



ABN 22 870 745 340

13 March 2013

Our Ref: 26274/11

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 the Commission's responses to the Questions on Notice (QON) arising from the Committee's hearing on 22 February 2013 and the additional QON referred by way of letter from the Director, Committees dated 28 February 2013 (your ref. D13/04671). Please note that the QON arising from the Committee's hearing have been paraphrased for the purpose of clarity in consultation with the Committee Secretariat.

Please note some of the information provided in response to the Questions on Notice is confidential. This material is marked confidential.

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 [REDACTED].

Yours faithfully

[REDACTED]

The Hon Bruce James QC
Commissioner

RESPONSES TO QUESTIONS ON NOTICE ARISING FROM COMMITTEE HEARING ON 22 FEBRUARY 2013

1. Can the PIC provide the Committee with a copy of the criteria, and provide more information about the process we use to assess complaints as potential preliminary or full investigations? (Transcript of Hearing, p 6)

Complaints are considered by the Commission in a multi-stage process which is designed to identify the most serious and most credible complaints for investigation. The key components of the process include:

1. Preliminary scanning to identify all available complaints and select those meriting formal assessment by the Complaint Assessment Team.
2. Formal assessment by the Complaints Assessment Team.
3. Scoring by the Tasking & Coordination Group.
4. Investigation Selection.

There are two main ways in which complaints¹ come to the attention of the Commission. There are those that are provided to the Commission by the NSWPF or the Ombudsman, known as 'referred' complaints, and complaints that are made direct to the Commission by complainants, those representing them or other agencies, which are known as 'non-referred' complaints. Almost all referred complaints come to the Commission by means of lodgement on the NSWPF complaints management system (c@ts.i). A small number are delivered physically to the Commission by the NSWPF or the Ombudsman.

All referred complaints are subjected to a preliminary scan referencing the *Priority Setting Criteria* contained at Attachment 'A' (a **CONFIDENTIAL** document) to assist in selecting complaints that are suitable for formal assessment². Non-referred complaints are not subjected to the preliminary scan – all are formally assessed in order that appropriate action can be determined.

Those referred complaints which are selected in the preliminary scan and all non-referred complaints are then formally assessed by the Complaint Assessment Team, again with reference to the *Priority Setting Criteria*. The Team may refer a complaint to the Tasking & Coordination Group (T&CG) for consideration for investigation. A complaint is referred to the T&CG when there is a consensus that a complaint substantially meets the criteria, or, where a complaint which might not otherwise meet the criteria is relevant to a current investigation of an officer or is similar to other offences under investigation. Credibility is also a key factor throughout the assessment process as often quite serious complaints are raised that are without foundation and ought not attract disproportionate attention. The Team may also recommend no further action in regard to a referred complaint or that a non-referred complaint be referred to the NSWPF and/or the Ombudsman.

The Complaint Assessment Team apply the criteria as a course 'filter' with a proportion referred to the T&CG unlikely to meet the threshold for a preliminary or full investigation. This is done to ensure that serious matters are not missed particularly those that might benefit from the more detailed assessment capabilities that the T&CG can bring to bear. The

¹ Complaints are made up of complaints of misconduct (which may be subject to disciplinary action or prosecution if allegations are proved), and, less serious Local Management Issues (often customer service related issues which are usually dealt with through counselling, training and performance management).

² Referred complaints that are not subsequently taken over by the Commission are dealt with by the NSWPF usually with oversight by the Ombudsman.

T&CG applies a more refined filtering process, formally 'scoring' each complaint referred to it against the detailed criteria contained in the *Case Categorisation & Prioritisation Model* (CCPM) score sheet which is attached at 'B' (a **CONFIDENTIAL** document). If there is insufficient information to 'score' the complaint, the T&CG can arrange for further research to be undertaken and advice provided. Generally, those that score high in the process become the subject of a preliminary investigation or are recommended to the Commissioner as a potential subject for a full investigation. Those scoring less may be the subject of oversight. Those with low scores are not generally subject to further action by the PIC apart from referral to the NSWPF in the case of a non-referred complaint.

