two interrelated issues relevant to the avoidance of prejudice to the criminal

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[13] State Coroners Office, New South Wales, *Record of Investigation into the Death of*

[14] As above,

[15] *Coroner's Act 2009* (NSW), s78.

process: compulsion and privilege. These concepts are both contained in s 40 of the *Police Integrity Commission Act 1996.* It is our view that compulsion adversely affects the prevention of police misconduct, and that the s 40 privilege adversely affects the quality of police oversight investigations.

Oversight cannot properly gauge the integrity of the NSWPF in circumstances where all witnesses in PIC hearings are under compulsion. For NSW to know how far it has to go, in ignoring police conduct, we need to know which police officers are not willing to assist in police oversight. Compulsion alienates police officers from the PIC as an institution. This excuse for antagonism needs to be removed. This will not render the oversight body toothless. We argue that the interoperation of 2 statutory mechanisms will better protect police witnesses and the public interest. We set out our proposal below.

The Commissioner's current dismissal power is on the basis of the officer being unsuitable to continue as a police officer because of their "competence, integrity, performance or conduct".[16] We have recommended that this power also be given to the police oversight body, so as not to leave the most serious police integrity decisions solely within the hands of the Commissioner. We are of the view that refusal to give evidence to the oversight body except on the bases available under the *Evidence Act*, can be legitimate grounds for triggering the s 181D power. When an officer shows disregard for their legal obligations in order to cover up misconduct, public confidence in police is eroded. The s181D dismissal power should be able to be wielded for protection of public safety and the integrity of the justice system.

A further reason for the repeal of s 40 of the *Police Integrity Commission Act* is that it encourages investigation strategies in which offending police are not held properly accountable. The s 40 privilege makes it easier to pursue charges of false or misleading evidence to the PIC, but the public interest is arguably better served by investigation for ordinary offences under the *Crimes Act*. When oversight agencies set their sights lower from the outset, we risk unduly diminishing the seriousness of the issues involved.

Recommendation: Repeal s 40 of the *Police Integrity Commission Act* (or equivalent) and provide protection to witnesses equivalent to the *Evidence Act 1995* (NSW).

6. Any implications for maintaining oversight of the NSW Crime Commission arising from the recommended model of police oversight, while aiming to minimise unnecessary duplication and overlap.

Any independent oversight model must have jurisdiction to investigate NSWCC activities. The principal functions of the NSWCC mean that it will always be involved with the activities of the NSWPF. Our observation is that duplication and overlap will remain necessary for so long as the NSW Crime Commission:

1. Engages in joint investigations with the NSWPF;
2. Accepts referrals at the request of the NSWPF; and
3. Receives officers seconded from the NSWPF.

Recommendation: That the police oversight body continue to have the existing PIC jurisdiction

[16] *Police Act 1990* (NSW), s181D.

to investigate complaints in relation to NSWCC activities.