

NSW POLICE FORCE

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ABN 43 408 613 180

**PROFESSIONAL
STANDARDS COMMAND**

Committee on the Independent Commission Against Corruption
Parliament of NSW
Macquarie Street
Sydney NSW 2000

**Re: Questions on notice to the NSW Police Force – Inquiry into protection of
public sector whistleblower employees**

On 5 March 2009 the Committee wrote to the Assistant Commissioner, Professional Standards Command requesting a response to questions on notice, in lieu of the evidence that the NSW Police Force was to give on 1 December 2008.

That response is attached to this correspondence.

I have provided a copy of the NSWPF Complaint Handling Guidelines, s169A Guidelines and the Class and Kind Agreement between the NSW Ombudsman and PIC, to assist the Committee.

Yours sincerely


J. A. Loy ARM
A/Assistant Commissioner
Professional Standards Command

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DRAFT

Committee on the ICAC

Inquiry into protection of public sector whistleblower employees

Questions on notice to the NSW Police Force

1. Your submission states that the NSW Police Force receives 2,500 internal reports of misconduct each year, most of which do not meet the criteria to be considered a protected disclosure
 - a) What proportion of the internal reports received in the last 2 financial years did not meet the relevant criteria?
 - b) Which of the criteria did the majority of complaints not meet?

Although the Protected Disclosures Act may technically apply to police complaints, the NSWPF does not assess complaints about police misconduct in accordance with that Act and therefore is unable to provide the statistical data requested.

It is NSWPF procedure, to register, assess and investigate complaints in accordance with the legislative provisions under Part 8A of the Police Act 1990. Compliance with Part 8A is considered sufficient to also meet the requirements under the Protected Disclosures Act ie confidentiality and protection against reprisals. The Part 8A system provides protection in a much broader range of circumstances than the Protected Disclosures Act.

The NSWPF police complaints handling model

Part 8A was written in compliance with the recommendations of the Wood Royal Commission. It is a comprehensive complaint handling model. All allegations about police misconduct, from the most minor managerial matters (eg customer service issues) to the most serious criminal allegations are registered on the system. A 'complaint' is not defined in the Police Act 1990 and therefore includes all written allegations of police misconduct. This will include reports by managers and supervisors that would not generally be considered to constitute a 'complaint', but are taken to meet the requirements under Part 8A because the report 'alleges or indicates' conduct that meets the requirements of Part 8A.

A copy of the NSWPF Complaint Handling Guidelines is attached for the information of the Committee. Also attached is a copy of the Commissioner's s169A Guidelines, referred to in those guidelines.

Protections under Part 8A of the Police Act 1990

Part 8A protects the identity of complainants (s169A) and provides for criminal sanctions where reprisal action is taken (s206), in the same way that the Protected Disclosures Act does.

However, there is no objective test to be met before the protections are invoked. A mere allegation is enough. The protections are invoked as long as the allegation meets the following criterion under Part 8A.

The complaint is in writing and 'alleges or indicates' the following:

- conduct of a police officer that constitutes an offence
- conduct of a police officer that constitutes corrupt conduct (including, but not limited to, corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988*),
- conduct of a police officer that constitutes unlawful conduct (not being an offence or corrupt conduct),
- conduct of a police officer that, although not unlawful:
 - is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or
 - arises, wholly or in part, from improper motives, or
 - arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or
 - arises, wholly or in part, from a mistake of law or fact, or
 - is conduct of a kind for which reasons should have (but have not) been given,
- conduct of a police officer that is engaged in accordance with a law or established practice, being a law or practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect.

No intention to 'complain' is required and there is no definition of 'complaint' in the Act, so any internal document is potentially caught.

The Ombudsman is notified under the class and kind agreement (attached). The matters listed are considered serious by the NSW Ombudsman and are subject to review by the NSW Ombudsman's Police Team. The NSW Ombudsman can direct the Commissioner of Police to investigate or further investigate a matter. The NSW Ombudsman can also make a Part 8A complaint, together with any investigation of the complaint and any related issues, the subject of an investigation under the Ombudsman Act.

The PIC trawls the police electronic complaints system (c@tsi) and can take over any matter of interest to the Commission.

Police complaints data collection

The c@tsi system was developed through a tri-agency arrangement between the NSWPF, NSW Ombudsman and PIC and was not configured to record and manage Protected Disclosures.

It was configured in accordance with the legislative requirements under Part 8A of the Police Act, which reflects the NSWPF complaint oversight model and provides all complaint statistical data. It does not produce statistical reports in relation to Protected Disclosures.

Annual reporting on police complaints

Detailed complaint statistics are annually reported to the NSW Parliament, by the NSW Ombudsman, which may be of interest to the Committee. See attached extract from the NSW Ombudsman's Annual Report for 2007-2008.

Complaints about civilian NSWPF employees

Part 8A of the Police Act does not apply to complaints about civilian employees. The Protected Disclosures Act applies to a complaint about a civilian employee.

There were no protected disclosures concerning civilian employees during the last 2 financial years.

- c) Were any complaints referred to an investigating authority? If so, what proportion?

In the 2007-2008 reporting period the NSW Ombudsman was notified of 2969 police complaints (internal and external). Of complaints notified to the NSW Ombudsman in accordance with the class and kind agreement (these are considered serious complaints by the NSW Ombudsman) 1056 (36%) were made by police officers. They are assessed based on the allegation as stated, not the substance of the allegation. Of those complaints the outcomes were as follows:

Management counselling	36%
Official reprimand/warning notice	15%
Additional training	10%
Performance agreement	7%
Coaching/mentoring/referral to specialist services	6%
Change in policy/procedure	5%
Increased or change in supervision	4%
Transfers	4%
Removal under s181D (dismissal)	3%
Reduction in rank/seniority	3%
Restricted duties	3%
Formal apology	2%
Deferral of salary increment	1%
Compensation paid	1%

d) What was the cost of conducting investigations into internal complaints?

The NSW Police Force complaint system does not operate like other NSW government agencies, which may have a discrete unit responsible for managing a small number of protected disclosures.

It is a decentralised managerial model, in which each Command investigates most complaints and allegations (serious and minor) made about the conduct of officers within their own Command. The police officers who perform those functions are operational police officers. They are not dedicated complaint investigators.

The Professional Standards Command also conducts investigations into serious police misconduct, covert operations, integrity tests and joint investigations with the Police Integrity Commission.

Investigations into civilian members of staff are conducted by administrative officers, who are similarly not dedicated investigators. These officers conduct investigations in addition to their normal employment duties.

The exact figures on the costs of conducting internal investigations by the NSW Police Force are not currently collated by the NSW Police Force.

e) Are there, in your view, sufficient protections available to public sector workers who make internal reports?

Generally there are sufficient protections available to NSW Police Force employees who make internal reports. However to create greater consistency within the NSWPF system, civilian employees who make allegations against police officers should have the same legislative protection against reprisals as police officers who make allegations against other police officers. See response to Q 5.