2. *How many complaints are not assessed by the PIC? Of those that are assessed, how many are not made the subject of a preliminary or full investigation by the PIC? What is the nature of these complaints? (p 7)*

Although there are variations, about 3,500 referred and non-referred complaints are made each year. There are also a number of less serious Local Management Issues (LMI's), bringing the total pool of complaints to about 5,000 (approx.) each year. The Commission conducts a brief preliminary scan of each of the 5,000 complaints and LMIs to determine suitability for formal assessment. The Commission considers this initial scan to be an important part of the process as, from time to time, serious complaints can be miscategorised as minor complaints, or minor complaints can be of a kind or occur in a pattern indicative of more serious misconduct. The Commission conducts the formal assessment against the criteria contained in Attachment 'A' for approximately 1000 complaints each year. Therefore, while the Commission may scan all complaints it formally assesses only 20% of the complaints.

Of the approximately 1,000 complaints that are formally assessed by the Commission approximately 200 are referred to the T&CG for assessment and scoring in the context of the CCPM. About 85 of these will go on to become preliminary or full investigations. Approximately 115 (58%) do not progress to preliminary or full investigation.

Absent detailed research it is not possible to characterise with any particularity those complaints that do not progress to become preliminary or full investigations. At a high level, the allegations contained in complaints that progress to an investigation are the same as those that do not. For example, as can be seen in the table below, 161 complaints of *Unauthorised/improper disclosure of information* were assessed during 2011-12, while 71 became the subject of a preliminary (56) or full (15) investigation, the remaining 90 did not. The 90 complaints were scored by the T&CG and achieved a Total Score which did not indicate that a Commission investigation was merited. Low scores in any combination of the 26 criteria used in the CCPM Score Sheet may contribute to a low Total Score and the complaint therefore not progress to investigation. Scores against individual criteria are not presently able to be captured by Commission systems. It is therefore not possible to describe the characteristics of complaints excluded from investigations beyond noting that they do not meet the Commission's criteria.

Table 1: Top 4 Allegations (by number) Assessed 2011-12

Alleged Offence Type	Assessed	Preliminary Investigation	Full Investigation
Unauthorised/improper disclosure of information	161	56	15
Improper Association	158	55	21
Failure to investigate	152	3	1
Misuse authority for personal benefit or the benefit of an associate	111	27	12

3. *How many preliminary investigations are not progressed to a full investigation? What are the characteristics of those preliminary investigations that do not progress to a full investigation? Could they have been dealt with at a lower level? (p 7)*

Preliminary investigations are conducted by the Commission in order to establish the veracity of allegations made against officers of the NSWPF or the NSWCC. The Commission receives numerous complaints during the year, each of which may contain numerous allegations. Section 24 of the PIC Act authorises the Commission to conduct preliminary investigations in order to "to discover or identify conduct that might be made the subject of a more complete investigation" or "to decide whether to make particular conduct the subject of a more complete investigation". The Commission is therefore able to use preliminary investigations as a way of assessing the merit of complaints prior to declaring a full investigation.

It follows that preliminary investigations which do not progress to become full investigations have been assessed by the Commission as not suitable for the allocation of further resources. Examples of when this might occur include:

- a. The Commission has exhausted all reasonable lines of inquiry. This does not mean that the Commission has formed a view that that the allegation is false, only that the Commission has no reasonable means available to progress the investigation further.
- b. The Commission has formed the view that the allegation was vexatious or otherwise not made in good faith. Often it is not possible to make this type of assessment without conducting preliminary inquiries into the nature of an allegation.
- c. The Commission has formed the view that the facts in a matter have been misinterpreted by a complainant. This usually occurs in situations where a complainant makes a good faith allegation of misconduct but has misunderstood facts which are materially relevant.
- d. The Commission has formed the view that the allegation is false. Where this occurs the Commission immediately ceases further inquiries.
- e. The Commission has identified misconduct, but that misconduct is not serious enough to warrant further Commission action. When this occurs, it is often the case

that another agency can better progress the matter and the Commission may disseminate material to that agency to assist.

