

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN & THE POLICE INTEGRITY COMMISSION

REPORT ON MATTERS ARISING FROM

- 7th General Meeting with the Ombudsman
- 3rd General Meeting with the Commissioner of the PIC
- 2nd General Meeting with the PIC Inspector
- Talks with Heads of Agencies
 - Ombudsman*
 - Commissioner of the PIC*
 - PIC Inspector*
 - Commissioner of the NSW Police Service*



AUGUST 1998

REPORT ON MATTERS ARISING FROM

7TH GENERAL MEETING WITH THE OMBUDSMAN

3RD GENERAL MEETING WITH THE COMMISSIONER OF THE PIC

2ND GENERAL MEETING WITH THE PIC INSPECTOR

TALKS WITH HEADS OF AGENCIES

OMBUDSMAN

COMMISSIONER OF THE PIC

PIC INSPECTOR

COMMISSIONER OF THE NSW POLICE SERVICE

**Committee on the Office of the Ombudsman &
the Police Integrity Commission**

August 1998

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CHAIRMAN'S FOREWORD

During the last two months the Committee has conducted an extensive program of General Meetings with the bodies it oversees, that is, the Ombudsman, Commissioner of the PIC and PIC Inspector. A series of private talks also was held involving meetings with these officers and the Commissioner of the New South Wales Police Service. Collations on the General Meetings, containing the transcript of each hearing and related submissions, have been tabled.

On this occasion the Committee has taken the step of preparing a separate report which joins together the evidence taken at the meetings on several key issues. Topics examined include the implementation of the Employee Management System(EMS) within the New South Wales Police Service, the external audit of the police reform process, conciliation of police complaints, new functions of the Ombudsman and jurisdictional issues facing the Office of the Ombudsman.

Implementation of the EMS is one of the critical reform areas for the Police Service, arising from the recommendations of the Royal Commission, and has been an ongoing theme of the Committee's inquiry program. The Committee has come to regard the Service's success in adopting and accepting this managerial approach as a litmus test of its ability to realise the cultural change advocated by the Royal Commission. The recent evidence taken by the Committee emphasises the need for further streamlining of the *Police Service Act 1990* to ensure that its provisions support the implementation of the EMS. Legislation also is needed to remedy continuing difficulties for the PIC and the PIC Inspector in relation to telecommunications interception. However, the relevant legislation can only be amended by the Federal Government as the *Telecommunications Interception Act 1979* is a Commonwealth statute.

Some of the topics dealt with in this report raise wide-ranging issues requiring further assessment by the Committee. This is particularly the case with the last chapter which deals with the accountability implications of the contracting out of services by public sector agencies. The Committee has focussed on the problems that contracting out presents in relation to access to information normally provided through FOI legislation. However, the evidence presented suggests that further information on the incidence of such problems may be available through the Auditor-General and the Ombudsman. The Committee intends to pursue this matter further in order to determine whether an inquiry is warranted.

On behalf of the Committee, I would like to thank all of the participants in the General Meetings for their cooperation and the high standard of material which they provided. The private talks held by the Committee produced fruitful discussions on matters affecting the Ombudsman, PIC and PIC Inspector and the Committee appreciates the cooperative manner in which the statutory officers and their senior staff approached each meeting. The Committee also is grateful to the Commissioner of Police for his contribution to the private talks.

Finally I would like to thank the Members of the Committee for their involvement in the hearings and subsequent deliberations, and the staff of the Secretariat for their support.



Bryce Gaudry
Chairman

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Committee on the Office of the Ombudsman and the Police Integrity Commission (left to right):
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MP, Paul Lynch MP, Anthony Stewart MP, Jim Small MP, The Hon Michael Gallacher MLC, The Hon
Elaine Nile MLC, and The Hon Anthony Kelly MLC.

INTRODUCTION

Format

This report examines certain issues arising from the proceedings of recent General Meetings and private talks held by the Committee over a two month period commencing on 11 June, 1998. The public hearings included the seventh General Meeting with the Ombudsman, the third General Meeting with the Commissioner of the PIC and the second General Meeting with the PIC Inspector. The submissions and transcripts of each General Meeting are contained in separate collations. Private sessions also were held with the Commissioner of Police and each of the statutory officers oversighted by the Committee. The evidence taken during the private talks and closed hearings is confidential and cannot be disclosed.

It has been the practice of the Committee to provide a commentary on significant issues arising from General Meetings in the relevant collation reports. On this occasion, the Committee is of the view that the body of material amassed from the meetings requires fuller treatment in a report highlighting those issues critical to the functions and work of each agency. The report concentrates on issues which would most effectively be dealt with by legislative amendment rather than administrative action. The background to each issue is given to furnish a context for the Committee's discussions, and recommendations are included where the Committee felt this to be necessary.

7TH GENERAL MEETING WITH THE OMBUDSMAN¹

The program of General Meetings with the Ombudsman has developed from a regular dialogue updating the Office's activities to a forum in which the issues raised feature as potential inquiry areas meriting further examination. The extent to which the program has expanded largely reflects the degree to which the Committee's relationship with the Office of the Ombudsman has developed and matured. The level of cooperation received from the staff of the Ombudsman when responding to Committee enquiries has contributed to extremely productive discussions about the key issues facing the Office.

The Ombudsman's jurisdiction has expanded significantly since the establishment of the Committee, and now includes responsibility for:

- dealing with protected disclosures and providing advice to public officials (*Protected Disclosures Act 1994*)
- dealing with all claims of detrimental action resulting from the making of protected disclosures
- determining appeals against decisions by the Commissioner of Police in relation to the inclusion in or removal from the witness protection program (*Witness Protection Act 1995*)

¹ Held on 11 June and 8 July 1998.

-
- auditing certain records of agencies authorised to conduct controlled operations (*Law Enforcement (Controlled Operations) Act 1997*)
 - monitoring the use of powers conferred on Police by the *Crimes Legislation Amendment (Police and Public Safety) Act 1998*

Apart from these new responsibilities the Ombudsman continues to deal with complaints about the conduct of NSW public authorities, including government departments, statutory authorities, councils, public officials and employees, in accordance with the provisions of the *Ombudsman Act 1974*. The Ombudsman also has an external appeal function under the *Freedom of Information Act 1989* in relation to FOI applicants dissatisfied with the determination of their applications. Under the *Telecommunications (Interception)(NSW) Act 1987*, the Ombudsman audits the records of agencies authorised to intercept telecommunications. However, review of this function falls outside the jurisdiction of the Committee.

The enactment and commencement of the *Police Integrity Commission Act 1996* and the *Police Legislation Amendment Act 1996* introduced a new scheme for the investigation of serious police misconduct and corruption. Under this scheme the Ombudsman has retained a civilian oversight role in relation to police internal investigations, and has the capacity to audit conciliation records and conduct direct investigations into police conduct where considered appropriate.

It is obvious that with such an expanded role the Office of the Ombudsman no longer functions solely as a complaint handling body dealing with maladministration. The controlled operations audit role assigned to the Ombudsman is indicative of the new type of function being performed by the Office and recognises its status and experience in public sector accountability, civilian oversight of police and the investigation of maladministration.

3RD GENERAL MEETING WITH THE COMMISSIONER OF THE PIC²

The third General Meeting with the Commissioner of the PIC and senior Commission staff members provided the Committee with an opportunity to consolidate its understanding of the work and functions of the Commission. The Committee has found the public hearings with the Commissioner to be a constructive mechanism through which it can exercise its monitoring and review role.

As the program of General Meetings has progressed, a number of procedural matters associated with the sensitivity of investigations and operations have arisen. The Committee considers it important to strike an appropriate balance between obtaining sufficient information to enable effective oversight of the Commission while not

² Held on 9 July 1998.

compromising the Commission's independence and investigative capacity. The approach taken by the Commissioner and his staff has assisted the Committee in achieving and maintaining such a balance.

In the relatively short period since the establishment of the PIC, the Committee has focussed on initiating a public dialogue on important current issues affecting the performance of the Commission. The Committee plans to expand its inquiry program in relation to the PIC so that it parallels that which applies to the Office of the Ombudsman. The fuller program would include examining key issues confronting the Commission and conducting specific inquiries when necessary. To date, the Committee has not considered there to have been a need for any major inquiries concerning the PIC.

2ND GENERAL MEETING WITH THE PIC INSPECTOR³

The PIC Inspector has met with the Committee in a General Meeting forum on one earlier occasion. Clearly, the Inspector is in the early stages of defining his relationship with the Committee and the Committee is of the view that significant scope exists to further develop this relationship.

The Inspector draws a direct comparison between his role with respect to the PIC and the role of the Commonwealth Inspector-General of Intelligence and Security Agencies. The Inspector-General oversees the Australian Security Intelligence Organisation (ASIO), the Australian Security Intelligence Service (ASIS), the Defence Signals Directorate (DSD), the Defence Intelligence Organisation (DIO) and the Office of National Assessments (ONA).

The functions of the Inspector-General under section 8 of the *Inspector-General of Intelligence and Security Act 1986* (Cth) focus on ensuring that the agencies within his jurisdiction comply with laws of the Commonwealth and States, and with directions given by the relevant Minister. He checks that their activities are undertaken with propriety and are not in conflict with human rights, as well as examining agency procedures for redressing grievances of employees. The Inspector-General's other functions relate to adverse intelligence reports by ASIO about Australian residents and citizens, the rights of such persons in those circumstances, and ensuring the report is necessary for national security.

These types of provisions are reflected in the functions of the Inspector under the *Police Integrity Act 1996*. The legislative framework setting out the functions and powers for each officer is very similar. However, the Committee considers that its relationship with the PIC Inspector should fully reflect both the processes and procedures under which parliamentary committees operate in New South Wales, and the accountability structure established by State Parliament for overseeing independent statutory bodies,

³ Held on 11 June 1998.

traditionally regarded as Officers of Parliament.

As the PIC Inspector has emphasised, his functions under the *Police Integrity Commission Act* do not require him to undertake any general review of the Commission's performance. Rather, Section 89 of the Act provides the Inspector with the following specific principal functions: to audit the operations of the PIC for the purpose of monitoring compliance with the law of the State; to deal with complaints of abuse of power, impropriety and other misconduct on the part of the Commission or its officers; and, to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.

The Committee recognises that the role performed by the PIC Inspector is unique and quite distinct from that of civilian oversight and investigative bodies such as the PIC and the Office of the Ombudsman. In light of this distinction, the Committee has given considerable attention to the nature of its relationship with the Inspector and the most appropriate means to give effect to its functions. The Committee intends to pursue these matters during the third General Meeting with the Inspector.

TALKS WITH HEADS OF AGENCIES

First series of talks

The Committee held its first series of talks with heads of agencies on 23 July 1997. The decision to hold the talks had been made following discussions with the Ombudsman on police matters during the fifth General Meeting. Recommendation 3 of the report on that meeting states:

'Heads of agencies' talks - Given the implications of the Royal Commission's recommendations for the bodies oversighted by the Committee, it is proposed that a series of talks should be held between the Committee and the Ombudsman, PIC Commissioner, PIC Inspector and the Police Commissioner. These discussions would enable the bodies relevant to the Committee's accountability functions to discuss matters arising from the Final report which may significantly affect their jurisdiction or operations. The talks also may highlight possible future areas of inquiry for the Committee.

The purpose of the first series of talks was twofold: firstly, to discuss with the heads of relevant agencies the implications of the Final Report of the Royal Commission into the NSW Police Service for the bodies oversighted by the Committee and, secondly, to monitor the effects of implementing the Royal Commission's recommendations on the work and jurisdiction of the Office of the Ombudsman, the PIC and the PIC Inspector. The talks were not intended as a review or reexamination of the Royal Commission's findings and recommendations.

Second series of talks - 8 & 9 July, 4 August 1998

On 6 May 1998, the Committee agreed to adopt a program of inquiries and meetings which included a second series of talks with heads of agencies scheduled for July 1998.

As a prelude to the talks, the Committee resolved on 11 June that the Chairman should write to the Police Commissioner to explain the importance which the Committee places upon the Employee Management System for the success of the police reform process and its consequent impact on the operation of the PIC and the Office of the Ombudsman. During the talks the Committee sought information on a wide range of issues pertaining to the implementation, development and evaluation of the system, including details of the programs available for training police officers.

Participants

The participants in the second series of talks, listed below, are the same individuals who were involved in the first series.

PIC	Judge Urquhart, Commissioner - accompanied by the Assistant Commissioner and senior Commission staff
Ombudsman's Office	Irene Moss, Ombudsman - accompanied by the Deputy and Assistant Ombudsmen
NSW Police Service	Peter Ryan, Police Commissioner - accompanied by the Commanders of Internal Affairs and Special Services Group
Inspector PIC	Mervyn Finlay

Format

The talks with heads of agencies are confidential and take place in closed session to allow a full and frank discussion of the issues under examination. Although the tone is fairly informal, a full record of the talks is retained by the Secretariat as a confidential working document.

1. CIVILIAN OVERSIGHT OF POLICE MISCONDUCT

1.1 The Employee Management System (EMS)

BACKGROUND

The Royal Commission recommended the adoption and implementation of a managerial complaints and disciplinary system focussing heavily on the role and responsibilities of Local Commanders.

Under the proposed system, Local Commanders would initiate inquiries, either locally or with Internal Affairs assistance, into complaints or matters constituting possible professional misconduct. Upon completing an investigation, the Local Commander would refer the matter to the PIC or Internal Affairs for further inquiry or criminal prosecution. Matters would be dealt with on a simple managerial basis (non-reviewable action)⁴ or the Local Commander could notify the officer concerned that action within the reviewable category⁵ would be taken. In the case of the latter, the conduct would then be dealt with by the Commissioner's Advisory Panel, to comprise a Deputy Commissioner and two independent Members from a panel agreed to by the Police Service and Associations.⁶

The role of Internal Affairs would extend to: investigating category 1 complaints deemed unsuitable for the PIC and relevant Local Commander; conducting integrity tests; planning proactive investigations in consultation with the PIC; assisting with the development of anti-corruption strategies and training for the Police Service. It also would play a support and advisory role, referring appropriate complaints to the relevant Local Commander, providing advice and covert assistance for the investigation and, if necessary, resources and personnel. A central internal affairs unit would be responsible for maintaining regional liaison officers and intelligence coordinators.

The Police Integrity Commission would monitor the progress of the new Employee Management System and investigations by Internal Affairs, exercise its coercive powers to assist Internal Affairs where expedient to do so, take over inquiries into police shootings or serious incidents where desirable, and undertake direct investigations into serious matters of corruption or police misconduct. The Office of the Ombudsman's role would be to monitor the managerial actions of Local Commanders, randomly check the progress made on non-reportable matters, react to public complaints about the

⁴ Action with limited consequences - includes informal discussion with the police officer concerned and options such as retraining, counselling, personal development, supervision, transfer, assignment to a mentor, change of shift, referral to welfare, report, conciliation, caution, reprimand, restriction of duties and transfer to uniform . Royal Commission Final Report vol. II, May 1997 p. 336.

⁵ Action involving substantial detriment - includes fine, increment deferral, loss of seniority, salary reduction, annulment of appointment, demotion or reduction in rank/position, dismissal for want of Commissioner's confidence. *ibid* pp. 336-7.