2. Your submission states that NSW Police successfully prosecuted a police officer under s60 of the Crimes Act for intimidating another officer who had made a disclosure.

- a) Please outline this case in general terms for the Committee, including the charges laid and the outcome in terms of sentencing.
- b) Why did NSW Police initiate proceedings in relation to this case under the Crimes Act, instead of the Protected Disclosures Act?

When the offences occurred the officer was not an internal police complainant (IPC), therefore the conduct did not constitute reprisal action

The victim became an IPC when she complained of the behaviour that led to the charges being laid. The subject officer was charged with the following offences:

- Stalk/intimidate with intent to cause fear of physical/mental harm – Section 562AB(1)
- Obtain money/valuable thing/financial advantage by deception for a false claim that he performed rostered duty section 178BA(1)

The officer was convicted of both offences and sentenced to a good behaviour bond under section 9 for 12 months. An apprehended violence order was also granted for a period of 12 months.

What is significant about this matter is that it establishes criminal action can be taken against a NSWPF employee where the victim (another employee) is willing to be identified and give evidence in the criminal matter. There was no confidentiality restriction in this matter. The victim fully cooperated and assisted the investigation.

The NSW Police Force is committed to taking criminal action against any employee found to have engaged in criminal conduct.

- c) The penalty provisions for reprisal offences under s20 of the Protected Disclosures Act provide for a maximum penalty of twelve months imprisonment or 50 penalty units, while s60 of the Crimes Act provides for various offences ranging from 5 to 14 years imprisonment. Do you have any comments on the adequacy of the penalty provisions for reprisal offences under the Protected Disclosures Act?

The Protected Disclosures Act penalty provisions cover a range of workplace conduct issues. The penalty provisions do not appear to be intended to cover conduct that would ordinarily be an offence under the Crimes Act such as assault, malicious damage to property, stalking etc, but are intended to cover conduct such as ostracising, derogatory comments, exclusion from social functions, confined to meaningless work, unfair treatment in employment etc. They are sufficient penalties for that type of conduct.

- d) In spite of this successful prosecution, your submission notes that the current legislative provisions do not appear to be effective, either as a deterrent against reprisals or in terms of prosecuting those who have engaged in reprisals. In your view, what changes are required to improve the detrimental action provisions of the relevant legislation?

The submission referred to the findings of research studies such as the 'Whistling While They Work' paper.

One of the obstacles to prosecuting an officer for detrimental action can be the operation of the confidentiality provision. While this is an important provision, without direct evidence that an officer engaging in reprisal action knew the

person's status as a complainant, the provision can provide a defence to the criminal charge.

The problem could then be compounded where the complainant believes he or she is the victim of reprisal action, but does not give consent to be identified in order that a manager can directly intervene and warn the officer to stop the behaviour.

The NSWPF is currently examining whether there are any feasible options to resolve this conflict and will be considering any recommendations made by the Committee in that regard.

3. Your submission states that NSW Police Force uses a decentralised complaint handling model, with complaints being made to officers with a ranking directly above that of the complainant and subsequently 'passing through a number of hands before reaching the delegate'
 - a) What specific training in complaint management does NSW Police provide its officers, to assist them in dealing with handling internal complaints about misconduct?

The NSW Police Force provides extensive training in complaint management. The complaint system is also extensively oversighted by the NSW Ombudsman and Police Integrity Commission. All allegations of police misconduct, from the most minor to the most serious (including criminal) are reviewed or are subject to audit by the NSW Ombudsman.

The NSWPF police complaint handling system, assesses and manages all written allegations (including verbal allegations that are reduced to writing) about police officers under Part 8A of the Police Act 1990. Part 8A covers minor and serious allegations of misconduct (subject to the class and kind agreement). There is no threshold test such as 'shows or tends to show'. The 'allegation' just needs to meet the criteria under s122 of the Police Act 1990.

The Professional Standards Command provides extensive training, guidelines and reference material for officers involved in the investigation and management of police complaints. These include the Complaint Investigation Course, c@tsi Course, Complaint Handling Guidelines and Complaint Practice Notes.

Consultants and Professional Standards Managers are also available to assist the field by providing ongoing advice.

The Professional Standards Command attends the Police College and gives presentations to police recruits on their rights and obligations with respect to making a complaint and reporting misconduct.

The Internal Witness Support Unit provides quarterly training presentations to students at the NSW Police College, which includes a master lecture followed by tutorials conducted by IWSU case officers.

Presentations are also regularly given at Local Area Command training days and forums such as Executive Officer forums and Professional Standard Duty Officer forums.

The NSW Ombudsman also attends forums and gives presentations.

Scenarios are developed and published in the Police Weekly and Policing Issues and Practice Journal.

The Professional Standards intranet site includes copies of all complaint related policies and procedures. All NSWPF employees can freely access this material from their own desktop.

Complaints about civilian employees are managed under s184 of the Police Act which adopts Part 2.7 of the Public Sector Employment and Management Act. Officers who conduct these investigations are trained by the Professional Standards Command on how to conduct investigations, the requirements for confidentiality and the Protected Disclosures Act.

- b) You note that the decentralised model can result in complainants not receiving adequate support. What procedures does NSW Police have in place to provide support for whistleblowers?

This issue only relates to verbal allegations that are caught by the Police Regulation. Written complaints are immediately assessed by commissioned officers (Inspector or above) and do not pose a problem in that regard.

The Police Regulation imposes a duty on police officers to report criminal activity or misconduct to a 'senior officer'. So a Probationary Constable can comply with his or her duty by verbally advising a Constable or Senior Constable, who does not have any management status. What happens in practice is that the issue is reported through the chain of Command.

The Professional Standards Command and the NSW Ombudsman are currently examining a disclosure model that clearly defines what constitutes 'misconduct' and defining a 'senior officer' to be an officer nominated by the Commissioner to receive disclosures. This will bring the Police Regulation model in line with other Government disclosure models and in line with the Ombudsman's Model Internal Reporting Policy. This will ensure that the officer's verbal disclosure is properly recorded and acted upon. It will also ensure that the Commander or any other senior manager can take immediate action in relation to providing welfare assistance if needed and reduces the number of officer's who are aware of the disclosure.

4. Your submission notes that the NSW Police Force relies on the provisions of the Police Act in handling complaints of misconduct. The Police Act provides for notification to the complainant of action taken or proposed, without specifying a time

limit for the notification, while the Protected Disclosures Act requires such a notification to occur within 6 months of the complaint being made. Does NSW Police Force have policies in place that provide for timely notifications or updates to be made to complainants?

More serious allegations that require an evidence based investigation are required to be completed within 90 calendar days. All other matters must comply with the corporate standard of 45 days. If the protected disclosures standard of 180 days is applied to serious police complaints ie those with a 90 day standard, there is a 93.2% compliance rate. Reasons for exceeding the 90 day period could be seeking advice from the DPP, waiting for the outcome of a criminal hearing, matters taken over by the PIC, complex matters involving surveillance, telephone intercepts, the investigation is on hold as it may compromise another investigation etc.