- f. The Commission has referred an allegation back to the NSWPF for further investigation. This will usually happen where the Commission holds the view that the NSWPF is better placed to manage an investigation into a particular allegation.
- g. The Commission is satisfied that another agency has investigated the matter satisfactorily. On some occasions, the NSWPF and the Commission may have an investigative interest in the same allegation. Where this is identified, usually the Commission will defer further action until the NSWPF have completed their inquiries and review the NSWPF handling of the matter before conducting further inquiries.

In the 2011 – 12 financial year the Commission closed 99 of the 137 preliminary investigations that were active during the year. Of the 99, 71 were closed with no further action. The reasons for closure of the 71 preliminary investigations are summarised in Table 2 below. The remainder either progressed to a full investigation or information was formally disseminated to another agency for action.

Table 2: Reasons for Preliminary Investigation Closure 2011-12

Reason	n=71
a. All reasonable lines of inquiry have been exhausted.	34%
b. The Commission has formed the view that the allegation is vexatious or not made in good faith	7%
c. The Commission has formed the view that the facts in a matter have been misinterpreted by a complainant	9%
d. Commission forms the view that the allegation is false	22%
e. The Commission has identified misconduct, but that misconduct is not serious enough to warrant further Commission action. Matter is better dealt with by another agency.	4%
f. The Commission has referred an allegation back to the NSWPF for further investigation.	10%
g. The Commission is satisfied that another agency has investigated the matter satisfactorily.	14%

It should be noted that investigation resources were allocated to these matters following selection in the detailed filtering process outlined earlier in this paper. Following formal assessment and scoring each matter appeared to be credible and concern serious misconduct. The Commission is of the view that these matters could not be accurately assessed without allocating the resources required in these preliminary investigations.

4. Can the PIC provide more information on its Corporate Plan and its planning, performance review and reporting processes? (p 8)

[REDACTED]

The Commission's Corporate Plan forms the overarching framework for performance planning and reporting at the Commission. The Corporate Plan provides high level, strategic direction for the Commission and its work for a three year period. The Corporate Plan is developed by the Commissioner's Executive Group following significant consultation with the staff of the Commission.

Please find attached the internal copy of the Commission's Corporate Plan (Attachment 'C'). It contains the indicators against which the Commission's performance is measured reported upon in the Annual Report.

Each Branch and Unit develops its annual business plan from the Key Goal Areas and Strategies described in the Corporate Plan. Each business plan guides in detail the work of the respective branch or unit.

[REDACTED]

Performance reporting by managers to the Executive is embedded as part of the Business Plan cycle. Every April managers review Branch and Unit performance and compile performance reports (see Section 4 of the Business Planning guide). The Executive reviews the extent to which Branches and Units have achieved planned business results and the Commission's overall performance, the outcome of which is reported in Section 3 of the Annual Report with details provided in relevant sections of the Annual Report.

Branch and Unit business plans are reviewed following the completion of the reporting period. This review usually occurs during August.

5. Can the PIC provide the Committee with more information on "whether the (Crown Solicitor) guidelines are satisfactory ... and ... whether the process of ensuring compliance with the guidelines is satisfactory"? (p 14)

This question relates to evidence given by Commissioner James at the top of p12 of the draft transcript to the effect that "There is an issue about whether guidelines governing the Crown Solicitor for acting were observed by the Crown Solicitor in his deciding to act for the Crime Commission." The guidelines referred to by Commissioner James are the Premiers Guidelines for Litigation Involving Government Authorities: M1997-26 (Attachment 'F'). Those guidelines are still current. Section 3 "Civil Proceedings" is the applicable section. Paragraphs 3.3-3.6 are in the following terms:

3.3 Where a dispute arises between Government authorities which could give rise to civil proceedings, all attempts must be made to resolve the dispute at senior officer level and, if necessary, by the relevant Ministers, with a view to resolving the matter without recourse to litigation.

3.4 It is Government policy that, where possible, attempts should be made to settle disputes by utilising alternative dispute resolution techniques rather than by resorting to the Court system. If a dispute cannot be resolved at officer level then alternative dispute resolution procedures should be used prior to litigation being commenced.

3.5 Where it is not possible to resolve the matter in dispute, the matter should be referred to the Premier.

3.6 The Premier may decide to obtain the opinion of the Attorney General as to the merits of the dispute. No proceedings should be instituted without the approval of the Premier.