⁶ *Ibid* p. 358.

ineffective or inappropriate management of a particular matter, and conduct its own investigations.⁷

Pilot projects

The first pilot of the EMS began in March 1996 and involved widening the class or kind of matters which the Ombudsman agreed could be dealt with managerially. The initial pilot was extended to include all patrols in South Region and a number of patrols from other regions. The Royal Commission found that this first phase of the pilots failed due to a lack of direction and a continued adherence to the "command and control" approach. The second phase of the trial commenced in January 1997 and involved 14 patrols from the four Police Service regions. It ceased suddenly in July 1997 when the patrol commanders participating in the pilot were redeployed as a result of the Police Service restructure. The system is still being trialed through pilot projects in the Hunter and Greater Hume Regions, the Police Academy and the Goulburn Local Area Command⁸.

Implementation Strategies

re: the proposed complaints and discipline system

In order to properly implement the EMS the Royal Commission recommended a phased introduction encompassing:

- an extension of the Pilot Program for at least six months and monitoring its progress;
- training for Local Commanders;
- amendment of legislation ;
- encouragement of individual commanders outside the pilot project, in conjunction with the Office of Internal Affairs and the Ombudsman, to apply the managerial approach on a wider basis; and
- overview and report by the PIC and the Ombudsman to the Minister and enactment of amending legislation when the new system is judged to be sufficiently understood and accepted within the Police Service.⁹

Amending legislation would be necessary to "broaden the scope of outcomes that could immediately be imposed, without the need for establishing a criminal or departmental charge", and to include a part in the *Police Service Act* which would provide for the EMS. This part of the Act would not commence immediately but on a date to be proclaimed pending the acceptance of the EMS by the Police Service.¹⁰

⁷ ibid pp.547-8.

⁸ NSW Ombudsman, Evaluation of the second phase of the EMS Pilot Project, January 1998 pp. 2-3.

⁹ Final Report, vol. II p.346.

¹⁰ ibid.

The Royal Commission argued that “proper implementation” of the EMS also would depend upon the allocation of additional resources and the establishment of an infrastructure which would provide for:

- the introduction of a comprehensive education and training program for Local Commanders, involving experts from outside the Service;
- the clear explanation of the changes to all members of the Service;
- the establishment of remedial training and mentoring centres; and
- procedures to allow for the monitoring and review of the way Local Commanders discharge their new responsibilities, and if necessary, for their guidance.¹¹

COMMITTEE PROCEEDINGS

The pilot project and the EMS have been the subject of lengthy discussion during previous General Meetings with the Ombudsman and in the private talks with heads of agencies. Matters covered to date include:

- the role of Local/Patrol Commanders in the management of police complaints;
- the conduct of the pilot project in which the EMS was trialed and initiatives towards implementing the EMS on a Service-wide basis;
- education and training programs for Local Commanders including external training;
- instruction and information to other Police Service members on the EMS;
- the establishment of procedures for monitoring and reviewing the performance of Local Commanders participating in the EMS and performance measurement; and
- mechanisms for promoting adherence to the managerial system.

Recently, the Committee has given particular attention to reviewing the progress made by the Ombudsman in evaluating Phase Two of the EMS pilot projects and the conclusions drawn from the evaluation.

THE OMBUDSMAN’S EVALUATION OF THE EMS

At the seventh General Meeting with the Ombudsman, Deputy and Assistant Ombudsmen, the Committee took evidence which indicated that local level police responses to the management of complaints had increased in sophistication and flexibility. The Committee also discussed with the Ombudsman the ways in which more serious matters are being dealt with at local command level and the initiatives being undertaken by the EMS Project Management Team within the Police Service.

The Ombudsman’s findings

The Ombudsman provided the Committee with a copy of the report on the Office’s evaluation of the EMS, entitled “NSW Ombudsman evaluation of the second phase of

¹¹ Ibid.

the EMS Pilot Project". The report concentrates on the application of the Employee Management (EM) approach to complaint handling and notes "small but promising shifts in complaint handling strategies adopted by commanders involved in the EM pilot". The Ombudsman makes specific reference to:

- ☐ a move towards dealing with a greater proportion of matters at the local level;
- ☐ the use of conciliation to successfully resolve a broader range of complaints;
- ☐ a greater willingness by local managers to take action to address complaints.¹²

She observed:

Although these improvements occurred in the context of an organised and reasonably well-resourced trial, they indicate that the Employee Management approach has the potential to improve complaint handling processes. However, the evaluation also identified ongoing impediments to Police Service attempts to apply EM principles to complaints about police. Further development is needed to assess whether the EM approach can produce significant improvements that can be replicated across the Police Service.¹³

In evidence the Ombudsman related that local area commanders "are prepared to resort to the more imaginative management-type responses than what was allowed to them before".¹⁴ The Assistant Ombudsman (Police) confirmed the improvements but noted them as marginal and identified Service-wide implementation of the EMS as the real factor in system's success. He stated that the Office still sees significant problems in the Service's approach to customer service and emphasised the difficulties involved for the Service in moving away from a "command and control type of structure" and an "adversarial approach to complaints".¹⁵

The Evaluation Report noted:

- a marked shift towards handling a greater number of complaints at local level (p.5)
- a greater willingness or ability of Pilot patrol commanders to address the concerns of complainants in some way (p.6)
- the apparent willingness of patrol commanders in Pilot II, in comparison to non-pilot commanders, to conciliate complaints (p.6)
- more effective use of conciliation by Pilot II commanders (p.7)
- Pilot trial commanders were more receptive to taking some form of

¹² Evaluation Report, op.cit, p.14.

¹³ Submission for the Seventh General Meeting, p.8.

¹⁴ Evidence 11 June 1998, p.6.

¹⁵ Ibid.

managerial action, such as training, than non-Pilot commanders (p.11)

To the Ombudsman, the developments noted during the evaluation were promising if the EM approach was to be used properly but further analysis was felt necessary to determine if the EM would result in significant improvements. The evaluation report states:

*The changes which occurred in the context of an organised and reasonably well-resourced trial indicate that the Employee Management approach has the potential to improve complaint handling processes. However, until the Police Service develops more effective ways to apply Employee Management principles to complaints, it would be dangerous to assume the modest successes of the Pilot Project can be replicated across the whole of the Police Service.*¹⁶

Initiatives

Positive initiatives have been undertaken by the Ombudsman's Office, in consultation with the Police Service, to help foster the development of the EMS. For example, in 1997 the Assistant Ombudsman (Police) and the Commander of Internal Affairs developed a broad set of principles for the application of the EMS to the management of police complaints. The Ombudsman's Office subsequently expanded the principles into a practical guide for police managers entitled, *Broad Principles for Conducting Investigations into Police Complaints*. The guidelines are being applied in the current phase of the EM trial and have been accepted by the PIC and the Police Service's Employee Management project team. Where successful, they will be adopted throughout the Service¹⁷.

Current position

The Ombudsman's Office is refining its evaluation strategies as part of the ongoing assessment of the application of the EMS to the police complaints system. The Ombudsman agrees with estimates that the evaluation and development of the EMS, realistically, will take anywhere between 2 and 5 years to complete. At this stage the Ombudsman feels that it is too early to draw firm conclusions about the success of EMS but concludes that the developmental approach being taken towards implementing the EMS is consistent with the recommendations of the Royal Commission¹⁸.

¹⁶ Evaluation report, p.14.

¹⁷ Ombudsman's Submission for Seventh General Meeting, p.8.

¹⁸ Ibid, p.9.

LOCAL COMMANDERS - PERFORMANCE MANAGEMENT

BACKGROUND

The Royal Commission recommended that the Police Service should increase its efforts to introduce effective, coordinated performance management schemes for all ranks and that external assistance should be sought to develop and implement such schemes. It also proposed that compliance with the schemes should be ensured, that increments be deferred for noncompliance, and that the schemes should be subject to ongoing review¹⁹.

The Final Report of the Royal Commission identifies the following performance issues relating to the effective management of the complaints process and the investigation of misconduct by the Police Service:

- the mechanisms available to ensure Patrol/Local Commanders are accountable for dealing with misconduct by officers under their command, e.g. contractual obligations
- whether the performance of supervisory and managerial roles are critical factors in the retention of command, or in the promotion of Patrol/Local Commanders - a Royal Commission recommendation²⁰
- the methods by which Patrol Commanders will report on systemic failures identified or highlighted by complaints.

Comment

It is evident to the Committee, from evidence and information obtained through the Ombudsman's evaluation of Phase Two of the Pilot, that there is a need for a formal structure of accountability for police managers in terms of their performance in achieving appropriate managerial outcomes. Local Commanders play a central role in the EMS and its overall success will largely depend on their commitment to the managerial approach and the extent to which they actively seek to utilise employee management. The Committee intends to pursue the mechanisms outlined in the Royal Commission report in future discussions with the Ombudsman and the Commissioner of Police in order to determine the measures that have been taken towards implementing the Royal Commission's recommendations relating to performance management for Local Commanders with particular reference to their handling of police complaints.

CONCLUSION

The Committee finds the improvements to the Police Service's handling of police complaints reassuring. However, the improvements are not dramatic and the Committee has some reservations about the capacity for Service-wide implementation of the Employee Management System. Should implementation of the system across the

¹⁹ Final Report, vol. II, p.325

²⁰ Ibid, p.334.

Police Service be problematic, this may impact significantly on the workload of the Ombudsman's Office as complaints not satisfactorily resolved by the Service would become the responsibility of the Office. This is an area which the Committee will continue to monitor and discuss with the Ombudsman and the Police Commissioner.

The Committee also is very concerned to ensure that failure to implement the EMS on a Service-wide basis does not result in any move towards decreasing the Ombudsman's role in the system for investigating and dealing with police misconduct. The Royal Commission emphasised that the role of the Ombudsman should continue in its present form. Likewise, the Committee does not consider any diminution of the Ombudsman's functions and powers with regard to police complaints to be in the public interest. Rightly, the Royal Commission stressed that the Office of the Ombudsman "represents the interests of the members of the public in seeing that the Service deals properly and effectively with their grievances and in ensuring the maintenance of standards of integrity and fair dealing".²¹ It is the view of the Committee that failure to fully implement the EMS would only serve to strengthen the need to maintain the Ombudsman's jurisdiction in relation to police complaints.

Evidence to the Committee has stressed that further legislative amendment, along the lines suggested by the Royal Commission, is required if the EMS is to be extended beyond the second phase of the pilot program. These issues are dealt with in more detail in section 1.2. Although the pilot program appears to have received adequate funding, extension of the system obviously would entail a commitment of significant funds and resources and the Committee is seeking to obtain an accurate estimation of these costs.

The Committee agrees with the Royal Commission when it concluded that in the event that the managerial approach cannot be fully developed within the Police Service, the pilot program would still be beneficial. As the Commission pointed out, the "groundwork will have been laid within the existing system for greater resort to a managerial approach with less need for formal departmental charges."²²

1.2 The Need for Legislative Amendments

Introduction

The Royal Commission envisaged that the change from a "command and control" based system to the proposed managerial model would be a gradual transition. The Final Report identifies several steps in this process including:

amendment of the legislation:

- *to broaden the scope of outcomes that could immediately be imposed, without the need for establishing a criminal or departmental charge; and*

²¹ Ibid, p.349.

²² Ibid, p.346.

-
- to introduce a Part into the Act, the commencement of which would await proclamation, providing for the matters outlined.²³

This proposal is encapsulated in Recommendation 89 which deals with consequential legislative amendments to the *Police Service Act 1990*. Two of the proposed amendments are :

- empowering Local Commanders to take necessary actions under the EMS;
- replacing the existing complaints categories in s. 162C with three categories of complaints as described in para. 4.24.

²⁴

These consequential amendments have not been introduced and a number of sections in Part 8A and Part 9 of the *Police Service Act 1990* appear to present certain impediments to the full implementation of the EMS throughout the Police Service. To appreciate these issues an understanding of the mechanics of the complaints system and its development is necessary. The next two sections deal with the two major issues raised with the Committee as possible impediments to the acceptance of the EMS by the Police Service.

1.2.1 Categorisation of Police Complaints

BACKGROUND

Royal Commission Interim Report

The Interim Report of the Royal Commission into the NSW Police Service, released in February 1996, proposed the following classification of police complaints:

Category 1: Serious Misconduct and Corruption, comprising:

- behaviour which constitutes corruption and other serious criminality;
- matters warranting dismissal from the Police Service, and
- matters in which it is unlikely that there will be public confidence in an internal police investigation (for example, where the complaint relates to a death or serious injury in police custody).

Category 2: Misconduct, comprising:

- serious breaches of police rules or procedures and lesser criminal conduct, which warrants investigation, and would require some sort of

²³ Ibid, p.346.

²⁴ Ibid, p. 549.

disciplinary action, short of dismissal, if proven.

Category 3: Customer Service Matters, comprising:

- lesser breaches of police rules or procedures, and matters suitable for conciliation, including, for example, failure of an officer to take necessary action, rudeness, incivility, perception of a threat and unreasonable treatment.

Category 4: Internal Management Matters, comprising:

- matters where there is no allegation or implication of misconduct but managerial action is called for, including, for example, loss or damage to police property, debts, failure to complete a rostered shift, absence from or during duty, incidents arising from police pursuits or the discharge of firearms (not involving death or serious injury) and injuries to a person in custody not involving allegations of police misconduct.²⁵

The classification of a matter would determine whether it was investigated by the Police Corruption Commission²⁶, the Police Service under the supervision of the PCC or the Police Service under the supervision of the Ombudsman.

The Royal Commission identified three key elements in this refined police complaints system, specifically:

- the majority of complaints should continue to be investigated by the Police Service under the oversight of the Ombudsman, whose existing powers should continue;
- a special category of 'serious misconduct and corruption' should be created, the responsibility for the investigation of which would rest with the PCC, and be directly attended to by it, or by the Police Service under PCC supervision; and
- the Ombudsman and the PCC should conduct audits of the Police Service internal investigations, where appropriate in conjunction with each other.²⁷

²⁵ Royal Commission into the NSW Police Service, Interim Report, February 1996 p.99.

²⁶ The proposed title for the independent body recommended by the Royal Commission. Later amended by Parliament to be the Police Integrity Commission.

²⁷ Interim report, p.98.

Existing legislation

The recommendations contained in the Interim Report of the Royal Commission were given legislative effect through the *Police Integrity Commission Act 1996* and the *Police Legislation Amendment Act 1996* which commenced in part on 1 July 1996.

Amendments to Part 8A of the *Police Service Act 1990* provided for four categories of police complaints. Category 1 complaints are defined in section 67 of the *Police Integrity Commission Act* as a police complaint:

- (a) *that is of a class or kind that the PIC Commissioner and the Ombudsman have agreed should be referred to the Commission; or*
- (b) *that the PIC Commissioner has requested should be referred to the Commission, or*
- (c) *that is of a class or kind prescribed by the regulations.*

A Category 3 complaint is a complaint where conciliation must be attempted if the complaint is of a class or kind that the Ombudsman and the Commissioner of Police agree may be suitable for conciliation (s.132 *Police Service Act 1990*). A Category 4 complaint is a complaint of a class or kind which the Ombudsman and the Commissioner of Police agree is appropriate to be dealt with by managerial action (s.139A *Police Service Act 1990*). A category 2 complaint is a complaint that does not fall within categories 1, 3 or 4 (s.162C(3) *Police Service Act*).

The class or kind agreements subsequently arrived at form a classification of complaints consistent with the recommendations contained in the Interim Report.