If the 180 day standard is applied to all police complaints ie 90 day standard and 45 day standard a compliance rate of 98.3% is achieved.

Matters that exceed NSWPF timeliness standards are notified to the Professional Standards Command by the c@tsi system and followed up by consultants. There are also regular meetings with the Assistant Ombudsman (Police). The Ombudsman's Office actively monitors NSWPF compliance with timeliness standards.

The NSWPF must consult with the complainant before making a decision and record whether the complainant was satisfied with the action taken or to be taken. This is recorded in the final report that is sent to the NSW Ombudsman.

5. You identify the increasing number of civilian employees working in the NSW Police Force as an issue, due to inconsistencies in the management of complaints, depending on whether they are made by sworn officers or civilian staff. What legislative changes would be required to provide for more uniform treatment and outcomes for internal witnesses within the NSW Police Force?

S206 of the Police Act does not provide legislative protections for civilian employees who make allegations against police officers. It only protects a police officer who makes an allegation against another police officer. There does not appear to be any reason for this disparity.

S206 of the Police Act could be amended to apply to any NSW Police Force employee.

6. During the previous committee's 2006 review of the Protected Disclosures Act, a number of agencies raised the issue of the Act being used by some individuals to air personal grievances and/or to mask performance issues. Has this posed a problem for the NSW Police Force, and if so how do your policies and procedures address this problem? Are there any legislative changes that you think are needed to ensure that personal grievances and performance management issues do not hinder the

investigation of bona fide disclosures and the effective operation of the Protected Disclosures Act?

The NSWPF system does not apply the same threshold tests as the Protected Disclosures legislation. It is a much broader scheme. The identity of any person who discloses police misconduct is kept confidential and police officers are protected against reprisal action for making allegations of misconduct. The protections arise based on the allegations that are made, no matter what the motivation. Any amendments to the Protected Disclosures Act would not change the requirements under Part 8A of the Police Act, which is the NSWPF primary system.

7. You indicated that the NSW Police Force and NSW Ombudsman are discussing a project to examine the whistle blowing provisions of the Police Act and Police Regulations and their overlap with the Protected Disclosures Act

- a) What outcomes does the NSW Police Force hope to achieve through this project?
- b) Have any particular issues been identified for the project to focus on?

The aim of the project is to develop one simple disclosure model for NSW Police employees. Some of the issues being examined are:

- Defining a 'senior officer' under the Police Regulation to be a person nominated by the Commissioner of Police to receive internal disclosures about misconduct or criminal activity by police officers.
- Defining 'misconduct' under the Police Regulation to be conduct that, if proven, would warrant serious management action or criminal prosecution
- Stating the obligations of persons who make disclosures to assist fully with the investigation
- Defining what type of allegation will not warrant protection. For example:
 - false or misleading allegations;
 - allegations made when directed to answer questions under the Police Regulation;
 - allegations made to avoid management action

8. Your 2006-2007 Annual Report states that an internal witness survey was completed with the involvement of the University of Technology. Did the survey results reveal any trends or issues of concern to the NSW Police Force?

This project was a bi-annual survey conducted by UKY (Urbis Keys Young) not the University of Technology (UTS).

Only a small proportion of internal witnesses are offered a place on the Internal Witness Support Program. In the period of the study, 2186 complaints were referred to the program for assessment against the criteria for program participation. Factors that influence assessment include the seriousness of the alleged misconduct, the likelihood of victimisation and harassment of the complainant, the rank of the complainant compared to the officer complained of and the likelihood the complainant will be required to give evidence in the matter. Matters which do not meet the criteria include supervisor's reports about the actions of junior officers or matters which do not amount to serious misconduct. The program is voluntary.

The study only surveyed officers who accepted program participation. In the period for which the survey was conducted 264 complainants were offered program participation. 159 declined to participate because they had no fear of reprisal action or already felt sufficiently supported in the workplace.

The research showed predictable trends given the targeted sample that was surveyed. It also generally reinforced known factors such as:

- It is important to internal witnesses to be advised about the progress of the investigation
- The most common types of victimisation and harassment are psychological harassment, social exclusion during work and verbal harassment (cruel jokes and teasing). Only 1% joined because of fears about career development or promotion prospects.
- While the IWSU provides a valuable service, field support is critical to the health and well being of internal witnesses. Internal witnesses were more likely to report harassment to senior officers than to the IWSU, Police Association, Ombudsman or PIC.
- 90% of internal witnesses said at least some of their colleagues knew they were involved in an internal investigation. This knowledge was attributed to the following factors:

The nature of the incident/investigation	42%
Gossip/rumours	16%
The subject officer or friends had worked it out	18%
I told people	15%
It was general/common knowledge	7%
The matter went to court	1%
From the IWSU	0%

Other	8%
Not sure	9%

This is line with the findings of the Ronald's review which found:

There is an obligation to report offences by a police officer under regulation 20 [now 49] of the Police Regulation. When a junior police officer does report to someone more senior but without any management status, then repeating the complaint up the chain of command sometimes results in a reinterpretation or downgrading of the complaint and its impact on the victim. Breaches of confidentiality were identified at each step of the way.

The Professional Standards Command is currently examining appropriate changes to the Police Regulation to formalise and improve the reporting structure.

9. Can you tell the Committee of the work of the NSW Police Internal Witness Support Unit – is this the same as the Internal Witness Advisory Committee (or Council)?

The Internal Witness Support Unit (IWSU) is part of the NSWPF Professional Standards Command. It's role is to provide ongoing support to commanders, professional standards managers, investigators and Complaint Management Teams and IPC's. IWSU case officers work collaboratively with commanders, investigators and internal witnesses to monitor the workplace for any signs of reprisal action. The Manager, IWSU is available on a 24 hour on-call crisis intervention basis via the VKG Duty Operations Inspector.

When a complaint is registered on the NSWPF electronic complaints system (c@tsi) the system automatically notifies the Manager, IWSU. The matter is assessed by the IWSU to determine whether support is needed. The criteria used is:

- The nature of the information
- The duties and working environment of the member
- The need for support, confidentiality and protection
- The potential for victimisation or harassment
- The personal stress/medical and other needs of the member
- The wishes of the member regarding involvement in the program

The IWSU provides the following support when an officer is accepted onto the program:

- Selects a support officer and/or mentor
- Assesses the needs of the internal witness
- Recommends support services such as psychologists or other assistance

- Ensures support during the investigation and any legal proceedings

The IWSU Case officer:

- Initiates contact with the complainant
- Explains the program and services available
- Liaises with the investigator during the investigation
- Liaises with the support officer or mentor
- Liaises with the Workplace Equity Unit
- Liaises with injury management officers
- Provides a full briefing about the program including:
 - The role of the IWSU
 - Legislative rights and protection
 - Role of the support officer and mentor
 - The investigation process
 - Confidentiality provisions
 - Support mechanisms and the role of Health Services
 - Likely physiological and psychological responses

The IWSU also provides training and presentations as part of the PSC complaint management training programs.