The Commission was advised by the Crown Solicitor by letter dated 24 March 2011 that the Premier's approval was not obtained for the commencement or maintenance of the proceedings brought by the NSW Crime Commission against the Police Integrity Commission in 2011 and that in the Crown Solicitor's opinion Premiers Memorandum M1997-26 did not apply to a dispute between the Crime Commission and the Police Integrity Commission in relation to the Police Integrity Commission's powers.

In the Commission's view the guidelines are quite clear but there appears to be no mechanism for ensuring compliance.

6. Can the PIC provide further information about the nature of its feedback to the Police Force on the draft critical incident investigation guidelines? Have the issues raised by the PIC been addressed in the reviewed guidelines? (p 3)

As noted in the Commission's Annual Report 2011-12, in October 2011 the Commission, along with other relevant stakeholders, were invited by the NSWPF Professional Standards Command to comment on a revised version of the NSW Police Force Guidelines for the Management and Investigation of Critical Incidents. In light of the response received from the NSWPF in November 2011 the Commission, along with the NSW Ombudsman's Office, raised further concerns with four aspects of the Guidelines through a joint letter and meeting with representatives from the Professional Standards Command (PSC). These issues and the results of further consultations with the Professional Standards Command are listed below.

- a. The omission of public interest considerations from the definition of what constitutes a critical incident – public interest was reinstated as a matter to consider by the Region Commander in whether or not to categorise an incident as critical.
- b. Inadequate identification of conflicts of interest – the Professional Standards Command agreed to consider developing a process that will document potential conflicts of interest in respect of key individuals involved in a critical incident investigation.
- c. The revised definition of 'serious injury' in the guidelines including the potential for confusion with the term 'seriously injured' in the mandatory Drug & Alcohol provisions of the Police Act 1990 - PSC will reinstate the 2006 definition for serious injury with only minor, agreed modifications.
- d. The need to clarify responsibilities around misconduct and systemic issues – the PSC agreed to note in the guidelines that information indicative of misconduct, procedural or systemic issues, and OH&S, ought be dealt with as identified even though the

Investigation Report in the case of a death is not required to be completed until after the conclusion of the coronial inquest.

7. Liaison between the PIC and the Crime Commission (pp 10-11) and resolution of conflicts in legal opinions (p 12).

The Commission notes that there is no present conflict in legal opinions between the Crime Commission and the PIC. The Committee's continuing interest in these matters is noted.

**RESPONSES TO ADDITIONAL QUESTIONS INCLUDED IN LETTER OF
28 FEBRUARY 2013**

1. *Prior to the Committee's general meeting with the PIC in May 2012, the Committee was advised by the Inspector of the PIC that there were no formal agreements with regard to communication between the PIC and the Inspector of the PIC.*

a. *Is this still the case?*

Yes, this is still the case. All communications between the offices occur directly between the Inspector and the Commissioner. Discussions occur regularly and are productive with no difficulties experienced. While the possibility of an agreement was discussed during 2012, it was agreed that formalisation of liaison arrangements was not necessary.

b. *From the PIC's point of view, is the level of the communication between the PIC and the Inspector satisfactory and sufficient for the exercise of the functions of both offices?*

Yes, the level of communication between the PIC and the Inspector is satisfactory and sufficient.

2. *Can you comment on the current state of the relationship and effectiveness of communication between the PIC and the NSW Police Force?*

The relationship with NSWPF in respect of the investigative function is effective. NSWPF are responsive to requests for information and assistance and existing mechanisms for reducing duplication of effort and avoiding interference in respective investigations work well.

The relationship in terms of the Commission's prevention function is more difficult to characterise. The Commission is committed to a consultative approach and will continue to work closely and collaboratively with the NSWPF in relation to its prevention projects and the recommendations that arise out of those projects. The Commission expects this commitment to be reciprocated by the NSWPF in a consistent manner across the agency. In some areas and in relation to some projects, a cooperative spirit is clearly in evidence. There have been occasions, however, in connection with some projects where the responsiveness of the NSWPF and its level of engagement with the Commission has been poor. There is no simple solution to this, and these experiences have underscored the importance of investing in regular liaison and communication – to ensure that the Commission's expectations are clear – and in reporting publicly, as it has done in the past, in circumstances where it has experienced difficulties in its relationship with the NSWPF.