Final Report of the Royal Commission (May 1997)

Recommendation 71 of the Final Report of the Royal Commission proposed that:

The current complaints handling and discipline system be replaced by a new system, the Employee Management System (EMS), that has as its primary objective the enabling of patrol and other Local Commanders to deal with complaints and take remedial action or impose sanctions on a managerial basis, without recourse to formalities such as the preferment of disciplinary charges and hearings (paras. 4.12-4.17), and contemplates three categories of complaint (para 4.24).²⁸

The three classes of police complaints to be created were:

- *category 1, more serious matters involving criminality or misconduct capable of leading to dismissal, requiring investigation by the PIC or the Office of Internal Affairs (to*

²⁸ Royal Commission, Final report vol II, p.368.

be entrusted to the PIC, or the Office of Internal Affairs, subject to PIC oversight, joint management for investigation);

- *category 2, less serious matters reportable to the Ombudsman and suitable for disposition by the Service under the proposed scheme (to be entrusted to the Local Commander for investigation and resolution along managerial lines);*
- *category 3, lesser matters of internal management, not reportable to the Ombudsman, but subject to discretionary or random audit by her (to be dealt with by the Local Commander according to current practice);²⁹*

The Royal Commission advocated that the Police Service, the PIC and the Ombudsman should continue the system of class or kind agreements to determine which matters should fall within each category and be reported to the Ombudsman and/or the PIC. Although the Final Report recommended a three-tier, rather than a four-tier, classification the Ombudsman's supervisory role was to continue in the same way as in the current system.³⁰ The Report lists the following functions for the Office of the Ombudsman:

- *to ensure that Local Commanders' decisions are appropriate;*
- *to conduct random checks on the progress of non-reportable matters;*
- *to report to the complainant on the outcome of any managerial action in reportable matters;*
- *to react to any complaint by a member of the public that the management of any particular matter was ineffective or inappropriate, and carry out its own investigations as necessary;*
- *to maintain close liaison with the PIC; and*
- *to report to Parliament, in the same way that it does at present, in relation to matters concerning the complaints system, human resource issues and matters of service delivery.³¹*

It is evident from the Final Report that the Royal Commission considered that the Ombudsman "should play a vital role in the proposed model." It was the Commission's

²⁹ Ibid, p.333.

³⁰ Ibid.

³¹ Ibid, p.349.

view that the Office of the Ombudsman “represents the interests of the members of the public in seeing that the Service deals properly and effectively with their grievances and in ensuring the maintenance of standards of integrity and fair dealing.”³²

The major difference between the classifications proposed in the Royal Commission’s Interim and Final Reports is the proposed removal of conciliation as a separate complaint category. Recommendation 89 proposed that the *Police Service Act 1990* should be amended by “abolishing the requirement under s.132 to attempt conciliation in favour of permitting the Local Commander to initiate conciliation only in those matters where it is considered appropriate”.³³ In the Royal Commission’s view, it was important that the patrol commander should conduct the conciliation “as a way of ensuring that a proper managerial outcome eventuates.”³⁴ The three-tier classification has yet to be given legislative effect.

Recent revisions³⁵

Category 1 - To date only the “class or kind” agreement which defines Category 1 complaints has been subject to revision. In February 1998 the PIC Commissioner wrote to inform the Committee that on 15 January he and the Ombudsman had entered into a new “class or kind” agreement with regard to Category 1 complaints.

The new Category 1 agreement consists of police complaints about: perverting or attempting to pervert the course of justice; assault leading to charges of malicious wounding or grievous bodily harm; property offences with a value exceeding \$5,000; any offence punishable by a five year prison sentence; soliciting or accepting a benefit; seeking to interfere or interfering with another officer’s investigation of an offence; failing to carry out a proper investigation of an alleged offence by another police officer; and complaints relating to the manufacture, cultivation or supply of a prohibited drug or prohibited plant. In addition, under the revised agreement the PIC will be notified of, but not referred, any complaints about police regarding: allegations of assault occasioning actual bodily harm; crimes punishable by a sentence of three or more years imprisonment; and, all complaints about police officers of or above the rank of Superintendent.

The Committee has sought some input during the consultation phase preceding the finalisation of the agreements and, towards this end, it previously recommended that its views be obtained on proposed categorisations prior to the finalisation of new ‘class or kind’ agreements.³⁶ The recommendation is aimed at assisting the parties in the

³² Ibid, p. 349.

³³ Ibid, .549.

³⁴ Ibid, p.343.

³⁵ Current class or kind agreements, including recent revisions, are attached as Appendix 1.

³⁶ Report on the Fifth General Meeting with the Ombudsman, June 1997, pp.58-9.

negotiating of the agreements and it should be emphasised that the Committee does not make any pretense to active involvement as another party to the negotiation process.

Police internal complaints - In her submission for the seventh General Meeting, the Ombudsman reported that police internal complaints had dropped from 1725 complaints in 1995-6, to 1006 in 1996-7 with an estimate of 720 complaints for 1997-8. The Ombudsman suggested that the main reason for the fall in such complaints was the category 3 class or kind agreement whereby minor matters no longer need to be reported to the Ombudsman. Due to the increasing number of matters subject to this agreement, the Office audited 300 complaints dealt with by the Police Service in this category. On the basis of the audit, the Ombudsman concluded that the Police Service appears to be dealing with most of these matters satisfactorily but that a number of cases were encountered where the management action was "less than satisfactory"³⁷.

CONCLUSION

The Committee understands that the Commissioner of Police, Ombudsman and the Commissioner of the PIC have met recently for joint discussions to deal with a number of issues relating to the operation of the police complaints system. Pending the outcome of the meeting, the Committee has resolved to make the following comment on the police complaints system and the categorisation of complaints.

The Committee wishes to express its concern about possible indications that an alternative is being sought to the system for the classification of police complaints contained in section 162C of the *Police Service Act*. It fully supports the retention of "class or kind" agreements as the most appropriate mechanism for determining the classification of complaints within the police complaints process. The agreements not only make the agencies directly affected by the categorisation equally responsible for its formulation but also allow sufficient flexibility for revision and adjustment when it becomes apparent that certain types of complaints should be either included or excluded from the agreements. The consensus required to maintain the agreements also prevents arbitrary decision making about complaint classification.

In its 1992 report on reforms to the police complaints system,³⁸ the then Committee on the Office of the Ombudsman recommended that the flexible agreements, arrived at under the PRAM Act 1978³⁹, between the Ombudsman and the Police Commissioner on internal management matters and matters to be dealt with by Internal Affairs, should be extended to include an agreement on conciliable matters. One of the benefits associated with the "class or kind" system of agreements was that, when combined with an audit power for the Ombudsman, it would provide "powerful incentives for police to

³⁷ Ombudsman's Submission, p.2.

³⁸ Committee on the Office of the Ombudsman, Inquiry Upon the Role of the Office of the Ombudsman in Investigating Complaints Against Police, April 1992 pp.53-62.

³⁹ *Police Regulation (Allegations of Misconduct) Act 1978* - repealed in 1996 following the enactment of the *Police Legislation Amendment Act*.

do the right thing.” The Committee argued:

The flexibility of the definition will allow the Ombudsman to recognize when matters are being properly and effectively handled by giving the police associated with them progressively more control and responsibility for conciliation. Conversely, in problem areas the Ombudsman may remove from police the authority to conciliate matters which are not being handled properly until such time as the police concerned demonstrate that they are able to deal with such matters in an appropriate way.⁴⁰

The present Committee similarly regards the use of “class or kind” agreements as an incentive for the Police Service to broaden the range of matters which can be dealt with at Local Command level under the EM approach, subject to monitoring by the Ombudsman’s Office. The class or kind agreements permit a flexible classification of complaints with the potential for further streamlining of the police complaints system. This potential already has been realised through the revisions to the agreements made since the commencement of the *Police Legislation Amendment Act 1996*.

For these reasons, the Committee considers that “class or kind” agreements have proven to be a highly workable mechanism for classifying police complaints. The Committee has been kept informed of all changes to the current agreements and has discussed these in public at General Meetings with the Ombudsman and the PIC.

The Committee also considers that types of matters presently contained within each category to be an appropriate classification, especially those complaints designated for monitoring or investigation by the Ombudsman’s Office. The Office deals with a high proportion of serious police complaints through “own-motion” investigations and the monitoring of police internal investigations. For instance, of the police complaints assessed during the four month period from 1 April until 31 July 1998, 69% of investigations and 52% of preliminary inquiries related to allegations of criminal conduct.⁴¹

Preliminary figures for the same period record the following breakdown of alleged criminal conduct for investigation: 78 assault matters (including serious); 52 matters involving allegations of theft, bribery, extortion, consorting and fraud; 46 court-related matters (e.g. perverting the course of justice, perjury, conspiracy etc.); 25 drug-related matters (trafficking, cultivating, selling, and use); 25 matters relating to unlawful access and unauthorised release of information; 10 sexual assault matters. The twelve remaining matters assessed for investigation included complaints containing allegations of manslaughter, illegal entry, stalking and criminal harassment, driving offences, malicious damage, unlawful use of a firearm: all matters involving allegations of serious

⁴⁰ Ibid p.63.

⁴¹ Complaint assessment figures 1.4.98-31.7.98: investigations - criminal 248, non-criminal 113; preliminary inquiries - criminal 186, non-criminal 171. Supplied by Office of the Ombudsman, facsimile, 14 August 1998.

police misconduct. In the case of non-criminal matters assessed for investigation, the breakdown contained matters such as failure to investigate, serious negligence in the performance of duties, harassment and abuse of powers⁴².

All serious complaints by police against other police are notified to the Ombudsman and the internal complaint statistics provided by the Office for the last three years indicate a relatively high portion of internal complaints concerning serious misconduct. In 1997-8, for example, 12 of the 51 internal complaints alleged criminal conduct, compared with 8 out of a total 53 internal complaints in the previous year, and 5 out of a total 24 in 1995-6⁴³.

The Committee appreciates that not all complaints assessed in these categories for investigation will be sustained. Nevertheless, the types of matters listed in these statistics cannot be classified as minor customer service or internal management matters, and the Committee considers that the types of matters falling within both the criminal and non-criminal classification used by the Office are of a nature to warrant scrutiny or investigation by a civilian oversight body.

Due to problems associated with the conciliation of police complaints, as identified in section 1.4 of this report, the Committee strongly believes that the Police Service's record of conciliating complaints should be comprehensively assessed before legislative amendments proposing the abolition of the existing third complaint category are entertained. The appropriate balance between ownership and oversight of the police complaints system also makes the Ombudsman's audit of Police Service conciliations an integral part of the system.

Under the existing system the Police Integrity Commission can target its resources towards investigating serious criminal conduct and corruption as outlined in the "class or kind" agreement between the Ombudsman and the Commissioner of the PIC, made in accordance with section 67 of the *Police Integrity Commission Act 1996*. The work of the Office of the Ombudsman is crucial to the Commission's ability to maintain its investigative focus on police corruption. Consequently, the Committee would have serious reservations about any proposed change to the current complaint categories which may have the potential to increase the PIC's involvement in dealing with Category 2 complaints at the expense of investigations into serious criminal and corrupt police misconduct.

Options for streamlining aspects of the categorisation of complaints or the police complaint system generally would be supported by the Committee to the extent that further efficiencies and improvements may be made without compromising the essential characteristics of the system recommended by the Royal Commission in its Final Report. Committee support for any legislative or administrative changes to the police complaints system would depend completely upon the preservation of the powers and

⁴² *ibid.*

⁴³ Office of the Ombudsman 2nd Submission for the 7th General Meeting, p.7.

functions of the Office of the Ombudsman and the Police Integrity Commission.

Having said this, the Committee is mindful of the desirability of police ownership for as much of the police complaints system as is possible. The "class or kind" agreements offer the Police Service scope to increase the areas of the complaints system for which it is directly responsible. The Royal Commission summed up the balance thus:

Retention of a role within the Service to respond to corruption was seen as essential, otherwise there was a risk that it might abandon all responsibility and interest in maintaining high standards of integrity. On the other hand, external oversight was seen as advantageous in enhancing police accountability, guaranteeing independent and aggressive pursuit of serious corruption, and increasing public confidence in the Service.⁴⁴

The reform blueprint provided by the Royal Commission incorporated an external oversight model in which "the Service retained a direct responsibility to combat corruption within its ranks" and "an external agency, staffed by skilled lawyers and investigators independent of the Service, assumed an oversighting role and a capacity to undertake direct investigations into selected cases".⁴⁵ It is this balance which the Committee supports as the essential feature of the system for dealing with serious police misconduct and corruption in New South Wales.

RECOMMENDATION 1

- 1a. The Committee recommends that the existing system of "class or kind" agreements which determine the categorisation of police complaints should continue.
- 1b. The Committee further recommends that the legislative framework for the police complaints system, including the class or kind categories of complaints, should be streamlined as much as possible, without compromising the functions and powers of the Police Integrity Commission and the Office of the Ombudsman.
- 1c. The Committee recommends that, in view of the ongoing failure rates in relation to police complaints dealt with by conciliation, any legislative proposal to abolish s.132 of the *Police Service Act 1990*, which requires that certain police complaints be conciliated, should not be considered in advance of a thorough assessment by the Ombudsman of the Police Service's performance in effectively conciliating complaints.

⁴⁴ Royal Commission, Final Report, vol. II, p.524.

⁴⁵ Ibid.

1.2.2 Scope of Managerial Action

Currently, Part 9 of the *Police Service Act 1990* provides for the disciplinary system to be used by the Police Service when dealing with unsatisfactory conduct on the part of its officers. Under section 173 of Part 9 the Commissioner may direct the preferment of a departmental charge against an officer, the institution of court proceedings or admonishment. This provision reflects the “command and control” approach and does not provide for the range of managerial actions of the type proposed by the Royal Commission.

BACKGROUND

The Royal Commission was critical of the limited types of action available to Local Commanders in cases where departmental or criminal charges could not be established and concluded that the actions were inadequate for an effective complaints handling system. In the Commission’s view, the “ability to take managerial action should . . . be as broad as the initiative of a fair and capable manager” and the challenge posed would be “to make the action fit the particular circumstances”.⁴⁶ Factors to be considered in determining the most appropriate action included:

- the seriousness of the current incident;
- past responses by the officer to management action;
- the degree of behaviour modification sought;
- the need to satisfy the complainant that the matter has been redressed; and
- the need to demonstrate to the public, and members of the Service, that the conduct is unacceptable.⁴⁷

The Final Report recommended that the options available in the case of bad performances should fall into the following reviewable and non-reviewable categories:

Non-Reviewable

- informal discussion with the officer to elicit the cause of the behaviour attracting concern, and the ways in which improvement can be achieved, including:
 - retraining;
 - counselling;
 - personal development;
 - supervision;
 - transfer from a particular area of work;
 - assignment to work with a mentor;
 - change of shift;
 - referral to welfare, for example, in cases involving difficulties in personal relationships or substance abuse;

⁴⁶ *Ibid*, p.335.

⁴⁷ *Ibid*.

-
- presentation of a report;
 - conciliation or other form of problem solving, involving the complainant;
 - caution;
 - reprimand;
 - restriction of duties; and
 - transfer to uniform

Reviewable

- fine;
- deferral of an increment;
- loss of seniority;
- reduction in salary;
- annulment of an appointment;
- demotion or reduction in rank or position; and
- dismissal for want of Commissioner's confidence.⁴⁸

Generally, the Local Commander would not use any of the reviewable options unless satisfied that there was no appropriate option within the non-reviewable category.