The Internal Witness Advisory Committee (IWAC) was an external advice committee which included representatives of the NSW Ombudsman, ICAC, Whistleblowers Australia, St James Ethics Centre and the NSWPF. The IWAC was disbanded, by mutual agreement, in February 2007.

The IWAC was a very useful advisory group for its time. However the transfer of the Internal Witness Support Unit from Human Resource Services to the Professional Standards Command in 2007, created a stronger strategic link between the Professional Standards Command (PSC), the oversight agencies and the unit. It has ensured that the unit is actively involved in setting the strategic direction of the PSC, so that the rights of internal witnesses are properly recognised and incorporated into PSC policy, procedure, training and education programs. The rights of the internal police complainant are properly represented by the NSW Ombudsman and PSC within the NSWPF complaints handling system.

10. Agencies are currently not required to report on protected disclosures, either in their annual reports or to any central agency. The Committee is considering ways to improve the current reporting regime, including requiring agencies to report on protected disclosures in the same way they report on Freedom of Information applications. The information reported on could include the number of disclosures with year on year comparisons, agency policies and procedures, investigation outcomes and the financial impact of conducting investigations.

a) What is your view on the feasibility of such a proposal?

- b) Can you identify any implementation issues that may arise if such a proposal were to be adopted?

The NSW Police Force is the subject of rigorous oversight and extensive reporting requirements under the Part 8A model. It is suggested that the NSW Police Force Part 8A complaint system should be exempted from those requirements.

There is no objection to the proposal in relation to complaints about civilian employees.

11. One issue that has arisen both in this inquiry and in the previous Committee's inquiry into the Protected Disclosures Act is the need to achieve standard guidelines for the lodgement, investigation, handling and reporting of protected disclosures. One possibility would be to make it mandatory for NSW agencies to implement the Ombudsman's Protected Disclosures Guidelines

- a) What is your view on the feasibility of such a proposal?
- b) Can you identify any implementation issues that may arise if such a proposal were to be adopted?

As discussed above, the Part 8A complaint system could not strictly comply with the Ombudsman's Protected Disclosures Guidelines, although it could be brought more in line with that model.

Some issues would be:

- The tests for police complaints are set out in Part 8A of the Police Act and clause 49 of the Police Regulation. Disclosures are protected if they are made in writing or if they are made to a senior officer under clause 49 of the Police regulation.
- There is no test of 'shows or tends to show' for protections to be invoked
- Under the Police act a complainants identity can be released in accordance with guidelines under s169A (see attached).
- There is no requirement under Part 8A to notify the complainant of action taken or proposed to be taken within 6 months. The NSWPF has its own timeliness standards: 90 days for evidence based investigations and 45 days for all other complaints.
- Complaints are not excluded if they are made solely or substantially with the motive of avoiding dismissal or other disciplinary action
- It is not an offence under the Police Regulation to wilfully make a false or misleading statement when making a disclosure. It is an offence to make a false complaint under Part 8A.

- There is no disclosure coordinator in the Part 8A system or Police Regulation.
- Referrals to oversight agencies of Part 8A complaints are in accordance with Part 8A.
- The ICAC and the Audit Office do not have jurisdiction over police complaints. This is the role of the PIC and NSW Ombudsman.
- There are different reprisal actions under the Police Act (written complaints) and the Police Regulation (verbal allegations).
- The Police Act confidentiality provision allows the Commissioner of Police to determine when the identity of a complainant can be identified under s169A.

There is no objection to this proposal in relation to complaints about civilian employees.



D/2009/41129

5 March 2009

Assistant Commissioner
Professional Standards Command
NSW Police Force
Locked Bag 5102
Parramatta NSW 2124

Dear Assistant Commissioner

Inquiry into the protection of public sector whistleblower employees

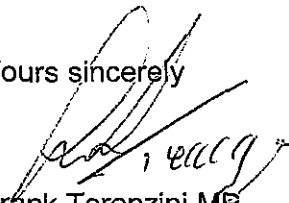
As you may be aware, the NSW Police Force was unable to give evidence before the Committee on 1 December 2008 due to extensions in time given to other witnesses appearing before the Committee and prior commitments on the part of your representatives.

At its meeting on 5 March 2009, the Committee resolved to send you questions on notice in lieu of the evidence that the NSW Police Force was to give at the hearing on 1 December 2008. It would be appreciated if answers to these questions could be provided to the Committee secretariat no later than four weeks from the date of this letter.

Should the NSW Police Force's attendance be required at any future hearings the secretariat will make contact with your representatives.

If you have any questions in relation to the enclosed questions on notice please telephone the A/Committee Manager, Dr Jasen Burgess, on 9230 2062.

Yours sincerely


Frank Terenzini MP
Chair

Encl.

COMMITTEE ON THE ICAC

Inquiry into protection of public sector whistleblower employees

Questions on notice to the NSW Police Force

1. Your submission states that the NSW Police Force receives 2,500 internal reports of misconduct each year, most of which do not meet the criteria to be considered a protected disclosure.
 - (a) What proportion of the internal complaints received in the last 2 financial years did not meet the relevant criteria?
 - (b) Which of the criteria did the majority of complaints not meet?
 - (c) Were any complaints referred to an investigating authority? If so, what proportion?
 - (d) What was the cost of conducting investigations into internal complaints?
 - (e) Are there, in your view, sufficient protections available to public sector workers who make internal reports?
2. Your submission states that NSW Police successfully prosecuted a police officer under s 60 of the Crimes Act for intimidating another officer who had made a disclosure.
 - (a) Please outline this case in general terms for the Committee, including the charges laid and the outcome in terms of sentencing.
 - (b) Why did NSW Police initiate proceedings in relation to this case under the Crimes Act, instead of the Protected Disclosures Act?
 - (c) The penalty provisions for reprisal offences under s 20 of the Protected Disclosures Act provide for a maximum penalty of 12 months imprisonment or 50 penalty units, while s 60 of the Crimes Act provides for various offences ranging from 5 to 14 years imprisonment. Do you have any comments on the adequacy of the penalty provisions for reprisal offences under the Protected Disclosures Act?
 - (d) In spite of this successful prosecution, your submission notes that the current legislative provisions do not appear to be effective, either as a deterrent against reprisals or in terms of prosecuting those who have engaged in reprisals. In your view, what changes are required to improve the detrimental action provisions of the relevant legislation?
3. Your submission states that NSW Police Force uses a decentralised complaint handling model, with complaints being made to officers with a ranking directly above that of the complainant and subsequently 'passing through a number of hands before reaching the delegate'(p 9).
 - (a) What specific training in complaint management does NSW Police provide its officers, to assist them in dealing with handling internal complaints about misconduct?
 - (b) You note that the decentralised model can result in complainants not receiving adequate support. What procedures does NSW Police have in place to provide support for whistleblowers?
4. Your submission notes that the NSW Police Force relies on the provisions of the Police Act in handling complaints of misconduct. The Police Act provides for notification to the

complainant of action taken or proposed, without specifying a time limit for the notification, while the Protected Disclosures Act requires such a notification to occur within 6 months of the complaint being made. Does NSW Police Force have policies in place that provide for timely notifications or updates to be made to complainants?