3. *The Operation Winjana report, published in November 2012, included a number of recommendations regarding affected persons, as well as a number of recommendations regarding regulations and guidelines for the NSW Crime Commission. To your knowledge,*

what progress is being made with regard to adopting and implementing these recommendations?

A brief has been provided to the Office of the Director of Public Prosecutions for consideration of prosecution of Lou Novakovic for the criminal offences suggested in the Report. Material has also been supplied to the Legal Services Commission for consideration of further action against Salina Sadiq.

In relation to the recommendations made by the Commission in Chapter 7 regarding the content of the guidelines to be established by the Management Committee of the NSWCC or regulations able to be made under s 16B, the Commission has received no response. In relation to the recommendation at paragraph 579 concerning the Inspector of the NSWCC, as far as the Commission is aware an Inspector is still to be appointed.

[REDACTED]

[REDACTED]

5. *In England and Wales, the electorate vote for the Police and Crime Commissioners. Do you have any comment to make on the appropriateness of such a process in the NSW context?*

Apart from noting that the first elections for the Police and Crime Commissioners were held in November 2012 and therefore the full impact of these new arrangements is yet to be assessed, the Commission has no comment to make on the appropriateness of such a process in the NSW context.

[REDACTED]

[REDACTED]

A number of attachments (Appendices A, B, D & E) were considered In Camera by the Committee.

POLICE INTEGRITY COMMISSION CORPORATE PLAN 2012-15

Key Directives

- Vision** Public confidence in the integrity of the NSW Police Force and the NSW Crime Commission
- Mission** Contribute to the integrity of the NSW Police Force and the NSW Crime Commission by detecting, investigating and preventing serious officer misconduct.
- Values** Integrity, independence, fairness, accountability, impartiality and continuous improvement

Key Goal 1

To detect, investigate and expose serious officer misconduct and corruption in the New South Wales Police Force and the New South Wales Crime Commission

Objective	Strategies	Indicators
1.1 Detect serious officer misconduct	<p>Ensure that the public/other agencies are aware of available avenues to contact the Commission with information in relation to serious officer misconduct</p> <p>Maintain effective complaints management and intelligence development capabilities</p>	<p>% of total complaints of misconduct made directly to the Commission</p> <p>% of own motion investigations</p>
1.2 Deter serious officer misconduct through investigation	<p>Efficiently manage resources and processes to investigate serious officer misconduct</p> <p>Make recommendations for consideration of disciplinary action and prosecution as a result of investigations</p> <p>Conduct public hearings as appropriate</p>	<p>% of investigations that resulted in material being communicated to NSW Police Force for consideration of further action</p> <p>% of investigations that resulted in briefs being referred to the DPP for consideration of prosecution</p> <p>% of investigations that lead to a public hearing</p>
1.3 Exposure of serious officer misconduct	<p>Prepare reports following public hearings, present those reports to Parliament and make them publicly available</p> <p>Provide evidence for prosecutions arising from investigations</p>	<p>% of growth in internet traffic to access the Commission website</p> <p>% of investigations leading to prosecutions</p>

Key Goal 2

Prevent serious officer misconduct by supporting improvements to the NSW Police Force and the NSW Crime Commission systems and practices

Objective	Strategies	Indicators
<p>2.1 Informed advice and recommendations on improvements to systems and practices</p>	<p>Use investigations and hearings to examine policies and practices that may have contributed to serious officer misconduct</p> <p>Undertake research projects emphasising the prevention of suspected officer misconduct</p> <p>Work with senior officers to secure a commitment to implement Commission recommendations</p>	<p>% of investigations where corruption prevention themes are identified and explored</p> <p>% of recommendations accepted</p>
<p>2.2 Informed advice and recommendations on improvements to the quality of complaint investigations</p>	<p>Oversight selected complaints investigations, draw on the results of investigations and research to recommend improvements where deficiencies are identified</p>	<p>% of complaints which are oversighted</p> <p>% of complaints oversighted with a satisfactory outcome</p>