CONCLUSION

In October 1996 the Assistant Ombudsman (Police) Mr Steven Kinmond, provided the Police Service with comments on the Interim Report on the Post-Implementation Review of the Complaints Handling Trials which had been prepared for the Police Service by consultants⁴⁹. Mr Kinmond noted that the Police Service needed to consider further the issue of delegating to patrol commanders the power to take a comprehensive range of management/disciplinary action. He advised Commissioner Ryan that, "[t]he Police Service needs to take a position on whether legislative change to the disciplinary system is required prior to significantly broadening the discretion of patrol commanders in this area"⁵⁰. The Office's subsequent evaluation of Phase Two of the EMS Pilot Project⁵¹ notes the view of the Royal Commission that further legislative amendment is one of the factors upon which the effectiveness of the new EM system depends.

In July 1997, senior representatives of the Police Service discussed this issue with the Committee during a public hearing on key issues arising from the Ombudsman's Fourth General Meeting with the Committee. They stated that the formality of the legislative framework, which has an emphasis on charging and disciplinary action, remains one

⁴⁸ Ibid pp.335-6.

⁴⁹ Ombudsman's Submission, Attachments 1a and 1b, *5th General Meeting Report*, June 1997.

⁵⁰ Ibid, Attachment 1b, pp.11-12.

⁵¹ Ombudsman's Submission, *7th General Meeting Evaluation Report*, op.cit, p.3.

of the inhibitors to implementation of the EMS⁵².

Such commentary points to the need for legislative amendments to provide for a range of managerial actions supportive of the EMS advocated by the Royal Commission and the Committee has taken considerable evidence in public and in private on the managerial actions available to Local Commanders.

The Committee is convinced that the introduction of legislation to broaden the scope of disciplinary outcomes available to Local Commanders is critical to the successful Service-wide implementation of the EM approach currently under trial. This view is supported by the comments of the Royal Commission, Police Service and the Office of the Ombudsman. In the Committee's opinion, the managerial options recommended by the Royal Commission are essential to facilitate the ongoing development of the EMS. Consequently, the Committee supports amendments which would increase the actions available to local commanders wishing to take a flexible, managerial approach to complaints where appropriate.

It must be acknowledged that the Royal Commission envisaged a progressive development of the EMS system, the success of which would depend upon Police Service acceptance of the managerial approach. The absence of any legislative provisions in Part 9 of the *Police Service Act* to provide a wide-range of actions for police managers appears to present an impediment to adoption and acceptance of the EMS throughout the Police Service.

The Committee considers that the scope for pursuing the managerial approach administratively, without legislative underpinning, could be further explored by the Police Service, possibly by seeking legal advice. The EMS has not been thoroughly trialed and the Committee believes that it may be possible to utilise managerial options on an administrative basis within the current legislative framework. Nevertheless, the Committee accepts the common view held by the Royal Commission and the Police Service that legislative amendments are desirable if the managerial approach is to be adopted on a permanent basis, and urges that priority be given to such amendments so that police do not remain locked into the "command and control" approach.

⁵²

Committee on the Office of the Ombudsman and the Police Integrity Commission, *Key Issues Arising from the Fourth General Meeting with the Ombudsman*, October 1997, p.12.

RECOMMENDATION 2

- 2a. The Committee recommends that priority be given to amending the *Police Service Act 1990* to provide Local Commanders managing police complaints with a wider range of managerial and other actions supportive of the Employee Management approach advocated by the Royal Commission into the NSW Police Service.
- 2b. The Committee recommends that, in the event that discussions between the Commissioner of the PIC, the Ombudsman and the Commissioner of Police fail to achieve agreement on the issues which have arisen in relation to the police complaints system, a round table conference be convened between the Committee and the aforementioned parties for the purpose of resolving any outstanding matters.

1.3 External Audit of the Police Reform Process

BACKGROUND

Royal Commission recommendation

Recommendation 174 of the Royal Commission Final Report proposes the appointment of an external strategic auditor upon engagement to the PIC, to carry out a qualitative and strategic audit of the reform process, and to report to the PIC, which in turn would report to the Minister and the Service. Appendix 31 of the Royal Commission report (vol. II) contains details of the recommended program for the external audit including the key reform areas to be audited, the stages to be covered in each year of the audit, and the activities which require ongoing audit.

Recent legislation

The *Police Integrity Commission Amendment Act*⁵³ provides for a special audit of the reform process within the Police Service to be arranged and overseen by the PIC over a three year period. The audit is to be of the kind referred to in Recommendation 174 and described in Appendix 31.

Under the Act the PIC has responsibility for selecting and engaging the auditors, approving the audit specifications, and overseeing and administering the audit process. The auditors are required to submit progress reports on the conduct of the audit to the PIC and a final report is provided to the Commission as soon as possible after the expiry of the three year period. Both the Minister and the Commissioner of Police are to be provided with a copy of any progress reports, the final report, and any recommendations made by the PIC in light of the audit.

⁵³

Assented to on 30 June 1998, proclaimed to commence on 17 July 1998.

Additional funding of \$1.5 million has been allocated to the Police Integrity Commission for the audit⁵⁴. Until recently, the only information available on the conduct of the audit was that contained in the Royal Commission report. This does not address in any detail matters such as the procedures for selecting and appointing the auditors, and the mechanisms for monitoring the progress of the audit.

The Ombudsman advised at the 7th General Meeting that the PIC has sought involvement from the Office in the initial process for selecting the external auditor. The Ombudsman also anticipates an ongoing role for the Office in the external audit process, especially in the provision of complaint data to the auditor⁵⁵.

COMMITTEE PROCEEDINGS

The Commissioner of the PIC has informed the Committee that the specifications for the qualitative strategic audit of the reform process of the New South Wales Police Service (QSARP) will encompass all of the ten points proposed by the Royal Commission. The tender specifications require the external auditor to work closely with the NSW Police Service in the initial stages of the audit to ascertain how best to determine and measure progress in light of all ten key areas in the reform agenda. The auditor will report regularly to the PIC in respect of the key areas of reform⁵⁶.

The Commissioner also advised the Committee that the audit will examine additional areas not already identified by the Royal Commission. The PIC's submission reported that:

The QSARP specifications can be modified by the Police Integrity Commission to address issues other than the ten key areas in the reform agenda. Following early consultation with the Police Service, the external auditor may recommend some flexibility in the application of the QSARP specifications in year 1. The Commission may agree provided the results of the QSARP would not be compromised.

Similarly, at the conclusion of years 1 and 2 of the three year QSARP cycle, the Commission may elect to modify the specifications either in light of progress communicated by audit reports, the need to focus on high priority areas of weaknesses, or other matters identified by the auditor, and any Ministerial directives given to the NSW Police Service in relation to previous management audits. The auditor has the opportunity to raise such contingencies with the Commission in either interim or annual audit reports for year 1 and 2 respectively, prior to commencement of the next audit year of the three year process.⁵⁷

⁵⁴ NSW Budget Papers, Budget Information 1998-99, Budget Paper No.2, p.4-188.

⁵⁵ Evidence 11 June 1998, p.7.

⁵⁶ PIC Submission, 3rd General Meeting, p.7.

⁵⁷ *Ibid*, pp.7-8.

Subsequently, the Commissioner of the PIC provided the Committee with a copy of the specification and related material for the qualitative strategic audit⁵⁸. The Commissioner advised that he had initiated a two-stage tendering process to select a suitably qualified person(s) or organisation to undertake the audit, the first stage of which had commenced. Expressions of interest were to be lodged with the Commission on 30 July 1998 and an inter-agency team will assess the expressions of interest received. The Committee supports the consultative approach adopted by the Commission in this process and notes that the Ombudsman and Auditor-General are both represented on the evaluation team. The Specification for the QSARP will be subject to further refinement and the Committee will continue to monitor the implementation and conduct of the audit.

RECOMMENDATION 3

The Committee recommends that the Ombudsman should be fully consulted by the Police Integrity Commission in the development and conduct of the audit process, and that the material obtained from the Office's evaluation of the EMS, and the conclusions drawn from the evaluation, be made available to the auditor engaged by the PIC to conduct the external strategic audit of the reform process.

RECOMMENDATION 4

The Committee recommends that the Police Integrity Commission regularly report to the Committee as part of the General Meeting proceedings on the conduct of the audit process, the progress made towards completing the audit, and any matters arising from the audit which have implications for the functions and work of both the Commission and the Office of the Ombudsman.

1.4 The Conciliation of Police Complaints

BACKGROUND

Conciliation failure rates

Conciliation rates have been discussed with the Ombudsman and the Commissioner of Police during public hearings on key issues raised in the Ombudsman's annual reports.

The Committee has concentrated upon the conciliation of police complaints as an area for review, especially in light of the continued increase in failed conciliation rates. The Police Service has set a benchmark of 12% for conciliation failure rates. However, conciliation failure rates, as a percentage of the matters in which conciliation was attempted, rose from 12% in 1994-5, to 24% in 1995-6, 27% for the period 1/7/96-

⁵⁸ letter dated 5 August 1998.

4/3/97, and 35% for the period July-November 1997⁵⁹.

Conciliation training

The Royal Commission endorsed recommendations by the Ombudsman that there should be enhanced conciliation training for police officers and that conciliators should be provided with the power to negotiate effectively. It also proposed that a small group of officers be trained in advanced dispute resolution techniques. The Final Report recommended that patrol commanders should conduct conciliations to ensure a proper managerial outcome and that responsibility for the conciliation should be non-transferable. The Royal Commission argued that conciliations should not be left unresolved with parties "agreeing to disagree" and that the performance of the officer should be addressed⁶⁰.

COMMITTEE PROCEEDINGS

The Committee has canvassed a number of issues relating to the conciliation of police complaints during public hearings. For instance:

- the extent of conciliation training available to patrol commanders
- the establishment of a benchmark for conciliations as a percentage of complaints determined and the mechanism for monitoring performance re conciliations
- progress made by the working party on conciliation
- incentives for police officers to conciliate
- increasing failure rates for conciliations of police complaints

In its first report on key issues arising from the Ombudsman's annual and other reports, the Committee noted with concern that failure rates for conciliations had reached 27% in 1996-7. The Ombudsman advised the Committee on the measures she believed were required to improve the success of conciliations, including: the need for a mechanism for monitoring the conciliation process and reviewing unsuccessful conciliations; improving the profile of conciliations among police officers; simplifying the conciliation form; and, developing a policy concerning the retention of conciliation records for use in promotion and recruitment within the Service⁶¹

The Committee also examined the Royal Commission's recommendation for the abolition of the category of complaints where conciliations must be attempted but was concerned that such a change could result in a reversion to very low rates for the use of conciliations. The Committee held that should this category be removed, consideration should be given to including a provision in the legislation for a benchmark on the use of conciliations. The benchmark should be subject to agreement between

⁵⁹ Ombudsman's Submission, 7th General Meeting, p.9.

⁶⁰ Royal Commission, Final Report vol. II p.343.

⁶¹ Committee on the Office of the Ombudsman and the Police Integrity Commission, Key Issues Report, October 1997, pp 12-3.

the Ombudsman and the Police Commissioner.

On revisiting conciliation during the seventh General Meeting, the Committee heard that the failure rate for conciliations had increased to 28.5% for the period between December 1997 and May 1998. Although the Ombudsman found the slight improvement in conciliation rates between the sixth and seventh General Meetings to be encouraging, she felt that further improvement is required.

Initiatives have been taken by the Police Service to reduce the failure rate to 12%, and to aim to attempt conciliation in 30% of complaints. The Commissioner of Police, Mr Peter Ryan, has shown his support for conciliation, writing to all Commanders earlier this year and directing them to take action to meet the benchmarks for conciliation. The Customer Assistance Unit of the Police Service has undertaken a number of measures to improve conciliations. For internal promotion purposes, the Unit produced resource materials which were published in the *Policing Issues and Practice Journal* and shown on the Police TV network. The Customer Assistance Unit in addition has undertaken to follow up on police compliance with the benchmarks for conciliations established by the Police Commissioner and is working closely with the Internal Affairs consultant engaged in the Greater Hume Region trial. Internal Affairs also is developing a trial to give conciliation officers authority to offer small compensatory payments, for minor loss of property or damage to property, as a means of extending the options available to them to resolve complaints where minor compensation is warranted and would assist with a resolution. Internal mechanisms for monitoring the use of conciliation and identifying problem areas also are under review. The conciliation working party is examining ways to develop internal review of failed conciliations to identify complaints with reasonable prospects of resolution through informal grievance procedures⁶².

Training for conciliators has undergone some changes. The training for conciliation techniques is no longer limited to a two-day seminar as ongoing activities provide support and advice on a wide range of conciliation-related issues⁶³.

These initiatives prompted the Ombudsman to comment:

We feel that within the Service there is a greater commitment to trying to use conciliation and to involve the public in the resolution of complaints⁶⁴.

The Assistant Ombudsman (Police) looked forward to the stage when the Office would be involved to a lesser degree in assisting the Police Service with conciliations and noted that there had been some progress by the Service towards providing internal support to help managers with their decisions. Acceptance by the Police Service of responsibility for managerial decision-making was seen by the Office as central to the EMS. The Ombudsman claimed:

⁶² Submission, pp.9-10.

⁶³ Kinmond, evidence 11 June 1998, p.8.

⁶⁴ Moss, evidence 11 June 1998, p.7.

That is basically what the EMS scheme is about; trying to get senior officers to think for themselves, take on responsibility and make hard decisions. . . .that is still a variable process at this time. . . . The results of the evaluations, comparing the pilot to the non-pilot, show slight differences. Senior people are prepared to take on decision making but, again, that has been a difficult process.

⁶⁵
..

The Assistant Ombudsman (Police) indicated that he still possessed concerns about the likely success of conciliations. He told the Committee:

My prediction is that we will continue to have problems. We need to ensure that the Police Service has in place ongoing monitoring systems that continually identify problems and that it has an ongoing process of education⁶⁶.

The Committee notes that a sophisticated monitoring system will be necessary to ensure that it not only determines the compliance with the benchmarks, but also assesses the causes of conciliation failure so that measures can be developed to overcome any problems. Monitoring the quality of conciliations is essential in the Committee's view given the experience of individual respondents participating in the Ombudsman's surveys for the evaluation of Phase Two of the Pilot project. The complainants' responses refer to: the perception that they had no other choice but to accept; being advised that the matter was closed; failure of police officers subject to complaint to tell the investigating officer the full story; relevant information not being submitted; and complaints not being dealt with seriously⁶⁷.

The Ombudsman's Office currently is undertaking a review of the methodology used to measure Police Service performance with regard to conciliations and this will enable the Ombudsman to report on conciliation rates and turnaround times for conciliations in each region⁶⁸. The Committee will examine with interest the more detailed conciliation figures that the Ombudsman will be able to provide as a result.

One critical factor in acceptance of the new system throughout the Police Service appears to be a strong perception among police officers that admissions of minor mistakes will be registered permanently on their records. The Assistant Ombudsman (Police) explained to the problem thus:

⁶⁵ Evidence 11 June 1998, p.10.

⁶⁶ Kinmond, evidence 11 June 1998, p.9.

⁶⁷ Evaluation of the second phase of the EMS Pilot Project, op,cit, Appendix 2, pp. 18-20.

⁶⁸ Seventh General Meeting Report, August 1998, p17.