5. You identify the increasing number of civilian employees working in the NSW Police Force as an issue, due to inconsistencies in the management of complaints, depending on whether they are made by sworn officers or civilian staff. What legislative changes would be required to provide for more uniform treatment and outcomes for internal witnesses within the NSW Police Force?
6. During the previous Committee's 2006 review of the Protected Disclosures Act, a number of agencies raised the issue of the Act being used by some individuals to air personal grievances and/or to mask performance issues. Has this posed a problem for the NSW Police Force, and if so how do your policies and procedures address this problem? Are there any legislative changes that you think are needed to ensure that personal grievances and performance management issues do not hinder the investigation of bona fide disclosures and the effective operation of the Protected Disclosures Act?
7. You indicated that the NSW Police Force and NSW Ombudsman are discussing a project to examine the whistleblowing provisions of the Police Act and Police Regulations and their overlap with the Protected Disclosures Act.
 - (a) What outcomes does the NSW Police Force hope to achieve through the project?
 - (b) Have any particular issues been identified for the project to focus on?
8. Your 2006-2007 Annual Report states that an internal witness survey was completed, with the involvement of the University of Technology. Did the survey results reveal any trends or issues of concern to the NSW Police Force?
9. Can you tell the Committee of the work of the NSW Police Internal Witness Support Unit – is this the same as the Internal Witness Advisory Committee (or Council)?
10. Agencies are currently not required to report on protected disclosures, either in their annual reports or to any central agency. The Committee is considering ways to improve the current reporting regime, including requiring agencies to report on protected disclosures in the same way they report on Freedom of Information applications. The information reported on could include the number of disclosures with year on year comparisons, agency policies and procedures, investigation outcomes and the financial impact of conducting investigations.
 - (a) What is your view on the feasibility of such a proposal?
 - (b) Can you identify any implementation issues that may arise if such a proposal were to be adopted?
11. One issue that has arisen both in this inquiry and in the previous Committees' inquiry into the Protected Disclosures Act is the need to achieve standard guidelines for the lodgement, investigation, handling and reporting of protected disclosures. One possibility would be to make it mandatory for NSW agencies to implement the Ombudsman's Protected Disclosures Guidelines.
 - (a) What is your view on the feasibility of such a proposal?
 - (b) Can you identify any implementation issues that may arise if such a proposal were to be adopted?

Complaint Handling Guidelines



NSW Police Force

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Introduction

These guidelines provide instructions for managing a complaint received by the NSW Police Force about the conduct of a NSW police officer.

The following document is divided into six parts that reflect the key areas of complaint management. It provides guidance on the triage process, managing a complaint that does not require evidence based investigation, managing complaints that do require an evidence based investigation and management action.

Part 1 Triage describes the triage process to be followed when a command receives a complaint.

Part 2 Resolution provides guidance to resolution managers on resolving complaints.

Part 3 Complaint Management Team describes steps that may be required by a Complaint Management Team (CMT) in the complaints management process.

Part 4 CMT evidence based investigations provides guidance to investigators on CMT managed investigations.

Part 5 Complaint outcomes and management action provides information and guidelines about management action.

Part 6 Administrative support functions provides guidance on administrative actions that support triage / resolution and CMT managed investigation processes

Commonly used acronyms / legislation & CPNs

Acronyms

CARA	Complaint Allocation Risk Appraisal
CCR	Call charge record
CCYP	Commission for Children and Young People
CCTV	Closed circuit television
CINs	Criminal Infringement Notices
CMT	Complaint Management Team
CPN	Complaint Practice Note
EDO	Education Development Officer
ICV	In car video
IPC	Internal Police Complaint
IRP	Internal Review Panel
IWSU	Internal Witness Support Unit
MOU	Memorandum of Understanding
PIC	Police Integrity Commission
PSC	Professional Standards Command
PSDO	Professional Standards Duty Officer
PSM	Professional Standards Manager
SES	Senior Executive Service

Parts and sections of the *Police Act 1990*

The Police Act is referenced extensively throughout this document. Where ever the parts and sections listed below appear in the document, they are to be interpreted as parts and sections of the *Police Act*.

Part 8A	Complaints about conduct of police officers
Section 6	Mission and functions of NSW Police Force
Section 7	Statement of values of members of NSW Police Force
Section 31	Delegation by Commissioner
Section 33	Composition of NSW Police Force Senior Executive Service
Section 80(3)	The Commissioner may dismiss any such probationary police officer from the NSW Police Force at any time and without giving any reason
Section 141	Factors affecting decision as to investigation of complaint
Section 145	Conduct of investigation
Section 148	Proceedings to be instituted if warranted
Section 150	Information to be sent to complainant and Ombudsman
Section 160	Inspection of records and reports
Section 163	Ombudsman not to publish certain information
Section 167A	Offence of making false complaint about conduct of police officer or giving false information
Section 169A	Identity of complainant not to be disclosed
Section 170	Certain documents privileged

Section 171(2)	Action on a complaint may be taken otherwise than under this Part (including action involving criminal proceedings and action under Part 9) even if action on the complaint has yet to commence or is in progress under this Part
Section 173	Commissioner may take action with respect to police officer's misconduct or unsatisfactory performance.
Section 181D	Commissioner may remove police officers

Complaint Practice Notes (CPNs)

08/01	Notification of certain complaints to the Commission for Children and Young People (CCYP)
07/12	Finalising complaints where the Police Integrity Commission (PIC) take over a Part 8A investigation
07/10	Protection of Registered Sources when involved as either complainants or witnesses in complaint investigations
07/09	Identifying anonymous complainants
07/08	Using information from carriage service providers in complaint investigations under Part 8A of the <i>Police Act</i> 1990
07/07	Advice on the dissemination of telecommunication intercept material to the NSW Ombudsman and PIC
07/03	Reviewing findings made in complaint investigations based on adverse judicial comments or findings
05/11	Assessment and investigation of the safe keeping of firearms
05/05	Role of Senior Executive Officers in Part 8A complaint interviews
04/05	Conduct of internal investigations whilst court proceedings are in progress (updated 12/12/07)
04/04	Complaints made to police officers in the course of unrelated dealings
04/03	Identification and management of reprisal (payback) complaints
04/02	Directed interviews with Senior Officers under clause 8(1) of the <i>Police Regulation</i> 2008
03/03	Approval to institute proceedings against a police officer (updated 09/11/07)

Complaint Workflow

Timeframes

From date received (by NSW Police Force):

- CMT managed complaints 90 calendar days for completion.
- Non CMT managed complaints 45 calendar days for completion.
- 14 working days to create c@ts.i record.