Key Goal 3

Continued accountability for the Commission

Objective	Strategies	Indicators
3.1 Continued public accountability for the Commission	<p>Accurate and timely responses to requests for information from the Inspector and the Parliamentary Joint Committee</p> <p>Public reporting on the activities of the Commission</p> <p>Use of statutory powers in compliance with legislative requirements</p>	<p>% of responses to requests finalised within an agreed timeframe</p> <p>Number of Commission publications</p> <p>All uses of statutory powers to be checked by Commission lawyers</p> <p>% of uses assessed as compliant in Ombudsman audits of Telecommunications Interception, Controlled Operations and Surveillance devices deployments</p>

Key Goal 4

The Commission as a productive workplace

Objective	Strategies	Indicators
4.1 Provide an equitable, safe and satisfying workplace	Develop and maintain an organisational culture which promotes equity, diversity and safety	Continued compliance with Work, Health and Safety legislation, the Disability Action Plan and NSW Action Plan for Women
4.2 Promote a culture of learning and development	Ensure constructive communications between units	Number of unit managers' meetings per year
4.3 Strong internal governance framework	<p>Embedding risk management in the planning framework</p> <p>Maintain and enhance planning processes by aligning individual and business performance with the corporate plan</p> <p>Maintain effective records and financial management systems</p>	<p>Corporate risks reflected in relevant business unit plans</p> <p>Quarterly review of key risks by Executive</p> <p>Implement and maintain performance measures for each business unit</p> <p>Review, implement and maintain individual performance agreements</p> <p>Regular reporting to the Executive on business performance and financial management systems</p>

Premier and Cabinet

NSW Government

M1997-26 Litigation Involving Government Authorities

Status: current

The purpose of this Memorandum is to issue revised guidelines for litigation involving Government authorities. This Memorandum replaces Memorandum 91-9 issued on 18 April 1991. The guidelines issued by way of this Memorandum take effect immediately.

The guidelines apply both to civil and criminal proceedings. They are based on the general principle that litigation between Government authorities is undesirable and should be avoided whenever possible. Where litigation does occur, Government authorities should take steps, as set out in the guidelines, to consult with the authority against which litigation has been commenced and attempt to reach agreement on as many factual and legal issues as possible, to ensure only matters which need to be resolved by the Court are left in issue. In civil proceedings, alternative dispute resolution procedures should be utilised before resorting to the Court system.

The guidelines recognise that, in some circumstances, the only appropriate course is to commence prosecutions against Government authorities as a way of enforcing compliance with environmental, safety and other standards. The guidelines are not intended to interfere with the normal prosecution discretion of Government authorities.

The guidelines apply to all Government authorities, including Government Trading Enterprises. The guidelines are not expressed to apply to State Owned Corporations. However, as the guidelines provide a sound approach to the management of litigation and disputes, I urge shareholding Ministers and Boards of State Owned Corporations to agree to adopt the guidelines by incorporating them into their Statements of Corporate Intent. This Memorandum should therefore be forwarded to all State Owned Corporations for their consideration.

Any inquiries as to the operation and application of the guidelines may be directed to Mr Bill Grant, Deputy Director-General, Attorney General's Department (Ph 9228 7017) or Ms Jane Smith, Legal Branch, The Cabinet Office (Ph 9228 4000), or Louise Wattus, Legal Branch, The Cabinet Office (Ph 9228 5546).

Would you please ensure that these guidelines are brought to the attention of all departments and other authorities within your portfolio.

Bob Carr
Premier

ISSUED: Legal Branch, The Cabinet Office
DATE: 8 October 1997

GUIDELINES FOR LITIGATION INVOLVING OR BETWEEN GOVERNMENT DEPARTMENTS AND AUTHORITIES

1.0 Application of these Guidelines

1.1 These guidelines apply to:

(a) all Government Departments; and

(b) all Government agencies, instrumentalities and bodies, including Government Trading Enterprises, whether or not they represent the Crown.