There needs to be a system whereby, from an intelligence point of view, complaints are recorded, but from the point of view of promotion there is a fair outcome in respect of the recording of those matters. For example, if an officer makes a mistake that is not of a serious nature and does not repeat the mistake, that it is not going to be permanently on that officer's record. Senior management from the Police Service is telling its officers, 'We will treat you fairly in that situation. It is a perception problem that you have.' But the rank and file do not believe it. That is the critical area for the service to move ahead.⁶⁹

According to Mr Kinmond, one issue that has become a source of some tension between the Ombudsman's Office and the Police Service is the number of matters returned by the Office to the Service because police complaint outcomes, and the managerial actions being taken, were not creative and mistakes had not been acknowledged.⁷⁰

CONCLUSION

The Committee regards developments in the conciliation of police complaints as a key issue for the Office of the Ombudsman and intends reporting separately on this area in its forthcoming Key Issues Report.

1.5 Electronic Surveillance

BACKGROUND

The Royal Commission termed electronic surveillance "the single most important factor in achieving a breakthrough in [Royal Commission] investigations"⁷¹ and considered it to be essential to the capacity of the Police Service and the PIC to detect and investigate corrupt conduct. According to the Royal Commission, it also has the important advantage of providing a "compelling, incontrovertible and contemporaneous record of criminal activity" thereby removing the incentive for process corruption.

The Final Report contains a number of recommendations concerning telephone intercepts, listening devices and video surveillance. Of these, telephone intercepts remains an area needing further amendments to federal legislation. In particular, the Royal Commission pointed to the need for amending legislation "to enable the use of intercept product in proceedings which although not criminal are integrally related e.g. bail applications, proceedings for contempt, Coroner's Court proceedings and proceedings for the recovery of assets of crime".⁷² In his Annual Report for 1996-7, the

⁶⁹ Evidence 11 June 1998, p.12.

⁷⁰ Evidence 11 June 1998, p.14..

⁷¹ Royal Commission, Final Report, vol. II p.448.

⁷² Ibid, p.451.

PIC Inspector advised that legislation had not been passed to allow lawfully obtained telecommunication intercept (TI) material to be used in contempt proceedings in the same way that it is allowed to be used on bail applications. The Inspector has drawn this matter to the attention of the New South Wales Attorney General and the Minister for Police, and has discussed its implications with the Committee. The issue was again raised in the Inspector's Annual Report for 1997-8 where concern is expressed that the lack of such amending legislation is likely to have an adverse affect on the operational effectiveness of the PIC.⁷³

A second TI matter highlighted by the Inspector is that he does not have access to information lawfully obtained by telephone intercepts and needs to be able to do so in order to fulfil his functions under the PIC Act. At his first General Meeting with the Committee on 17 November 1997, the Inspector explained that the *Telecommunications Interception Act* (Cth) "was capable of being interpreted in a way as to suggest that the Inspector may not have authority to access Police Integrity Commission files containing information gained by lawful telephone intercepts."⁷⁴ This could lead to the possibility of a "ludicrous situation" where the Inspector would not be able to investigate a complaint alleging impropriety, or other forms of misconduct, on the part of the Commission because the Commission claims to have relied upon "lawfully obtained information under the *TI Act*", and that information could not be disclosed to the Inspector for the purpose of dealing with the complaint.⁷⁵

Consequently, the Inspector has called for two amendments at Federal level to the *Telecommunications (Interception) Act 1979 (Cth)*, specifically:

- 1) *To enable the Police Integrity Commission to communicate lawfully obtained telephone intercept material to the Inspector of the Police Integrity Commission for him to fulfil his functions under section 89 of the Police Integrity Commission Act 1996.*
- 2) *To enable lawfully obtained telephone intercept material to be used in proceedings alleging contempt of the Police Integrity Commission.*⁷⁶

COMMITTEE PROCEEDINGS

The Committee has discussed these matters with the Inspector and the Commissioner of the PIC on a number of occasions in both public and private session. Both issues have significant implications for the performance of the Inspector and the PIC. The Committee fully supports the amendments proposed by the Inspector and has written

⁷³ PIC Inspector, Annual Report 1997-8, p.14.

⁷⁴ Ibid, p.13.

⁷⁵ Ibid.

⁷⁶ Ibid, p.14.

to the Minister of Police accordingly. The Commission is permitted to obtain TI warrants following a declaration by the Federal Attorney General under the *TI Act* made on 14 July, 1998.

RECOMMENDATION 5

The Committee recommends that every effort should be made to facilitate the enactment of legislation to amend the *Telecommunications Interception Act 1979* (Cth) to enable the Police Integrity Commission to communicate lawfully obtained telephone intercept material to the Inspector, in order that he can fulfil his statutory functions, and to allow lawfully obtained telephone intercept material to be used in proceedings alleging contempt of the Police Integrity Commission. For its part, the Committee intends to continue to put the case for the proposed amendments as much-needed initiatives.

2. OMBUDSMAN - NEW FUNCTIONS

BACKGROUND

In her opening statement to the Committee on 11 June, the Ombudsman addressed legislation which gave her two new functions. The first of these relates to controlled operations as introduced by the *Law Enforcement (Controlled Operations) Act 1997*. Under Part 4 of this Act the Ombudsman acquired a monitoring function which involves inspecting records held by the Police Service, the ICAC, the NSW Crime Commission and the PIC for the purpose of ascertaining whether or not each of these law enforcement agencies has complied with the requirements of the Act. The second new function relates to the use of powers conferred on Police under the *Crimes Legislation Amendment (Police and Public Safety) Act 1988*, assented to on 18 June 1998.

2.1 Controlled Operations

Part 2 of the *Law Enforcement (Controlled Operations) Act 1997* permits an officer or employee of the PIC, the ICAC, the Police Service or the Crime Commission to apply to the chief executive officer of their agency for an authority to conduct a controlled operation on behalf of the agency⁷⁷. Controlled operations are conducted for the purpose of obtaining evidence of, or arresting any person involved in, criminal activity or corrupt conduct, or to frustrate such conduct. They involve activities which would be considered unlawful had they not been undertaken for the purposes of the Act and in accordance with its provisions. The requirements to be met when applying for an authority are outlined in section 5 of the Act.

Functions of the Ombudsman

The Ombudsman's role is set out in Part 4 of the Act which requires that a chief executive officer must notify the Ombudsman within 21 days after granting an authority, variation of authority, or authority renewal to conduct a controlled operation. The chief executive officer also must notify the Ombudsman within 21 days after receiving a report on the conduct of an authorised operation. The Act empowers the Ombudsman to obtain information from the officer in order to consider such notifications and reports (s.21).

Under Section 22 of the Act, the Ombudsman must inspect the records of each law enforcement agency named in the Act, at least once every twelve months, and may inspect the records of any of the agencies at any time. Such inspections are undertaken for the purpose of ascertaining whether or not the agencies have complied with the requirements of the Act. The reports are provided to the chief executive officer of the agency to which the report relates and to the Minister responsible for that agency. The Ombudsman also may make a special report to Parliament with respect to any inspection conducted under section 22.

⁷⁷ The legislation specifies the relevant chief executive officers to be the Commissioner of the Police Service, the ICAC Commissioner, the Commissioner of the Crime Commission and the PIC Commissioner.

In April 1998, the Ombudsman conducted inspections of the NSW Police Service and the Crime Commission which at that time were the only agencies to have authorised any controlled operations. The Office intends to conduct further inspections prior to the end of the financial year and the preparation of the Ombudsman's Annual Report.

Ombudsman Reports

The Ombudsman must prepare an annual report to Parliament on the Office's work and activities under this Act and the matters to be included in the annual report are listed at section 23(2) as follows:

- a) the number of authorities granted, varied, renewed or refused by each chief executive officer during the period to which the report relates;
- b) the nature of the criminal activity or corrupt conduct against which the controlled operations were directed;
- c) the number of law enforcement and civilian participants involved in the controlled operations;
- d) the nature of the controlled activities engaged in for the purposes of controlled operations; and
- e) the number of law enforcement and civilian participants who have engaged in controlled activities for the purposes of controlled operations.

The Ombudsman's reports must not include any information that could reasonably be expected to:

- i) endanger the health or safety of any person;
- ii) disclose the methodology used in any investigation that is being, has been or is proposed to be conducted by any law enforcement agency;
- iii) prejudice any current or proposed investigation conducted by a law enforcement agency;
- iv) prejudice any legal proceedings arising from any such investigation.

COMMITTEE PROCEEDINGS

Certain record-keeping deficiencies have been identified by the Ombudsman in her inspections to date and the agencies concerned are currently revising their procedures in light of the Ombudsman's findings. Future inspections by the Office will include an assessment of whether the agencies have implemented the Ombudsman's recommendations.

The Ombudsman explained in her answers for the General Meeting that the requirements of the Act place a substantial administrative burden upon the agencies and that as a result some "fine tuning" of the legislation is expected.

The Act also poses some problems in terms of the matters on which the Ombudsman must report. The Ombudsman advised that even describing the nature of the criminal activity or corrupt conduct against which the controlled operations are directed may in some cases be difficult as the Act specifies that her reports must not include any information that, if made public, could reasonably be expected to endanger the health

and safety of any person⁷⁸.

CONCLUSION

The Ombudsman has given evidence in camera to the Committee on her functions with respect to controlled operations. Publicly, the Ombudsman has commented that her new role has significant resource implications for the Office as it has been absorbed without the allocation of additional resources. The Committee appreciates the sensitivity of this area of the Office's activities and, consequently, is not in a position to comment on the evidence it has taken in confidential session. However, there are a number of concerns which the Committee wishes to express in view of the evidence it has taken and the requirements of the Act.

Obviously, the Ombudsman will be performing this new monitoring function in a highly sensitive environment and will be required to exercise great care and judgement when conducting and reporting on inspections of agency activities and records. The Committee is confident that the Office is capable of performing such a role efficiently and effectively but is anxious that the level of oversight required by the Act will consume significant Office resources in the absence of supplementation for this function. It is anticipated that the impact on the Office will be felt increasingly as the law enforcement agencies make greater use of the controlled operation legislation and extensions and variations to authorities are assessed.

Controlled operations involve significant resources and given the extraordinary powers provided to the law enforcement agencies defined in the Act, there is an obvious need for an independent, external accountability body such as the Office of the Ombudsman. In the view of the Committee, the monitoring of controlled operations by the Office is essential to ensure that the activities permitted by the legislation are conducted properly and for the strict purposes intended. Another safeguard contained within the Act is the mandatory code of conduct each agency must implement, on the approval of the PIC Inspector, to provide operatives and participants involved in controlled operations guidance on standards of professional conduct.

The Committee is particularly concerned that extensions to the Ombudsman's jurisdiction should be adequately funded and not made to the detriment of the other activities undertaken by the Office. The Ombudsman's monitoring role under this Act must be robust and unconstrained by lack of funds, staffing considerations or the actions of the law enforcement agencies to be monitoring. Additional resources will be necessary if this function is to be an effective mechanism for monitoring compliance with the provisions of the Act. Ultimately, it is a matter for the Ombudsman to determine the way in which the Office will perform its statutory audit functions within the legislative framework created by the *Law Enforcement (Controlled Operations) Act 1997*.

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Ombudsman's Submission, 7th General Meeting, pp.18-19.

RECOMMENDATION 6

The Committee recommends that:

- a) additional funding be provided to the Office of the Ombudsman for the purpose of monitoring controlled operations in accordance with the Ombudsman's functions under the *Law Enforcement (Controlled Operations) Act 1997*.
- b) each law enforcement agency involved in conducting controlled operations provide the Committee, if necessary on a confidential basis, with information as to how it facilitates the Ombudsman's exercise of her monitoring role under the Act.
- c) the Ombudsman advise the Committee of any recommendations made following audit inspections in respect of controlled operations which are not implemented and the reasons given by the agency concerned for not doing so.

2.2 Knife Powers

Crimes Legislation Amendment (Police and Public Safety) Act 1998

This Act amends the *Summary Offences Act 1988* to make further provision with respect to knives carried in public places or schools, police powers to search for and confiscate dangerous implements in public places or schools, and police powers to give directions to persons in public places. It also amends the *Crimes Act 1900* to provide police with powers to request names and addresses.

The Ombudsman has a monitoring role in relation to the operation of the Act and for the first twelve months from the date of commencement the Office must scrutinise police use of the powers conferred upon them by the provisions of the Act. For that purpose, the Ombudsman may require the Commissioner of Police to provide information about the exercise of those powers. As soon as is practicable after the expiration of the twelve month period, the Ombudsman must prepare a report on the Office's work and activities in this area and furnish a copy of the report to the Minister for Police and the Commissioner of Police.

The Ombudsman advised the Committee that the Office has secured funding for an additional person to undertake this project. The Committee understands that the position has been advertised and that the Office is in the process of making an appointment. In the interim the Office has consulted with police involved in the project and researchers, including the Bureau of Crime Statistics and Research. This preparatory work is aimed at defining the Office's information needs and obtaining support and cooperation from the relevant parties⁷⁹.

⁷⁹ Evidence 11 June 1998, p.3.

RECOMMENDATION 7

The Committee recommends that the Ombudsman provide it with further information on the funds and resources necessary to adequately perform her functions under the *Crimes Legislation Amendment (Police and Public Safety) Act 1998*. The Committee intends to discuss further the Office's activities in this area at the eighth General Meeting.

2.3 Protected Disclosures

2.3.1 Detrimental action

Section 20 of the *Protected Disclosures Act* creates for an offence where a person takes detrimental action against another person that is substantially in reprisal for the making of a protected disclosure. In this context, detrimental action is defined as action causing, comprising or involving any of the following: injury, damage or loss; intimidation or harassment; discrimination, disadvantage or adverse treatment in relation to employment; dismissal from, or prejudice in, employment; or disciplinary proceedings.

BACKGROUND

Previous legislation

Schedule 1 of the *Ombudsman Act 1974* describes the classes of conduct excluded from the Ombudsman's jurisdiction. Prior to June 1998, the conduct of a public authority regarding employee-related matters was excluded from the Ombudsman's jurisdiction, unless the conduct arose from the making or referral of a protected disclosure (within the meaning of the *Protected Disclosures Act 1994*) to the Ombudsman.

Recent amendment

On 31 March 1998, the Premier wrote to the Chairman seeking the Committee's views on a proposal to amend clause 12 of Schedule 1 of the *Ombudsman Act 1974*. The proposal involved the removal of the proviso that the Ombudsman can only investigate conduct arising from the making of a protected disclosure where the disclosure is made or referred to the Ombudsman. Removal of the proviso would enable the Ombudsman to investigate the conduct of a public authority concerning employee-related matters arising from the making of a protected disclosure, regardless of whether or not the Ombudsman originally received the protected disclosure.

In order to obtain further information on the background to the proposal, its exact nature and implications, the Committee obtained briefings from the Deputy Director-General of the Cabinet Office, the Ombudsman and Deputy Ombudsman.

Following the briefings the Committee resolved to support fully the proposed amendment of clause 12, schedule 1 and formally advised the Premier of its position.

The Committee believes that the Ombudsman should be able to investigate the conduct of public authorities involving possible detrimental action in relation to any protected disclosure, providing that it is made in accordance with the *Protected Disclosures Act 1994*, and felt that this was a highly desirable expansion of the Ombudsman's jurisdiction in relation to protected disclosures. Due to the urgency which the Ombudsman ascribed to the resolution of this matter, the Committee supported a further proposal to give effect to the amendment by proclamation.

