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The Hon Catherine Cusack MLC
Chair
Committee on the Office of the Ombudsman
and the Police Integrity Commission
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Chair

Please find enclosed at Attachment 'A' the Commission's responses to the Questions on Notice (QON) arising from the Committee's hearing on 11 April 2013. Please note that the terms of the questions were settled in consultation with the Committee's secretariat and it was agreed with the Secretariat that the statistics to be provided should be those of the 2011-12 financial year.

In reference to the preliminary discussion at the hearing on 11 April 2013, I would also like to take this opportunity to provide more detailed comments on the use of complaints as a basis for measuring the integrity of a police force or the performance of an anti-corruption agency. These comments are contained in Attachment 'B'.

Should there be any queries in relation to any matter arising from this correspondence, the Commission contact is Ms Pru Sheaves, Executive Officer. Ms Sheaves can be contacted on [REDACTED]

Yours faithfully

The Hon Bruce James QC
Commissioner

**RESPONSES TO QUESTIONS ON NOTICE ARISING FROM COMMITTEE HEARING ON
11 APRIL 2013**

1. Of the total pool of complaints (between 4000-5000), how many are made by Police?

The Commission does not collect information on the sources of all complaints of police misconduct, only those that it assesses for potential investigation. The Commission, therefore, cannot assist with this query. The NSWPF or the Ombudsman may be able to assist.

2. What happened to the complaint made to the Commission that Mr Richard Torbay was permitted to access a prisoner in a police cell?

On 3 July 2007, a complaint was received from a NSW police officer alleging that Superintendent David Cushway had provided Mr Richard Torbay with access to a prisoner, Mr Phillip Hanna, in an interview room in Armidale Police Station, potentially interfering with an investigation. Superintendent Cushway was the Commander of New England Local Area Command but was on sick leave at the time of the alleged incident.

The Commission commenced a preliminary investigation which involved inquiries in Armidale, interviews in person and over the telephone and checks of police databases and other information sources. It was subsequently determined that the complaint should not be further pursued by the Commission and it should be referred to the NSW Police. Contact was made with the complainant to seek his consent to that course. After a number of telephone conversations the complainant agreed to the complaint being referred to the NSW Police on the basis that he (the complainant) was not identified. Accordingly all of the Commission's relevant information and the anonymised complaint were sent to the NSW Police in 2007. The Commission did not ask to be advised of the outcome. The complainant would not have received any further advice about the matter from the NSW Police because the NSW Police was not aware of his identity as the complainant.

3. What proportion of the approximately 380 complaints made directly to the Commission were made by police officers?

During 2011-12, 381 complaints of police misconduct were made directly to the Commission, 31 of which were made by serving police officers.

4. How many of the 200 (the complaints referred to the Tasking & Coordination Group for consideration for investigation) are complaints that have been made by police officers?

During 2011-12, of the total of 965 complaints of police misconduct assessed by the Commission, 203 were referred to the Tasking & Coordination Group for consideration for investigation, 13 of which were made by serving police officers. Notably, 11 (85%) of these went on to become a preliminary or full investigation compared to 60 (32%) from other sources, which may be indicative of a more informed insight into misconduct by police officers, perhaps greater credibility or some other factor.

5. *How many hearings has the Commission conducted over the last 12 months?*

Following consultation with the Committee Secretariat it was agreed that the Commission's response should canvass the period of the 2011-12 financial year.

As reported in the *Police Integrity Commission Annual Report 2011 – 2012* (p. 20), during the last financial year the Commission held a total of 31 private hearings relating to six separate investigations. The Commission also held seven days of public hearings related to Operation WINJANA.

6. *How many investigations are conducted by the Commission? How many of those result in hearings?*

As reported in the *Police Integrity Commission Annual Report 2011 – 2012* (p. 21-23) the Commission worked on 187 investigations during 2011-12, including 7 intelligence projects (which are regarded as preliminary investigations for statistical purposes), 137 preliminary investigations and 43 full investigations. Of these, 117 investigations were completed and 70 were ongoing as at June 30 2012.

Of the 43 full investigations worked on during 2011-12, 15 led to hearings which occurred either in 2011-12 (7) or have done so since (8).

7. *How many complaints result in findings of misconduct? How many are upheld?*

When the Commission is satisfied that misconduct has occurred it will prepare a report expressing an "*opinion*" that a person has engaged, is engaged or is about to engage in misconduct. Section 16 is the relevant section of the *Police Integrity Commission Act 1996* ("the Act"):

16 Provisions regarding assessments, opinions and recommendations

(1) *The Commission may:*

(a) *make assessments and form opinions, on the basis of its investigations or those of the Police Royal Commission or of agencies of which it has management or oversight under this Act, as to whether police misconduct or other misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer:*

- *has or may have occurred, or*
- *is or may be occurring, or*
- *is or may be about to occur, or*
- *is likely to occur, and*

(b) *make recommendations as to whether consideration should or should not be given to the prosecution of or the taking of action under Part 9 of the Police Act 1990 or other disciplinary action against particular persons, and*

(c) *make recommendations for the taking of other action that the Commission considers should be taken in relation to the subject-matter of its assessments or opinions or the results of any such investigations.*

(2) *However, the Commission may not:*

(a) *make a finding or form an opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence), or*

- (b) *make a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence).*
- (3) *An opinion that a person has engaged, is engaging or is about to engage:*
 - (a) *in police misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer (whether or not specified conduct), or*
 - (b) *in specified conduct (being conduct that constitutes or involves or could constitute or involve police misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer),**is not a finding or opinion that the person is guilty of or has committed, or is committing or is about to commit a criminal offence or disciplinary offence.*
- (4) *Nothing in this section prevents or affects the exercise of any function by the Commissioner that it considers appropriate for the purposes of or in the context of Division 2 of Part 9 of the Police Act 1990.*

No power to make a "*finding*" is expressly conferred by s 16. However, there are indications in provisions of the Act that the Commission does have power to make a "*finding*", provided that it is not a finding of the kind prohibited by s 16(2)(a). Section 16(2)(a) itself implies that the Commission has power to make a finding, other than a finding falling within the terms of s 16(2)(a). Section 95(2)(c) in Part 7 of the Act, which deals with the Parliamentary Joint Committee, provides that nothing in Part 7 authorises the Joint Committee to reconsider "*findings*" of the Commission in relation to a particular investigation or a particular complaint, thereby recognising that the Commission has power to make such findings.