1.2 In these guidelines, the above will all be referred to as Government authorities.

1.3 These guidelines do not apply to State Owned Corporations or local government authorities. However, as the guidelines and the principles underpinning them provide a sound approach to the management of litigation by publicly owned enterprises, State Owned Corporations are encouraged to adopt the guidelines as part of their policy. Similarly, prosecution agencies are urged to apply the principles of the guidelines to State Owned Corporations.

1.4 These guidelines do not affect any statutory requirement for the consent of a particular person or body before proceedings are commenced.

1.5 The aims of the guidelines are, so far as possible, to ensure that:

(i) in the prosecution of one Government authority by another the cost to the public purse is kept to a minimum;

(ii) only appropriate prosecution action is taken;

(iii) inappropriate or irrelevant defences are not pleaded;

(iv) the Court's time spent in resolving prosecutions or disputes involving Government authorities is kept to a minimum;

(v) that responsible Ministers are kept informed of pending prosecutions and possible disputes between Government authorities; and

(vi) Government authorities act, so far as is possible, as model litigants in proceedings before the Court.

1.6 These guidelines replace and expand those which were issued on 18 April 1991 by the then Premier, the Honourable N. F. Greiner.

2.0 Criminal Proceedings

2.1 Government authorities have a responsibility to comply with the law and can be subject to the same penal sanctions as the rest of the community.

2.2 Criminal proceedings against Government authorities may be the only appropriate method of enforcing compliance with prescribed safety, environmental and other standards. Such prosecution action may be necessary to ensure the acceptance of an appropriate sense of responsibility for the consequences of the breach of such standards or because it is otherwise in the public interest for proceedings to be commenced.

2.3 Nothing in these guidelines is meant to in any way interfere with the normal prosecution discretion as to whether or not to commence prosecution proceedings or to discontinue prosecution proceedings.

2.4 However, it is appropriate that Government authorities vested with the power to commence prosecutions should consult with the Government authority against whom a prosecution is contemplated. Such consultation will ensure that:

(i) inappropriate procedures are changed as soon as possible;

(ii) the facts surrounding the incident are ascertained and, if possible, agreed upon;

(iii) any defence to the prosecution is made known;

(iv) inappropriate proceedings which would not achieve the object of sheeting home responsibility against the body to be prosecuted are not taken; and

(v) the Government authorities co-operate to ensure the Court only has to deal with the real questions in issue.

2.5 This consultation process is consistent with the normal processes that are followed by a prosecution agency when determining whether or not, in all the circumstances, prosecution action is the most appropriate way of dealing with a possible breach of law and is not meant to imply that Government authorities are treated any more favourably than other defendants.

2.6 The consultation process should be initiated at senior officer level with a view to full discussion, on a without prejudice basis, of the incident in question. It may be appropriate that legal proceedings not be commenced. To illustrate, the Government authority liable to prosecution action may undertake some action which will ensure that similar breaches do not occur in the future and in particular circumstances, this may be acceptable to the prosecution authority.

2.7 If the matter is to continue then the consultation process should be used to identify the factual or legal issues in dispute in the matter and to assist with reaching agreement on as many of those issues as possible. To illustrate, it may be that there can be an agreed statement of facts or a significant number of the relevant facts can be agreed so that a Court's time is not wasted in establishing these facts.

2.8 It is incumbent on Government authorities to do all they can to narrow the issues before the Court and in this regard authorities are urged to be 'model litigants', ensuring that only matters which need to be resolved by the Court are left in issue.

2.9 It should be recognised that to enable the allegedly offending Government authority to participate with full knowledge in the consultation process it will be necessary for the prosecuting authority to supply a statement of facts outlining the nature of the alleged offence. Whilst it may not be appropriate, at this stage of proceedings, for the prosecuting authority to provide a full brief of evidence to the other authority, it is recognised that sufficient information should be provided to allow the other authority to evaluate its position.

2.10 The consultation process is to take place within an appropriate time frame. It is essential that these guidelines are not used by any Government authority to delay the resolution of a matter which could result in prosecution action. All necessary consultations should be finalised within a period of 30 days from the time that the statement of facts is provided.