On 3 June 1998, a proclamation was made amending clause 12, schedule 1 of the *Ombudsman Act 1974* to enable the Ombudsman to investigate any allegation of detrimental action arising from a protected disclosure, regardless of to whom the protected disclosure was originally made.⁸⁰

COMMITTEE PROCEEDINGS

7th General Meeting

Answering a question on notice about the funding and resource implications of the amendment to clause 12, Schedule 1 the Ombudsman stated:

Given the experience of this Office in relation to obtaining funding enhancements for the purpose of undertaking its activities, and also given the Treasury threshold of \$100,000 for enhancements for small agencies we are working on the assumption that we will be provided with no extra funding or resources arising out of the amendment to clause [12] of Schedule 1. Additionally, we are aware from our own experience in handling protected disclosure matters, and from our knowledge of a special investigation undertaken at the behest of a Minister, that these types of complaints and their investigation are extremely resource-intensive. (In the case of the Ministerial investigation, we have been informed by the investigator that investigation and writing of the report will take a total of six weeks full-time.)

Based on the assumption that we will not get an enhancement and our knowledge that these matters are extremely resource-intensive, we have formed the view that we will have to severely restrict the number of matters taken up by this Office that are brought within jurisdiction by the proposed amendment of clause 12. This means that for each matter taken up there will be a corresponding impact on the other types of complaints that would otherwise be addressed by this Office.⁸¹

⁸⁰ Gazetted on 12 June 1998, NSW Government Gazette No.92, p.4146.

⁸¹ Ombudsman's Submission, 7th General Meeting, pp12-14.

CONCLUSION

Issues with the potential to impact adversely on the operation of the Office or to compromise its investigative capacity are given serious consideration by the Committee. The Committee will be seeking ongoing assessments from the Ombudsman on the impact of the clause 12 amendment on the funds and resources available to the Office to conduct investigations and these assessments will be discussed with the Ombudsman at the next General Meeting. Issues relating to the investigation of detrimental action also will form part of the Committee's wider examination of the *Protected Disclosures Act* conducted every two years in accordance with section 32 of that Act.

2.3.2 Internal Reporting Systems

BACKGROUND

Protected disclosures are an important means of exposing and reducing maladministration, corruption, and serious and substantial waste of public money in the public sector. The establishment by management of policies and procedures for internal reporting is critical to the success of the protected disclosures scheme. Such internal reporting policies are not mandatory under the *Protected Disclosures Act* and their introduction is a matter left to the discretion of agencies. However, the Premier issued a memorandum to all State government agencies in November 1996 confirming that all public agencies should implement "documented internal reporting procedures that provide clear and unequivocal protection to employee's who make protected disclosures." The completion date for implementation was 30 January 1997. Agencies were required to respond to the Premier's Department which then forwarded the procedures adopted by each agency to the Office of the Ombudsman for assessment⁸².

The Ombudsman has a high workload in relation to protected disclosures, including receiving and investigating disclosures about maladministration, and advising prospective whistleblowers and public authorities about protections and requirements under the Act.

COMMITTEE PROCEEDINGS

By the time of the seventh General Meeting in June 1998, twenty months after the Premier's original memorandum, the Committee heard that some public authorities and local councils still lacked effective and adequate internal reporting procedures. The implementation of internal reporting systems was progressively monitored by the Office during this period and the systems of over one hundred agencies were assessed, with in excess of 90 being informed of deficiencies in their system. Fifteen agencies had failed to adopt an internal reporting system. The Deputy Ombudsman informed the Committee:

We recently wrote to all 15 agencies, pointing out that they had failed to comply with the Premier's memorandum, indicating that

⁸² *Ibid*, pp.10-13.

we wanted a copy of their internal reporting policy, and that if it was not forthcoming within a fixed period there was a strong chance they would be criticised in the next annual report. We have received six responses so far. ... By the end of next week we should have responses from all 15 agencies. ... It is not a blanket problem. Some agencies have tried very hard and some have done a very good job...⁸³.

One suggestion made by the Committee was that agencies should be required to include their internal reporting policy in their annual report. While the Ombudsman thought this was a useful suggestion which she would take up with agencies there were some potential problems with the idea. The Deputy Ombudsman explained that some agencies became confused about the relationship between their policies for grievance handling and the reporting of inappropriate conduct. This had led to the problem of some agencies building their internal reporting system into their grievance handling system. Another issue was the tests relating to corrupt conduct which differ between the *ICAC Act* and the *Protected Disclosures Act*.⁸⁴

The Ombudsman confirmed that there was still a poor response from local councils in relation to internal reporting policies. Fifty-two local councils had failed to inform their outdoor staff of their internal reporting systems, 37 had failed to inform the councillors, and 28 had not advised the indoor staff of the council. This failure had occurred despite the efforts of the Department of Local Government which provided all councils with a copy of a model internal reporting policy and distributed a number of circulars on this topic⁸⁵.

In view of this situation the Ombudsman proposed that consideration should be given to two amendments as follows:

- 1) *an amendment to section 9 of the Protected Disclosures Act making the development and adoption of an internal reporting system mandatory for all public sector agencies; and*
- 2) *the establishment and adequate resourcing of the Protected Disclosures Unit recommended by the Committee in its September 1996 report, "Review of the Protected Disclosures Act 1994"⁸⁶.*

Following the public hearing on 11 June 1998, the Office conducted an audit of the internal reporting systems adopted by state government agencies and supplied the

⁸³ Evidence 11 June 1998, pp. 27 and 30.

⁸⁴ Evidence, p.30.

⁸⁵ Ombudsman's Submission, 7th General Meeting, p.12.

⁸⁶ *ibid*, p.13.

Committee with a copy of the report (2nd submission). At the time the report was prepared in July 1998, 14 of the 15 remaining agencies had responded to the Office. Some of the key findings of the Office's audit reveal that of the 139 relevant agencies audited:

- 34.5% (48) had documented their policies to a very good or adequate standard
- 16% (22) had adopted generally adequate policies and were notified of various deficiencies
- 38%(53) had inadequate policies
- 3.6%(5) responded but had not adopted an internal reporting policy
- 0.7% (1) had no staff
- 7.2% (10) had not responded⁸⁷.

The Office plans to write to the 53 agencies with inadequate policies seeking advice on their response to the Ombudsman's comments about their policies and copies of any revised policy.

CONCLUSION

The Committee views internal reporting systems to be crucial to meeting the objectives of the *Protected Disclosures Act* and intends to revisit this issue, and examine the Ombudsman's proposals, as part of the second Review of the *Protected Disclosures Act*. All agencies and local councils should have effective internal reporting systems in place by that time.

⁸⁷ Ombudsman's 2nd Submission, 7th General Meeting.

3. JURISDICTIONAL ISSUES

3.1 The Ombudsman & Complaints about Contracted Services

BACKGROUND

The Ombudsman has identified complaints about contracted services as a potential inquiry area for the Committee. In particular, the Ombudsman questioned the adequacy and availability of complaint-handling mechanisms for the public where services are funded, either in whole or in part, by the government and delivered or provided under contract by the private sector.

This matter was raised previously in the Ombudsman's Annual Report for 1996-7, which examined the issue of whether "the scope for scrutiny of public authorities has been reduced by contracting out and privatisation." In this section of the report the Ombudsman asserted:

*The issue of the extent to which a public authority is required to monitor and control the conduct of subcontractors is a difficult one. Ultimately, a balance must be reached between the right of the public authority to contract out thereby removing itself from the day to day delivery of services, and the need to ensure that the subcontractor remains accountable to the public authority.*⁸⁸

During the seventh General Meeting, the Ombudsman advised the Committee that this issue had been highlighted at the last interstate Ombudsmen's meeting and had been raised in a number of reports by the Commonwealth Ombudsman. Also at Federal level, the Administrative Review Council (ARC) has examined access to information as part of a broader inquiry on the administrative law implications of the contracting out of government services.⁸⁹

The terms of reference for the ARC's contracting out project were twofold. Firstly, it examined the circumstances in which federal administrative law, and/or other safeguards, should exist to preserve appropriate government accountability where services are provided to the community on behalf of government by private sector contractors. Secondly, the Council examined whether federal administrative law remedies (and/or other safeguards) should be available to members of the public to seek redress from private sector contractors providing services on behalf of the Commonwealth Government.⁹⁰ The comments made by the ARC in a discussion paper on the project relate directly to the issues raised by the New South Wales Ombudsman and support her comments. The Council's findings and recommendations will be

⁸⁸ Ombudsman's Annual Report 1996-7, "The buck stops at the public authority", pp.44-5.

⁸⁹ Administrative Review Council, *The Contracting out of Government Services - Issues Paper*, February 1997 and *The Contracting out of Government Services - Discussion Paper - Access to Information*, December 1997.

⁹⁰ ARC Discussion paper, *ibid*, p.25.

published in a forthcoming report.

Administrative Review Council Project

Part of the ARC project involved an examination of the need to preserve access currently provided by the *Freedom of Information Act 1982* (Cth). The difficulties presented by the contracting out process is summarised by the ARC in its discussion paper on access to information:

Where a government service is delivered by a contractor the information sought by a service recipient or other member of the public may be held by the contractor rather than the government agency. Members of the public, however, have no general right to seek access to information held by private sector bodies; in particular, service recipients and others have no right of access to information held by contractors providing services on behalf of the Government.⁹¹

The Council went on to explain the problems associated with accessing the documents that did remain in the possession of the government agency:

A request may be made under the FOI Act for access to documents in the government agency's possession that relate to the service delivered by the contractor. Even those documents may be exempt from disclosure because they have been provided to the Government in confidence. A person will not be able to obtain access under the FOI Act to documents in a contractor's possession relating to the delivery of the service.⁹²

Five proposals were canvassed by the Council as options for ensuring access to information about government services contracted out, as follows:

*Proposal 1 - extend the FOI Act to apply to contractors;
Proposal 2 - deem specified documents in the possession of the contractor to be in the possession of the government agency;
Proposal 3 - deem documents in the possession of the contractor that relate directly to the performance of their contractual obligations to be in the possession of the government agency;
Proposal 4 - incorporate information access rights into individual contracts;
Proposal 5 - a separate information access regime.⁹³*

⁹¹ Ibid, p.5.

⁹² Ibid.

⁹³ Ibid, pp.7-8.

For reasons fully outlined by the Council in the Discussion Paper, it prefers the third proposal as "the most effective way of ensuring appropriate access to information held by contractors."⁹⁴

The ARC concluded that "rights of access to information should not be lost or diminished because of changing mechanisms of government service delivery or because a document relating to the provision of services under a government contract is in the possession of a contractor and not a government agency".⁹⁵ It offered two guiding principles for relations between the public, government agencies and contractors:

Principle 1: Rights of access to information relating to government services should not be lost or diminished because of the contracting out process.

*Principle 2: The Government, rather than individual contractors, should normally be responsible for ensuring that the rights of access to information currently provided by the FOI Act are not lost or diminished as a result of contracting out.*⁹⁶

The relevance of these principles is confirmed by the Ombudsman's submission and evidence at the seventh General Meeting.

Senate Committee Report

In May 1998 the Senate Committee on Finance and Public Administration published a second report on its inquiry into the contracting out of Government services.⁹⁷ The report contains comments and recommendations consistent with the observations and conclusions made by the ARC.

The Senate inquiry was undertaken largely in response to comments in the Annual Report of the Commonwealth Ombudsman for 1995-6. The Ombudsman expressed concern that the Office had received a new range of complaints as a direct result of contractual arrangements between private sector contractors providing services on behalf of government agencies. The complaints generally related to instances where members of the public suffered some loss at the hands of a private contractor and had unsuccessfully attempted to seek redress. Other complaints concerned inadequate performance monitoring, the absence of complaint handling procedures and tendering disputes.

⁹⁴ Ibid, p.16.

⁹⁵ Ibid, p.6.

⁹⁶ Ibid, p.7.

⁹⁷ Senate Finance and Public Administration References Committee, *Contracting out of Government Services, Second Report*, Commonwealth of Australia, May 1998. (www.apf.gov.au/senate/committee/fapa_cte/contracting).

The Senate Committee report emphasises that access to information is a key factor in both public accountability and the opportunity for redress. The Committee held that it is of "crucial importance" to establish and entrench amongst contractors the same "culture of accountability as exists in the Commonwealth public sector" and to reinforce in the public sector that "outsourcing should not involve any lowering of the existing levels of public scrutiny and parliamentary accountability of publicly funded enterprises." The Senate Committee noted that providing access to records of contractors would be costly, in the same way as access to government records under FOI is costly. Nevertheless, the Committee supported the application of FOI to documents relating to the contracting out of Government services. The report states:

On balance, however, the Committee believes that the contribution the FOI Act has made in enhancing scrutiny of government activity is such that it should not be weakened in an outsourced environment. Service recipients should be able to access sufficient information to ascertain whether contractors are acting within the terms of their contract in dealings with them or to obtain evidence of service delivery problems⁹⁸.

Consequently, the Senate Committee declared its support for the ARC's third option of an amendment to the *FOI Act* "deeming documents in the possession of the contractor that relate directly to the performance of the contractor's contractual obligations to be in the possession of the government agency and hence FOIable, with the current exemptions." The Senate Committee agrees with the Council that "this is not a perfect solution" and concluded that the success of the proposal would depend on the contractor's adherence to his record-keeping obligations, which could be monitored by periodic auditing⁹⁹.

Comment

The commonality of this issue at both State and Federal Government emphasises the potential risk to accountability presented by the contracting out of services, "both in relation to the services provided to individual recipients and in relation to broader questions of public interest such as the evaluation of the performance of contractors."¹⁰⁰

The evidence supplied by the New South Wales Ombudsman involves cases pertaining to this latter category of broader public interest issues. Therefore, the parameters of

⁹⁸ www.apf.gov.au/senate/committee/fapa_ctte/contracting.

⁹⁹ *Ibid.*

¹⁰⁰ ARC Discussion paper, *op.cit.*, p.6. It should be noted that the South Australian Parliament is considering a bill entitled *Ombudsman (Private or Corporatised Community Service Providers) Amendment Bill 1998* which aims at maintaining the Ombudsman's ability to investigate complaints against the existing range of service providers where these services are privatised, outsourced or corporatised. (Legislative Assembly, S.A. Hansard 28/5/98 pp. 953-1547). The Bill has been referred to the Legislation Review Committee.

the issue in this State appear to have extended from what at first seemed to be complaints predominantly concerning limitations on the rights of individuals to access material, to wider questions of performance and accountability. It is the potential of contracting out to decrease the availability under FOI procedures of documents and information, and the consequent accountability and public interest issues, which this Committee finds disturbing.

COMMITTEE PROCEEDINGS

In New South Wales, the Ombudsman stated that during 1995 the amount of resources involved in out-sourcing was \$11.7 billion and she estimates that in 1998 the figure will be close to \$2 billion. To date the Ombudsman has received only a handful of complaints about contracted services and she suspects that this may be because individuals with complaints about private contractors do not consider that there is an available avenue of redress. While the Ombudsman is uncertain about the full extent of service problems associated with contracted services, her comments on the operation of freedom of information in this area were of real concern to the Committee. The Ombudsman has already experienced difficulties in reporting on the conduct of private individuals in an investigation into Royal Prince Alfred Hospital. She advised the Committee that in that case there were significant limitations upon the material which could be included in the report for submission to the Minister. The Ombudsman also identified the contracting of services to inter-state contractors as another potential problem area¹⁰¹.