However, notwithstanding the clear indications in the Act that the Commission has power to make a "*finding*", the Commission generally, in deference to the terms of s 16(1)(a), expresses a conclusion about whether a specified person has engaged in misconduct in terms of the Commission making an "*assessment*" or forming an "*opinion*" that the person has or has not engaged in misconduct.

To take a recent example, the Commission in its Operation Winjana investigation concluded that Lou Novakovic had engaged in misconduct of a Crime Commission officer and in paragraph 538 of its Report in Operation Winjana the Commission expressed this conclusion by stating that "*...the Commission is of the opinion that Mr Novakovic has engaged in misconduct of a Crime Commission officer*" in respect of the 5 different issues listed in the preceding paragraph.

In the Commission's view a "*finding*" that an officer has engaged in misconduct is really no different in substance to an "*opinion*" that misconduct has occurred, but the Commission considers that it should apply the words used in s 16(1)(a).

Because the expression of an opinion that an individual has engaged in misconduct would be adverse to the individual, the Commission must undertake the process of according procedural fairness before forming and publishing such an opinion. That process can be very time consuming and is not conducive to the NSW Police Force or the Crime Commission dealing promptly with an officer against whom there is some evidence of misconduct. Accordingly, the Commission does not always continue an investigation to the stage of forming an opinion as to whether or not misconduct has occurred.

The majority of matters the Commission investigates involve police officers and are conducted with the cooperation of the Professional Standards Command of the NSWPF. Where evidence of misconduct is obtained by the Commission it is likely that the evidence will be disseminated to the PSC without a formal opinion about misconduct being expressed by the Commission. This enables NSWPF to receive the evidence at an earlier point in time and make its own assessment and determination about the appropriate action to take. The

NSWPF would have to engage in that process, irrespective of whether or not the Commission had published an opinion that police misconduct had occurred.

Accordingly, it is usual for the Commission to express opinions that misconduct has occurred only in matters where a public hearing has been held and the Commission presents a report to Parliament. The formal processes involved in such an exercise are the reason why such reports (for example in Operation Winjana and Operation Calyx) take a long time to produce. The majority of complaints investigated by PIC which produce credible evidence are dealt with by the referral of that evidence to the NSWPF for the consideration of further investigation or managerial action, or the delivery of briefs to the DPP for the consideration of prosecution. For that reason the PIC will express its own "*opinion*" about whether misconduct has occurred in only a very small number of the matters it investigates.

So, although it is possible to provide the number of complaints which result in the expression of an "*opinion*" by the Commission that misconduct has occurred, the number is small and of little value in terms of assisting with the measurement of the Commission's performance. In addition, to emphasise these outcomes fails to recognise other legitimate outcomes for Commission investigations, including disseminations to NSWPF, the exoneration of an officer or the identification of a vexatious complaint.

The Committee will be aware from the Commission's responses to previous questions on notice that outcomes from investigations are not limited to: the forming of opinions that misconduct has occurred; the referral of information to the NSWPF; and, recommendations for managerial or prosecution action. This issue is discussed in more detail in the Commission's correspondence of 13 March 2013 (our ref. 26274/11). In summary, however, other outcomes include:

- a. All reasonable lines of inquiry have been exhausted and the complaint not sustained.
- b. The allegation has been identified as vexatious or not made in good faith.
- c. The Commission has identified that the facts in a matter have been misinterpreted by a complainant.
- d. The allegation is identified as false.
- e. Misconduct is identified, but that misconduct is not serious enough to warrant further Commission action.
- f. The Commission is satisfied that another agency has investigated the matter satisfactorily.

The Commission provides detailed information about investigation outcomes, including disseminations, recommendations for managerial action and prosecutions and other outcomes in its Annual Reports. The Committee is referred in particular to the investigation summaries in Chapter 5 and to the prosecutions table in Appendix 5. The other outcomes mentioned above are aggregated in the Investigation Outcome tables¹ in the 'No further action' line item. Investigations that result in a dissemination of information to the NSWPF are dealt with as a separate item in the tables. The tables, representing the outcomes for the Commission's full and preliminary investigations from the 2011-12 Annual Report are reproduced here for ease of reference:

¹ Police Integrity Commission Annual Report 2011-12, p.23 refers

Full Investigation outcomes 2011-12

Investigation Outcome	Total	%
Investigations referred to the ODPP for consideration of prosecution action	5	45.5%%
Investigations that resulted in a dissemination of information to the NSWPF	3	27.3%
No further action	3	27.3%

Preliminary investigation outcomes² 2011-12

Investigation Outcome	Total	%
Investigations that progressed to become full investigations	14	15%
Investigations that resulted in a dissemination of information to the NSWPF	2	2%
Matter referred to current full investigation	2	2%
No further action	71	76%

² An investigation can contain more than one outcome.