2.11 If, after the consultation process the prosecution authority considers that prosecution action should be instituted, then the Chief Executive Officers must bring the matter to the attention of the responsible Ministers.

2.12 If there are points of law in dispute between the Government authorities, it may be appropriate that these questions be referred to the Attorney General for Crown Law advice.

2.13 Whilst the Crown law officers' opinion on the matters referred should be given due weight in any consideration of whether or not charges should be laid or defended, these questions must ultimately be resolved by the relevant Government authorities.

2.14 If the matter proceeds to prosecution action it is emphasised that all steps must be taken by the authorities to reduce the issues in dispute between the parties, including the admission of all facts not in issue, thereby saving court time and keeping the cost to the public purse to a minimum.

2.15 The level of representation for both the prosecuting authority and the defending authority should be appropriate to the difficulty of the facts and issues still in dispute, but every effort should be made to keep legal costs to a minimum.

2.16 Where a prosecution action has been finalised, appeals should only be considered in exceptional cases. If possible, the Attorney General should be asked to provide Crown law advice on the likelihood of success of any appeal proceedings. Whilst such advice is not binding, it must be given due weight in any consideration of whether or not there should be an appeal.

3.0 Civil Proceedings

3.1 These guidelines apply where civil proceedings are being contemplated by one Government authority against another (including civil proceedings by way of cross claim) or if proceedings are commenced against two or more Government authorities.

3.2 Litigation is expensive to the parties and to the State which funds the legal system. Civil disputes between Government authorities should not be litigated before the procedure set out in paragraphs 3.3, 3.4 and 3.5 has been followed. The Premier will not approve the institution of proceedings unless there are compelling circumstances. Furthermore, Government authorities should, if practicable, co-operate to ensure that the total liability of the government is kept to a minimum: this means that cross claims for indemnity or contribution between Government authorities should not be litigated.

3.3 Where a dispute arises between Government authorities which could give rise to civil proceedings, all attempts must be made to resolve the dispute at senior officer level and, if necessary, by the relevant Ministers, with a view to resolving the matter without recourse to litigation.

3.4 It is Government policy that, where possible, attempts should be made to settle disputes by utilising alternative dispute resolution techniques rather than by resorting to the Court system. If a dispute cannot be resolved at officer level then alternative dispute resolution procedures should be used prior to litigation being commenced.

3.5 Where it is not possible to resolve the matter in dispute, the matter should be referred to the Premier.

3.6 The Premier may decide to obtain the opinion of the Attorney General as to the merits of the dispute. No proceedings should be instituted without the approval of the Premier.

3.7 Where a number of Government authorities are defendants in the same civil proceedings, they should co-operate in the conduct of their defences with a view to avoiding inflating the damages recoverable by the plaintiff, as well as unnecessary expense or use of resources. Unless impracticable, this co-operation should involve the sharing of legal representation.

4.0 Claims for Public Interest Immunity

4.1 Except in cases of emergency, no Government authority should object to the production of documents or the disclosure of information on the ground of public interest immunity without first consulting the Solicitor General or, if the Solicitor General is unavailable, the Crown Solicitor. If it is not possible to consult first, notice should be given to the Solicitor General at the earliest opportunity.

4.2 This practice will ensure that those charged with the responsibility of advising the Attorney General (who in the last resort may have to swear an affidavit formulating and claiming the immunity) can have an appropriate opportunity to do so before a claim is publicly made. The practice can result in inappropriate or excessive claims being withdrawn before public embarrassment or waste of costs occur.

4.3 Any process of discovery or subpoena relating to Cabinet documents or records should continue to be brought to the attention of the Director General of The Cabinet Office before any decision regarding access is made.

5.0 General

5.1 No Government authority should claim that any New South Wales legislation (including subordinate legislation) is invalid without first consulting the Attorney General.

6.0 Technical Defences

6.1 No Government authority should take a "technical defence" (i.e., defence not available to normal litigant) without first consulting the Attorney General.

7.0 Operation of the guidelines

7.1 These guidelines are not intended to affect substantial legal rights or to give rise to additional legal claims or defences. The guidelines should not be raised by Government authorities in legal proceedings.

© 2013 Department of Premier and Cabinet