Under existing legislation the Ombudsman is not authorised to investigate private contractors unless by special legislation, as is the case with complaints regarding Junee correctional centre. As a result the Ombudsman is unable to make a finding of wrong conduct with respect to a private contractor.

In cases where public money funds the contracted service, the Ombudsman holds the agency concerned accountable. In the Ombudsman's view public state agencies should ensure that their contracts with private contractors contain proper grievance and complaint handling mechanisms and that the public is fully aware of these mechanisms.¹⁰² Without the information which would be available from a full investigation of this area the Ombudsman is unable to determine the extent of this problem.

Possession of Information

The Ombudsman gave evidence that the Auditor-General claims a practice has developed where state agencies enter into contracts with other agencies performing work for them to escape the requirements of freedom of information legislation. According to the Ombudsman, the Auditor-General has found this practice to be rife and it involves instances of agencies engaging private contractors and contracting with

¹⁰¹ Evidence 8 July 1998, pp.17-22.

¹⁰² Evidence 8 July 98 pp.19-20.

them to hold all the documentation relating to the performance of a service.¹⁰³ As an agency can only be required under FOI to produce those documents in its possession, any documents transferred to a contractor would not be subject to FOI. The Ombudsman told of one recent occasion where an agency removed certain documents in its possession to a wholly-owned subsidiary company in order to avoid FOI.

Commercial-in-confidence¹⁰⁴

The Ombudsman also presented the use of the commercial in-confidence and exemption clauses contained in the *FOI Act* as a problem of larger proportions than is immediately apparent. The Committee agrees with the Ombudsman's conclusion that further information is needed on the tendency for agencies to attempt to avoid FOI by stating in contracts that matters are commercial in-confidence when this is not the case.¹⁰⁵

The ARC's comments on claims of commercial-in-confidence should be noted:

In the Council's view the mere fact that information is contained in a contract or relates to a contract does not of itself make that information confidential. Information about the contractor's cost structures, profit margins or trade secrets clearly is information of commercial value that might be diminished by disclosure. In addition disclosure of that information, particularly to a contractor's competitors, might damage the contractor's business. This sort of information would come within the existing exemptions in the FOI Act and should not be released.

The Council does not accept that information about the standards and levels of service that the contractor is obliged to provide can be commercially valuable in the same manner. Such information does not, in the Council's view, fall within the exemptions to disclosure contained in the FOI Act.¹⁰⁶

The Senate Committee considered that commercial-in-confidence is "a legitimate basis on which to restrict information." However, the Senate Committee qualified this statement by arguing that the application of this exemption should be "very narrow and clearly limited". In support of its position, the Senate Committee referred to evidence

¹⁰³ Ibid, p.18.

¹⁰⁴ *Freedom of Information Act 1989 (NSW)* - The definition of exempt documents in Section 6 of the Act includes documents affecting business affairs (clause 7, Schedule 1) and documents containing confidential material (clause 13, Schedule 1). Schedule 1, clause 13, specifies that a document is an exempt document "if it contains matter the disclosure of which would found an action for breach of confidence."

¹⁰⁵ Evidence 8 July 1998, pp. 23-5.

¹⁰⁶ ARC Discussion paper, op.cit., p.22.

it had taken from the New South Wales Auditor-General who expressed the view that “once a tendering process was complete and a contract was finalised there was relatively little information in a contract whose release would genuinely materially damage the relevant commercial interests of either party to the contract”. The Senate Committee advocated that it is this test which must be applied in determining the merit of a claim and it was firmly of the view that only relatively small parts of contractual arrangements will be genuinely commercially confidential. Consequently, the Senate Committee recommended that the onus should be on the person claiming confidentiality to argue the case for it. It concluded:

A great deal of heat could be taken out of the issue if agencies entering into contracts adopted the practice of making contracts available with any genuinely sensitive parts blacked out. The Committee accepts that some matters are legitimately commercially confidential. If Parliament insists on a ‘right to know’ such legitimately commercially confidential matters, the most appropriate course to achieve this would be the appointment of an independent arbiter such as the Auditor-General to look on its behalf and, as a corollary, to ensure that he has the staff and resources to do it properly¹⁰⁷.

One suggestion made by the ARC was that guidelines could be developed “to assist government officials to identify the circumstances in which it may be appropriate to treat information as commercial-in-confidence.” The Council felt such guidelines would promote better contracting practices and give assistance to government officials negotiating contracts.¹⁰⁸

CONCLUSION

The comments on contracted services made by the New South Wales Ombudsman have wide-ranging and significant implications for the accountability of private contractors using public sector funds and resources to provide services, goods or other things under contractual arrangements with public sector agencies. Given the increasing trend within the public sector towards the contracting out of services the Committee envisages that mechanisms for complaint handling and redress will become prominent issues for the Ombudsman and other bodies such as ICAC. The examples provided by the Ombudsman contain serious, unacceptable instances of contract provisions being used by public sector agencies to evade accountability and external scrutiny.

The Committee has requested that the Ombudsman forward suggestions for possible amendments to the *Freedom of Information Act* which would address the problems identified during the General Meeting in relation to avoidance of FOI by private contractors. The Ombudsman’s response has been received and is being examined in

¹⁰⁷ www.aph.gov.au/senate/committee/fapa_ctte/contracting.

¹⁰⁸ ARC Discussion paper, p.24.

closer detail. The Committee will comment on the Ombudsman's proposals and make recommendations where necessary.

It is evident that the information obtained by the Committee during the series of meetings touches on wider, complex issues concerning the accountability of contractors engaged by public sector agencies to provide services and other things on their behalf. The Committee intends to continue its discussions with the Ombudsman on this area at the eighth General Meeting with a view to determining if there is sufficient scope for a separate inquiry on the issue.

RECOMMENDATION 8

The Committee recommends that:

- a) the Auditor-General provide the Committee with further information on problems experienced by his office in relation to public sector agencies using contractual arrangements with private contractors to avoid existing accountability, complaint handling and redress mechanisms, especially freedom of information requirements.
- b) the Ombudsman provide the Committee with further information on the specific problems and cases outlined in her evidence at the seventh General Meeting.
- c) the information from the Auditor-General and the Ombudsman be assessed with a view to deciding whether to conduct an inquiry with respect to:
 - i) the use of contract provisions by public sector agencies engaging private contractors to avoid the requirements of the *Freedom of Information Act 1989*, investigation by the Ombudsman and other accountability measures;
 - ii) whether the Ombudsman's jurisdiction should be extended to include the conduct of a private contractor engaged by a public sector agency and using public monies to provide services, goods or other things, on behalf of that agency;
 - iii) the adequacy of arrangements for complaint handling and redress in relation to services contracted out by public sector agencies;
 - iv) possible legislative amendments to overcome the problems experienced by the Ombudsman in relation to private contractors;
 - v) any other matter considered by the Committee to be relevant to the inquiry.
- d) the legislative amendments to the *Freedom of Information Act 1989* suggested by the Ombudsman in response to questioning from the Committee be further examined and, where supported, taken up with the Premier as the Minister responsible for administering that Act.

SUMMARY OF RECOMMENDATIONS

Recommendation 1

- 1a. The Committee recommends that the existing system of “class or kind” agreements which determine the categorisation of police complaints should continue.
- 1b. The Committee further recommends that the legislative framework for the police complaints system, including the class or kind categories of complaints, should be streamlined as much as possible, without compromising the functions and powers of the Police Integrity Commission and the Office of the Ombudsman.
- 1c. The Committee recommends that, in view of the ongoing failure rates in relation to police complaints dealt with by conciliation, any legislative proposal to abolish s.132 of the *Police Service Act 1990*, which requires that certain police complaints be conciliated, should not be considered in advance of a thorough assessment by the Ombudsman of the Police Service’s performance in effectively conciliating complaints.

Recommendation 2

- 2a. The Committee recommends that priority be given to amending the *Police Service Act 1990* to provide Local Commanders managing police complaints with a wider range of managerial and other actions supportive of the Employee Management approach advocated by the Royal Commission into the NSW Police Service.
- 2b. The Committee recommends that, in the event that discussions between the Commissioner of the PIC, the Ombudsman and the Commissioner of Police fail to achieve agreement on the issues which have arisen in relation to the police complaints system, a round table conference be convened between the Committee and the aforementioned parties for the purpose of resolving any outstanding matters.

Recommendation 3

The Committee recommends that the Ombudsman should be fully consulted by the Police Integrity Commission in the development and conduct of the audit process, and that the material obtained from the Office’s evaluation of the EMS, and the conclusions drawn from the evaluation, be made available to the auditor engaged by the PIC to conduct the external strategic audit of the reform process.

Recommendation 4

The Committee recommends that the Police Integrity Commission regularly report to

the Committee as part of the General Meeting proceedings on the conduct of the audit process, the progress made towards completing the audit, and any matters arising from the audit which have implications for the functions and work of both the Commission and the Office of the Ombudsman.

Recommendation 5

The Committee recommends that every effort should be made to facilitate the enactment of legislation to amend the *Telecommunications Interception Act 1979* (Cth) to enable the Police Integrity Commission to communicate lawfully obtained telephone intercept material to the Inspector, in order that he can fulfil his statutory functions, and to allow lawfully obtained telephone intercept material to be used in proceedings alleging contempt of the Police Integrity Commission. For its part, the Committee intends to continue to put the case for the proposed amendments as much-needed initiatives.

Recommendation 6

The Committee recommends that:

- a. additional funding be provided to the Office of the Ombudsman for the purpose of monitoring controlled operations in accordance with the Ombudsman's functions under the *Law Enforcement (Controlled Operations) Act 1997*.
- b. each law enforcement agency involved in conducting controlled operations provide the Committee, if necessary on a confidential basis, with information as to how it facilitates the Ombudsman's exercise of her monitoring role under the Act.
- c. the Ombudsman advise the Committee of any recommendations made following audit inspections in respect of controlled operations which are not implemented and the reasons given by the agency concerned for not doing so.

Recommendation 7

The Committee recommends that the Ombudsman provide it with further information on the funds and resources necessary to adequately perform her functions under the *Crimes Legislation Amendment (Police and Public Safety) Act 1998*. The Committee intends to discuss further the Office's activities in this area at the eighth General Meeting.

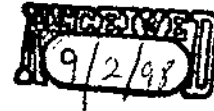
Recommendation 8

The Committee recommends that:

- a. the Auditor-General provide the Committee with further information on problems experienced by his office in relation to public sector agencies

-
- using contractual arrangements with private contractors to avoid existing accountability, complaint handling and redress mechanisms, especially freedom of information requirements.
- b.** the Ombudsman provide the Committee with further information on the specific problems and cases outlined in her evidence at the seventh General Meeting.
 - c.** the information from the Auditor-General and the Ombudsman be assessed with a view to deciding whether to conduct an inquiry with respect to:
 - i) the use of contract provisions by public sector agencies engaging private contractors to avoid the requirements of the *Freedom of Information Act 1989*, investigation by the Ombudsman and other accountability measures;
 - ii) whether the Ombudsman's jurisdiction should be extended to include the conduct of a private contractor engaged by a public sector agency and using public monies to provide services, goods or other things, on behalf of that agency;
 - iii) the adequacy of arrangements for complaint handling and redress in relation to services contracted out by public sector agencies;
 - iv) possible legislative amendments to overcome the problems experienced by the Ombudsman in relation to private contractors;
 - v) any other matter considered by the Committee to be relevant to the inquiry.
 - d.** the legislative amendments to the *Freedom of Information Act 1989* suggested by the Ombudsman in response to questioning from the Committee be further examined and, where supported, taken up with the Premier as the Minister responsible for administering that Act.

APPENDIX



Our Ref: 1129/50

5 February 1998

Mr Bryce Gaudry MP
Chairman
Committee on the Office of the Ombudsman
and the Police Integrity Commission
Parliament House
Macquarie Street
SYDNEY NSW 2000

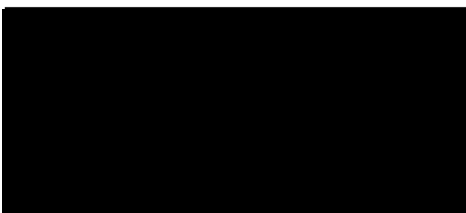
Dear Mr Gaudry

You will recall that at the Second General Meeting between the Committee and the Commission on 10 December 1997, there was some discussion about revising the s 67(a) agreement between the Ombudsman and me regarding Category 1 police complaints.

On 15 January 1998, the Ombudsman and I entered into a new agreement on the matter, and I attach a copy for the Committee's information.

In addition, at the Commission's request, the Ombudsman and the Commissioner of Police will forward to the Commission (but not by way of a request for referral under s 67(b)), copies of:

- (a) all complaints that a police officer has or may have committed or may commit the crime of assault occasioning actual bodily harm; and
- (b) all complaints that a police officer has or may have committed or may commit a crime (other than a crime relating to property) punishable on conviction on indictment by a maximum sentence of not less than three years imprisonment or three years penal servitude; and
- (c) all complaints made against a police officer of or above the rank of Superintendent.



Judge P D Orphan QC
Commissioner

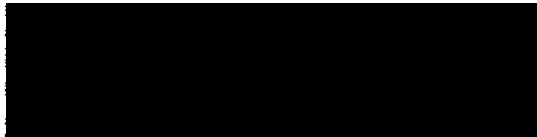
AGREEMENT made this fifteenth day of January 1998

BETWEEN THE COMMISSIONER FOR THE POLICE INTEGRITY COMMISSION ("the PIC Commissioner") AND THE OMBUDSMAN ("the Ombudsman")

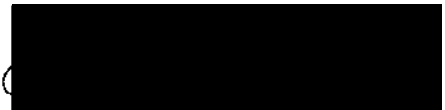
WHEREAS:

- A. the PIC Commissioner and the Ombudsman made an Agreement on the twentieth day of December 1996 pursuant to section 67 (a) of the Police Integrity Commission Act 1996;
- B. it is now appropriate to amend the Schedule to that Agreement;

IT IS HEREBY AGREED that the Schedule attached to this Agreement shall replace the Schedule to the Agreement made on the twentieth day of December 1996; and that the Schedule attached to this Agreement shall come into effect on 1 February 1998.



PIC Commissioner



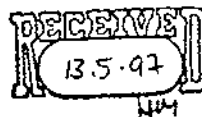
Ombudsman



SCHEDULE TO THE AGREEMENT MADE ON 15 JANUARY 1998 PURSUANT
TO S 67(a) OF THE POLICE INTEGRITY COMMISSION ACT 1996 BETWEEN
THE COMMISSIONER FOR THE POLICE INTEGRITY COMMISSION AND THE
OMBUDSMAN

- A. A complaint that a police officer has or may have sought or may seek to pervert the course of justice by giving false evidence, by destroying or interfering with evidence, by withholding or refraining from giving evidence, by fabricating evidence or by influencing another so to act.
- B. A complaint that a police officer has or may have committed or may commit
- (i) an assault which has caused or may cause a serious injury and which could lead to a charge of maliciously wounding or inflicting grievous bodily harm upon a person pursuant to section 35 of the *Crimes Act 1900*; or
 - (ii) an offence (including larceny) relating to property where the value exceeds \$5000; or
 - (iii) any offence (other than assault occasioning actual bodily harm) punishable on conviction on indictment by a maximum sentence of imprisonment or penal servitude for five years or more.
- C. A complaint that a police officer has or may have solicited or accepted, or may solicit or accept, a benefit for himself/herself or for another in return for failing to carry out his/her duties.
- D. A complaint that a police officer has or may have sought or may seek to interfere improperly in the investigation by another police officer of an alleged offence.
- E. A complaint that a police officer investigating an offence alleged to have been committed by another police officer has or may have improperly failed to carry out, or may improperly fail to carry out, his/her duties in the course of that investigation.
- F. A complaint that a police officer has or may have manufactured, or may manufacture, a prohibited drug, cultivated or may cultivate a prohibited plant, or supplied or may supply a prohibited drug or a prohibited plant, unless the amount or number of such drug or plant is less than the indictable quantity therefor as specified in the *Drug Misuse and Trafficking Act 1985*

Our Reference:
Your Reference:



13 May 1997

Ms Helen Minnican
Project Officer
Joint Committee on the Ombudsman and
the Police Integrity Commission
Room 813
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Minnican

Further to your letter of 8 May enclosed is the answer to the class or kind agreements question on notice referred to on page 18 of the transcript.