Complaint received by command

PSDO
Is the matter a Part 8A complaint?

No

- TRIM (do not enter on c@ts.i)
- Resolve by other means (outside of Part 8A)

Yes

Triage process

Triage

- Identify issues (are any issues notifiable to the Ombro (s121)?
- Examine holdings eg. CCTV, rosters, COPS events
- Speak with the complainant / victim
- Identify and satisfy legislative and administrative requirements (executive officer to record)
- Determine veracity of information

Resolve during Triage

Yes

Receipt on LMI stream, complete resolution report and add to c@ts.i record

No

Triage
Should the complaint be declined under s141 of the Police Act?

Yes

- Refer to commander to approve or decline
- Receipt on LMI workflow
- Attach all documents except COPS

No

Triage

- Does the matter require evidence based investigation?
- Is there inculpatory evidence that supports reviewable or criminal action?
- PIC involvement matters?
- Matters with corporate significance?
- Payback complaints?

Yes

No

CMT managed complaint

- Receipt on P workflow
- CMT Managed complaints process
- Satisfy legislative administrative requirements

Upgrade to P workflow on c@ts.i

At this stage if any inculpatory evidence is identified that supports reviewable or criminal action – matter should be upgraded to CMT managed

Non CMT managed complaint (LMI)

- Receipt on LMI workflow
- Allocate resolution manager
- Resolution / enquiry / ADR
- Establish facts / determine findings
- Complete Mandatory Resolution Outcome Report

PSDO

- Quality review Mandatory Resolution Outcome Report
- Refer to commander for management action (if any)
- Close c@ts.i file (complete legislative administrative requirements)

Part 1 Triage

The purpose of triage is to:

- identify and clarify complaint issues
- determine the most appropriate way to manage the matter effectively
- identify and satisfy legislative administrative requirements.

This will be achieved by:

- speaking with the complainant
- reviewing material provided by the complainant / victim
- examining holdings
- evaluating available information to make an informed judgement in regard to the veracity of the complaint allegation.

The outcomes of the triage process will determine whether the matter:

- is a Part 8A complaint
- can be declined in accordance with section 141 of the *Police Act 1990*
- is notifiable to the NSW Ombudsman
- requires an evidence based investigation.

Triage is conducted by the commander / manager or their delegate (the 'triage officer'). The triage officer may use an appropriate officer to assist with triage related enquiries.

Triage officer

Commanders / managers may delegate this triage function to an appropriately qualified senior officer where necessary. Officers who may be suitable to perform this function may include the crime manager or professional standards duty officer (PSDO). The function should not be delegated to the executive officer. Commanders / managers should be mindful that the complaint decision making delegation still rests with them in accordance with section 31 of the *Police Act*. The *Instrument of Delegation* can be found by selecting the Policies and Procedures icon on the Professional Standards Command (PSC) home page, then selecting the Legal Delegations of Authority icon.

Complaint information must be managed so that its integrity is protected at all times. This includes officers treating all information which comes to them in an official capacity as strictly confidential. Complaint information should be secured accordingly. This includes security of documents, computer information and other formats. Triage officers should ensure information is provided to resolution managers in a secured manner.

Triage process steps

There are several types of activities associated with the triage process at the information gathering stage. The triage officer may conduct an analysis of the following information before making an assessment regarding how the matter should be managed.

Identify the issues

The complaint letter or communication should be examined with all issues identified and ranked in order of seriousness. The overall response to the complaint should be governed by the needs of the most serious allegation, but must also account for lower ranked issues. For example, a complaint letter may refer to several different issues ranging from alleged corruption to rudeness. If the most serious issue is confirmed to be corruption, then the manner in which the overall complaint is managed will be based on that issue. This provides the triage officer with a basis to commence evaluating police holdings or guide the manner in which inquiries are made with the complainant.

Reviewing the material contained within a complaint letter may, on face value, provide the triage officer with enough information to determine an appropriate course of action. For example, it could be quite apparent that the matter is not a Part 8A complaint and can be resolved external to the complaint process. Or it may be the case that the complainant has provided comprehensive material that supports the allegation, allowing the triage officer to form an opinion regarding the treatment of the complaint.

In most cases further collection and evaluation of information will be required before a decision can be made in regard to managing the complaint.

Examine holdings

A check of holdings during triage is necessary to clarify issues and determine the veracity of the complaint. Examples of holdings are listed below.

- **CCTV footage** – this includes police station holdings such as charge room and reception area footage, as well as footage from other external sources such as licensed premises.
- **ICV footage** – is useful to confirm or deny allegations of rudeness, unlawful searches and breaches of the Safe Driving Policy etc.
- **COPS/Charge/Custody records** – COPS events may confirm that police did take action, or provide an explanation for not taking a particular action where the allegation is one of inaction. Similarly, events and charge records may provide sufficient information to allow a complaint to be declined and left to the determination of a court.
- **Notebooks/Duty books** – these holdings may provide evidence of actions taken and the decision making processes of police involved in the complaint.
- **Rosters** – can be used to confirm if certain police were working when the incident subject of a complaint occurred.
- **Vehicle diaries** – can be used to confirm police attendance at incidents and people who have been conveyed in police vehicles etc.

- **Workplace correspondence** - exhibits, CIDS/CAD records, tasking sheets, work returns and other information may also be useful.
- **CCRs** – call charge records can be used to assess the validity of allegations (must see CPN 04/08 - *Using information from carriage service providers in complaint investigations under Part 8A of the Police Act 1990*).
- **Court transcripts** – can be used to clarify evidence presented at court, eg. clarify magistrates comments etc.

Speak with the complainant/victim

The purpose of speaking to the complainant / victim during triage is to clarify the nature of their complaint and details surrounding the alleged incident. It is important to consult with the complainant about their concerns at the earliest opportunity.

The manner in which this is conducted is dependant upon the triage officer. It can be done formally or informally. As a general rule, initial inquiries with complainants should be conducted informally to clarify the nature of the complaint. For example a complaint letter may refer to matters that appear to be a criminal allegation. After speaking with the complainant, it may become apparent that the complaint does not detail criminal conduct.

Depending on the circumstances, it may be possible for the triage officer to resolve the matter during triage. For example, when speaking with the complainant / victim it may become apparent that the issues can be addressed by explaining the law, policy or practice. If this is the case the matter should be resolved at that time.

If the complainant / victim is not able to be contacted in person or by telephone, it may be necessary to contact them via email or by posting a complaint form to them. This may also be useful where their original correspondence contains large amounts of unstructured information and it is unclear what their concerns are or how they relate to the NSW Police Force.