Annexure 1

Letter to the Commission of Police from the Ombudsman dated 20 December 1997. The letter includes the arrangements for 'Class or Kind' agreements from 1 January 1997 when the amended *Police Service Act* came into operation. The letter contains the agreement for Category 3 matters made pursuant to Section 132 of the *Police Service Act 1990*. Annexure '1a' is the agreement for Category 4 matters made pursuant to Section 139A of the *Police Service Act 1990* (as amended) formerly Section 124.

Annexure 2

Agreement between the Ombudsman and the Commissioner for the Police Integrity Commissioner Category 1 Complaints pursuant to Section 67 of the *Police Integrity Commission Act* dated 20 December 1996.

Yours sincerely


Irene Moss
NSW OMBUDSMAN

enc

NSW Ombudsman

*for fairness,
integrity and
improved public
administration*

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SYDNEY
NSW 2000

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(02) 9264 8050

DX 1041
SYDNEY

(ANNEXURE "1")

Our reference: G43812

Inquiries: Mr Steve Kinmond
☎ (02) 286 1069

Mr Peter Ryan QPM
Commissioner of Police
Level 18, Avery Building
14-24 College Street
DARLINGHURST NSW 2010

20 December 1996

Dear Mr Ryan

Police Service Act 1990, as amended by the Police Legislation Amendment Act 1996 - Category 3 and Category 4 complaints.

Section 162C of the *Police Service Act*, which will come into operation on 1 January 1997, is concerned with the 'classification' of complaints into four categories. The classification of Category 3 and Category 4 complaints requires appropriate agreements between this Office and the Police Service. The purpose of this letter is to make arrangements for those agreements.

CATEGORY 3 COMPLAINTS

Section 162C(4) provides:

"A Category 3 complaint is a complaint that is of a class or kind referred to in section 132."

Section 132 provides:

"An attempt must be made to deal with a complaint about the conduct of a police officer by conciliation if the complaint is of a class or kind that the Ombudsman and the Commissioner of Police have agreed may be suitable for conciliation."

This Office and the Police Service have an existing agreement under the current Section 132(1) of the *Police Service Act* with respect to complaints about police

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administration

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conduct "of a class or kind [which] should be dealt with by conciliation". The current agreement covers complaints about conduct of the following class or kind:

1. Failure to act, such as failure to take a complaint seriously, respond promptly to inquiries or attend a scene;
2. Rudeness or incivility;
3. Unreasonable treatment arising from a misunderstanding of police powers or the role of police;
4. Failure to return property;
5. Bias; and
6. Perception or threat of harassment.

I propose that the terms of the current 'Section 132 agreement' should become the terms of the agreement between this Office and the Police Service under Section 132 of the *Police Service Act* to come into operation on 1 January 1997. If you are agreeable to this proposal, please provide written confirmation of your agreement as a matter of urgency. The exchange of this letter and your letter would then constitute the agreement under Section 132.

CATEGORY 4 COMPLAINTS

Section 162C(5) provides:

"A Category 4 complaint is a complaint that is of a class or kind referred to in section 139A."

Section 139A provides:

"This Division [that is, Division 4 'Managerial Action'] applies to:

- (a) *a complaint that is of a class or kind that the Ombudsman and the Commissioner have agreed is appropriate to be dealt with by managerial action, whether it relates to matters of management or administration or otherwise, ..."*

This Office and the Police Service have an existing agreement under the current Section 124 of the *Police Service Act* with respect to complaints about police conduct "of a class or kind [which] concerns the internal management of the Police Service". That agreement is constituted by an exchange of letters between the Assistant Ombudsman (Police) and Assistant Commissioner Schuberg in August 1996. Copies of those letters are enclosed for your convenience. The agreement provides that complaints which fall within the agreement need not be notified to this Office by the Police Service.

I propose that the terms of the current 'Section 124 agreement' should become the terms of the agreement between this Office and the Police Service under Section 139A of the *Police Service Act* to come into operation on 1 January 1997. If you are

agreeable to this proposal, please provide **written** confirmation of your agreement as a **matter of urgency**. The exchange of this letter and your letter would then constitute the agreement under Section 139A.

I look forward to your prompt response to this letter. I have sent copies of this letter to Acting Deputy Commissioner Lawson and Assistant Commissioner Schuberg for their information.

Yours sincerely

A large black rectangular redaction box covering the signature area.

Irene Moss AO
Ombudsman

Our reference: G43812

(Annexure 1a)

Inquiries: Mr Steve Kinmond
Phone: (02) 286 1069

Your Reference: RMS 81702521 MWM:fm

Assistant Commissioner G Schuberg
Professional Responsibility
Police Headquarters
Avery Building
14-24 College Street
SYDNEY NSW 2000

Cc Dear Assistant Commissioner,

Re: Class and Kind Agreement - Section 124 of the Police Service Act

I refer to previous correspondence, specifically my letter dated 4 July 1996, and to discussions during the briefings for Patrol Commanders on the Pilot Project on 5 and 6 August 1996.

In light of those discussions, I now propose that the following matters be contained within the s124 agreement:

1. All complaints which are made from within the Police Service except those involving:

- criminal conduct;
- serious neglect or omission of duty which, if proved, might warrant the institution of departmental proceedings;
- harassment or victimisation of any person;
- matters previously notified to the Ombudsman under the former administrative arrangement (see page 2)

2. All complaints involving:

- Failure to attend court or notify witnesses;
- Absence from duty;
- Failure to commence or complete rostered shift;
- Loss or damage to police property excluding firearms;
- Driving or parking offences excluding serious traffic and drink/driving offences;
- Debt matters;
- Police Citizens Youth Club managerial issues;
- Loss of firearms except where an element of negligence or collusion may be involved;
- Promotional and recruitment complaints except those which allege corruption or misconduct;
- Cheating and plagiarism by police at the Academy;

SW Ombudsman

to the
office
of the
Ombudsman
Sydney
NSW
2000

- Complaints arising under the Police Service's Performance Management Scheme, except those which allege corruption or misconduct;
- Initial determination of complaints relating to Traffic Infringement Notices and Parking Infringement Notices. (Where such complaints involve allegations of rudeness and incivility by police, the Police Service now writes to complainants notifying them that they may elect to pursue the rudeness issue separately by writing again. This letter then becomes a complaint under the Police complaints System.)

You will note that the item **Police pursuits**, which was previously caught by the s124 agreement, is no longer in this list of matters. As police pursuits have now been removed from automatic notification to this Office, there is no need to include this category in the current s124 agreement.

Incidents previously notified to the Ombudsman by administrative arrangement:

As you are aware, the following types of incidents were previously notified to this Office by virtue of an administrative arrangement between the Ombudsman and the Commissioner:

- deaths or injuries in custody;
- shootings by police; and
- high speed car chases resulting in death or serious injury.

As these matters cannot be regarded as "complaints" without some inference of inappropriate conduct, I have no jurisdiction to insist that they be notified.


Nevertheless, police should be made aware of the need for careful recording and assessment of these incidents. **If inappropriate conduct is disclosed in any document concerning any of these matters, police need to be aware that they are required to treat the document as a complaint and must notify this Office accordingly. I must stress that even if the misconduct identified is only minor, these cases need to be notified.**

I also request that the records of these matters be kept in a manner which will allow Ombudsman staff to easily audit these cases.

I also confirm that I do not require any matter included in the s124 agreement to be faxed to this Office.

I await your response to my proposal.

Yours sincerely


S Kinmond
Assistant Ombudsman (Police)

cc Acting Deputy Commissioner B Lawson

AGREEMENT made this TWENTIETH day of DECEMBER 1996

BETWEEN THE COMMISSIONER FOR THE POLICE INTEGRITY COMMISSION ("the PIC Commissioner") AND THE OMBUDSMAN ("the Ombudsman")

WHEREAS:

- A. the Commissioner, the Ombudsman and others have certain duties in relation to police complaints within the meaning of the Police Integrity Commission Act 1996 ("the PIC Act") and in relation to complaints within the meaning of Part 8A of the Police Service Act 1990;
- B. complaints within the meaning of the said Part 8A are classified as Category 1 complaints, Category 2 complaints, Category 3 complaints and Category 4 complaints;
- C. a Category 1 complaint within the meaning of the said Part 8A is a Category 1 complaint as defined in section 67 of the PIC Act;
- D. the said section 67 provides as follows

Category 1 complaint means a police complaint:

- (a) that is of a class or kind that the PIC Commissioner and the Ombudsman have agreed should be referred to the Commission, or
- (b) that the PIC Commissioner has requested should be referred to the Commission, or
- (c) that is of a class or kind prescribed by the regulations.

IT IS HEREBY AGREED pursuant to the said section 67 (a) that a police complaint that is of a class or kind mentioned in the Schedule hereto shall be referred to the Police Integrity Commission.

[Redacted signature area]

PIC Commissioner

[Redacted signature area]

Ombudsman

20/12/96

20th December, 1996

NSW POLICE SERVICE

COMMISSIONER'S OFFICE

Avery Building
14-24 College Street
Darlinghurst NSW 2010
Box 45 GPO Sydney 2001



Telephone: (02) 339 5011
Eaglenet: 55011
Facsimile: (02) 339 5471
Eaglenet: 55471

Ms Irene Moss
Ombudsman
Level 3
580 George Street
SYDNEY NSW 2000



Reference:

23 DEC 1996

Dear Ms Moss


Re: Police Service Act, as amended by the Police Legislation Amendment Act 1996 - Category 3 and Category 4 complaints.

In response to your letter of the 20 December 1996.

I hereby provide this written confirmation by way of agreement with your proposed terms for class or kind classifications pursuant to Sections 132 and 139A of the Police Service Act, which are to come into operation on 1 January 1997.

A copy of your letter will be forwarded to the four Region Commanders for reference in their respective Internal Affairs assessment of complaints areas.

Yours faithfully


PJ Ryan
Commissioner

THE SCHEDULE

1. A complaint that a police officer has or may have sought to pervert the course of justice by giving false evidence, by destroying or interfering with evidence, by withholding or refraining from giving evidence, by fabricating evidence or by influencing another to so act.
2. A complaint that a police officer has or may have committed a crime punishable on conviction on indictment by a maximum sentence of not less than 3 years imprisonment or 3 years penal servitude.
3. A complaint that a police officer has or may have solicited or accepted a benefit for himself/herself or for another in return for failing to carry out his/her duties.
4. A complaint that a police officer has or may have sought to interfere improperly in the investigation by another police officer of an alleged offence.
5. A complaint that a police officer investigating an offence alleged to have been committed by another police officer, has or may have failed to carry out his/her duties in the course of that investigation.
6. A complaint that a police officer has or may have disseminated to a person not authorised to receive it or has or may have used for an unauthorised purpose any information of which he/she has become aware through proper or improper use of an information storage system of the Police Service or of any unit or part of the Police Service or of a system to which the Police Service or any unit or part of the Police Service has access.
7. A complaint that a police officer has or may have manufactured a prohibited drug, cultivated a prohibited plant, or supplied a prohibited drug or a prohibited plant unless the amount or number of such drug or plant is less than the indictable quantity therefor as specified in the Drug Misuse and Trafficking Act 1985.
8. A complaint made against a police officer who is of or above the rank of Superintendent or who holds a position referred to in Schedule 2 to the Police Service Act 1990.


 PIC Commissioner 20/12/96

Isaac Moss
 Ombudsman

20th December, 1996

~~SCHEDULE 1—PROVISIONS RELATING TO THE MEMBERS AND
PROCEDURE OF THE POLICE BOARD—*continued*~~

- ~~(a) be present during any deliberation of the Board, or take part in any decision of the Board, with respect to the appointment; or
(b) exercise any functions of the Board with respect to the appointment.~~

~~(2) Even though a member of the Board contravenes this clause, that contravention does not invalidate any decision of the Board or the exercise by the Board of any of its functions.~~

~~Proof of certain matters not required~~

~~16. In any legal proceedings proof is not required (and evidence is given to the contrary) of:~~

- ~~(a) the constitution of the Board; or
(b) any resolution of the Board; or
(c) the appointment of, or the holding of office by, any member of the Board; or
(d) the presence or nature of a quorum at any meeting of the Board.~~

SCHEDULE 2—POLICE SERVICE SENIOR EXECUTIVE POSITIONS

(Sec. 33)

State Commander
Inspector General
Director, Drug Enforcement Agency
Executive Director, Human Resources
Commander, Professional Responsibility
Commander, Strategic Services
Regional Commander—North
Regional Commander—North West
Regional Commander—South
Regional Commander—South West
Executive Director, Corporate Services
Director, Operations Support
Director, Education and Training
Commander, Technical Support Group
Principal, Police Academy
District Commander—Sydney
Director, Finance
Director, Information Technology
Commander, State Intelligence Group
Commander, Task Force Group
Dean of Studies
Commander, Professional Integrity Branch
District Commander—Northern Suburbs

Police Service Act 1990 No. 47

SCHEDULE 2—POLICE SERVICE SENIOR EXECUTIVE POSITIONS—
continued

District Commander—Warringah
 District Commander—Central Coast
 District Commander—Hunter
 District Commander—Prospect
 District Commander—Cumberland
 District Commander—Nepean—Blue Mountain
 District Commander—Eastern Suburbs
 District Commander—St George—Sutherland
 District Commander—Illawarra
 District Commander—Mid Western Suburbs
 District Commander—Georges River
 District Commander—Inner West
 District Commander—Macarthur
 Chief of Staff (Operations)
 Chief of Staff (Administration)
 Director, Administration, State Command
 Commander, Police Citizens Youth Clubs
 Commander, Establishment Control
 Director, Industrial Relations
 Director, Personnel
 Director, Executive Development Program
 Commander, Internal Affairs
 Solicitor
 Director, Marketing and Media
 District Commander—Northern Rivers
 District Commander—Upper Hunter
 District Commander—Mid North Coast
 District Commander—Central West
 District Commander—Orana
 District Commander—Peel
 District Commander—Murray
 District Commander—Monaro
 District Commander—Barrier
 District Commander—Southern Highlands
 District Commander—Riverina
 Director, Properties
 Planning and Control Manager, Information Technology Branch
 Communications Manager, Information Technology Branch
 Applications Development Manager, Information Technology Branch
 Manager, National Exchange of Police Information
 Director, Investigations, Independent Commission Against Corruption