Generally, less formal methods such as making notes in notebooks or duty books should be used to record triage actions and outcomes. Conversely, when speaking to a complainant, if it becomes apparent that a CMT managed evidence based investigation is warranted, a more formal approach such as taking a statement may be required.

Determine veracity of information

After checking holdings and speaking with the complainant, the triage officer should be in a better position to determine the veracity of the complaint. This will assist in determining the most appropriate course of action to manage these matters.

This determination includes revisiting the considerations made during the original identification, ranking of the issues and reassessing the situation where necessary. When reconsidering the issues care should be taken **not** to replace triage objectives with resolution outcomes. The purpose is to accurately determine what the issues are, not substituting the issues with an outcome.

If at any time during the triage process inculpatory evidence is obtained, an evidence based investigation response is required and the matter must be referred to the Complaint Management Team (CMT). All other matters can continue to be managed through to resolution.

Key administrative decisions

Once the complaint issues have been clarified by examining police holdings and by speaking with the complainant, the triage officer must consider the following key administrative decisions.

- Is the matter a Part 8A complaint?
- Are any issues notifiable to the NSW Ombudsman?
- Should any issues be declined?
- Do any of the issues require an evidence based investigation?

Is the matter a Part 8A complaint?

In general terms a Part 8A complaint must:

- be made in writing
- be delivered to an investigative authority
- relate to conduct of a police officer
- relate to conduct on or off duty
- relate to conduct occurring anywhere.

If it does not satisfy these criteria, it does not constitute a complaint and should be recorded on TRIM and referred for appropriate action.

Clause 49 of the Police Regulation states that allegations or a sincere belief that a police officer has engaged in conduct consistent with that clause i.e. criminal or other misconduct must be reported to a senior police officer. Verbal complaints that are unlikely to result in reviewable or appealable action and do not fall within the definition of clause 49 need not be dealt with as a complaint under Part 8A of the Police Act 1990. Information concerning procedures to be adopted when receiving a verbal complaint can be found in the NSW Police Handbook. In addition, information concerning complaints made to police in the course of unrelated dealings can be found in Complaint Practice Note (CPN) 04/04 *Complaints made to police officers in the course of unrelated dealings* via the PSC intranet site.

Crown Solicitors advice is such that 'Claims made within a Statement of Claim do not constitute complaints under Part 8A of the Police Act...' and that 'Clause 49 of the *Police Regulation* does not apply to claims made within a Statement of Claim...' among other things. If these factors arise during triage, consult with CPN 04/05 *Conduct of internal investigations into police officers while court proceedings are in progress (criminal/civil)* accessible on the PSC intranet.

Are any issues notifiable to the NSW Ombudsman?

Notifiable issues are listed in the current Class or Kind Agreement. If the issues meet the criteria set out in the Class or Kind Agreement, the complaint is notifiable to the NSW Ombudsman and the matter must be notified through c@ts.i.

This applies as a legislative requirement and the fact that a matter is assessed as suitable for decline, resolution or evidence based investigation does not impact on whether the NSW Ombudsman is notified. The NSW Ombudsman will require notification of declined matters and matters that are assessed as suitable for informal resolution on the basis that the original allegations met the criteria listed in the Class and Kind Agreement.

Notification to the NSW Ombudsman is an administrative step only. It has no effect on the management of the complaint.

Should any issues be declined?

Only officers with appropriate delegation can decline a complaint. Commanders / managers and professional standards managers (PSMs) have this delegation.

In deciding whether to decline an issue, the Commissioner may consider the following criteria.

- Action has been, is being, or will be taken to remedy the subject matter of the complaint without the need for an investigation.
- The complaint is frivolous, vexatious or not made in good faith.
- The subject matter of the complaint is trivial.
- The conduct complained of occurred too long ago to justify investigation.
- There is, or was available to the complainant, an alternative and satisfactory means of redress in relation to the complained about conduct.
- The complainant does not or could not have an interest, or a sufficient interest, in the complained about conduct.
- The complaint is misconceived.

In all instances the appropriate delegate should be consulted and the decision to decline must be endorsed by the delegate prior to the complaint being processed as a declined matter.

Note 1: If a complaint is assessed as frivolous, vexatious or not made in good faith make application to the PSC for the subject officer's name not to be recorded. See PSC Information Sheets via 'Practice Notes' on the PSC intranet site.

Note 2: If declining a matter on the basis that the issues will be explored in criminal court proceedings eg. alternative redress, commands must have a reasonable belief that the issues will be explored in that jurisdiction. For example allegations of racist language by police during an arrest may be noted during proceedings, but may not be explored to the extent necessary to satisfy Part 8A complaint obligations leaving the issues inadequately addressed.

Do any issues require an evidence based investigation?

If any of the issues requires an evidence based investigation the complaint must be managed by the CMT.

As a guide, a matter that if proven would warrant mandatory referral to the NSW Police Force Internal Review Panel (IRP) would warrant an evidence based investigation.

An evidence based investigation is gathering and documenting sufficient evidence that may later be considered in formal proceedings (in accordance with the rules of evidence of the various forums in which the proceedings are to be heard). Formal proceedings include matters destined for hearings before courts or tribunals.

Evidence based investigations require more formal documentation, generally consistent with rules of evidence. These requirements are necessary as there is an increased likelihood that such matters may be subject to scrutiny in a court or tribunal. More formal documentation includes statements, records of interview and directive memorandums.

Where a matter is considered suitable for evidence based investigation and inculpatory evidence has been identified during triage the matter must be referred for CMT management.

Any complaint not declined or referred to the CMT should be referred for resolution.

Other types of complaints recommended for CMT management

The following types of matters are highly recommended for CMT management, but are not mandatory.

- Matters with known Police Integrity Commission (PIC) involvement.
- Matters with issues of a media / corporate significance.
- Matters considered to be a payback complaint as per the *Police Act*.
- Matters that have substantial investigative resource implications for the command.

CMT operation and the conduct of evidence based investigations are addressed in Parts 3 and 4 of these *Guidelines*.

Other issues triage officers must consider

Consider if the matter is likely to be notified to the IRP if sustained

Triage officers should consider records of any previous implementation of reviewable management action and / or issue of a Warning Notice against the subject officer/s. If any new complaint is sustained, the matter must be notified to the IRP. The IRP requires substantial records and evidence to make its recommendations. Therefore, evidence based methods are likely even for relatively minor matters in this situation only and the matter should be referred to the CMT. See Police Circular 08/02 *Changes to mandatory notification to the IRP / CAP*.

Complaints arising from unauthorised sick leave absence

Where an officer is absent from the workplace and did not apply for and was not granted any form of paid leave, it must follow that they were absent without proper cause.¹ Legal advice confirms that the deduction of an officers pay for an unauthorised period of sick leave does not fall under the definition of a 'reviewable action' under section 173 of the *Police Act*. This is because non payment of wages is not being implemented as a disciplinary sanction but rather it is a case where the officer has failed to perform an obligation which makes their salary payable.

The fact that a deduction of pay is not a reviewable action means that it can be made in the absence of a complaint investigation. In addition, not all unauthorised absences will automatically generate a complaint, the appropriate response should be considered on a case by case basis. As per the *Sick Leave Policy*, if an officer is found to have lied about their reason for absence then this should be considered a conduct issue which constitutes a complaint under Part 8A of the *Police Act*. As stated, this does not alter the right to deduct the officers pay and is investigated as a separate issue in the usual manner. The NSW Police Force *Sick Leave Absence Information Guide* has more information.

Review complaints for evidence of reprisal complaints ('payback')

Triage officers must consider whether they have received a reprisal or 'payback' complaint. The complaint may amount to offences under the *Police Act* and *Protected Disclosures Act 1994*. To identify a reprisal complaint consider whether the current complaint is about the conduct of an officer who previously made a certain type of complaint (a 'protected disclosure' or 'protected allegation') and whether the current complaint appears to have been made in reprisal for that complaint. As this type of complaint may amount to an offence, where any inculpatory evidence is identified during triage, referral to the CMT will be warranted.

Refer to CPN 04/03 *Identification and management of reprisal (payback) complaints* and to the *Guidelines for Determining Possible Detrimental Action Including Payback (Reprisal) Complaints* (2005) available on the Internal Witness Support Unit (IWSU) site, accessed through the PSC intranet site. Further advice may be sought from the IWSU.

Managing false complaints made against police

If it is apparent during triage that a false complaint may have been made, consult with the commander / manager concerning its management eg. CCTV footage viewed during triage clearly shows alleged behaviour did not occur. The false complaint may amount to an offence under the *Police Act* and / or the *Crimes Act 1900*. There may also be an acceptable explanation for the complainant's error.

When inculpatory evidence is presented indicating that a complaint about a NSW police officer is false, the original complaint should be completed as required and the false complaint matter should be investigated. As this implicates evidence based investigation, the false complaint investigation must be referred to the CMT.

More instruction on this action, including legal interpretation of key words and other factors is available in Part 4 CMT evidence based investigations.

¹ Henry Davis York Lawyers – Legal Advice 'IRP Notification: HYD Summary' Ref: 9000512_1/SJL/3110000 11 August 2008.

Responding to untruthfulness

Any belief that an officer may have been untruthful in relation to the handling of the complaint should immediately be reported to the PSDO or the commander / manager for further instruction. A response to the issue is required. This means triage processes described above would be applied to the 'discovery' of untruthfulness. Untruthfulness is more than being evasive or not being fully frank and forthright.

Application of triage processes should include consideration of whether or not the truthfulness may amount to an offence, such as *Providing False or Misleading Information* under section 167A(2) of the *Police Act*, or other legislation. Short of criminal allegations, untruthfulness may become the most serious issue to be addressed in the complaint.

If inculpatory evidence has been identified in this regard, an evidence based enquiry may be necessary, which requires referral to the CMT. See Part 6 Administrative support functions for c@ts.i instructions.

Apply interim risk management strategies as required

In appropriate circumstances interim management action may be required. This is determined and approved by the commander / manager. However, the triage officer is well placed to make related recommendations.

Taking interim management action is legally provided for through section 171(2) of the *Police Act* ('...action on a complaint may be taken otherwise than under this Part...').

Interim management action can be taken at any time in relation to a complaint matter until final management action is determined and implemented. It is critical that any action taken is clearly recorded as 'interim management action' to differentiate between this action and final management action. Taking interim management action does not prevent a commander from taking final management action. The interim management action is taken in response to an identified risk while managing the complaint allegation.

Risk management action may include; a change of duties, additional supervision, rostering with more experienced staff, rectifying systemic or procedural practices, referring recommendations on organisational issues to responsible commands, suspension and any other management action that appropriately alters relevant risks.

In all these instances the CMT must monitor any change of circumstance during the investigation of the complaint and amend interim management action where required.

Consult *Interim management action guidelines* for further instruction. Advice can also be provided by PSC Employee Management Consultancy Unit on 40699 / 8234 5699.

Suspension

Suspending an officer with or without pay is an interim risk management action. For more guidance on the authority to instigate this action, on related processes and to locate the relevant policy documents, contact the PSC Employee Management, Quality & Review Unit on 40699 / 8234 5699.

Review the need for referral of internal police complainants (IPCs) to the IWSU

Triage officers must review the need for referrals to the IWSU. All police officers or non sworn employees who lay a complaint are referred to as IPCs. All IPCs are referred to the IWSU.

Commanders / managers still have obligations to provide support to all IPCs and have the primary responsibility for notifying the Manager, IWSU of IPC complaints lodged in their commands. Mandatory reports based on supervisory, audit or similar functions need not be reported to IWSU.

Mandatory reports consistent with clause 49 of the *Police Regulation* reporting must be notified eg. officer advises senior officer of criminal offence, senior officer reports it on paper. In this case, the original officer is the IPC and the senior officer is the reporting person.

See earlier regarding clause 49 of the *Police Regulation* and below in Part 6 Administrative support functions. There are also guidelines on managing IPCs in the *Internal Witness Support Policy* available on the PSC intranet site.

Handling of situation reports and other information that identifies criminal proceedings against police have already commenced, eg PCA

In some cases, triage officers will receive situation reports or other notification of a complaint that identifies criminal proceedings have commenced against police officers. These matters should be referred to the CMT on the basis of an existing evidence based investigation.

Handling adverse judicial comments or conclusions

Triage officers may receive correspondence detailing that in civil or criminal court proceedings the judiciary have made adverse comments concerning police officers conduct that have already been the subject of an associated Part 8A complaint investigation, finalised prior to the matters being dealt with at court.

In order for the triage officer to adequately consider the judicial comments, it may be appropriate for the triage officer to obtain the transcripts of evidence, copies of exhibits tendered and any other material which may have been placed before court. This does not need to occur in every case and is a decision for the triage officer.

On receipt of such correspondence, triage officers are advised to read and CPN 07/03 *Reviewing findings made in complaint investigations based on adverse judicial comments or findings*. This includes assistance in deciding if reinvestigation of the matter is required. A complete copy of the legal advice as outlined above is available, on request, to the Commander, Employee Management, PSC.

If any inculpatory evidence is identified requiring evidence based investigation, the matter should be referred to the CMT.

Complaints arising from the use of social networking internet sites

If triage officers receive correspondence indicating police use of social networking sites has resulted in a Part 8A complaint, they should read Police Notice 08/01 *Use of social networking websites such as YouTube and MySpace by NSW Police Force Employees*. That Notice details NSW Police Force concerns about police use of such sites.

Handling of a complaint that originates from a Hurt on Duty (HOD) claim

All police are required under clause 49 of the *Police Regulation* to report the misconduct of another police officer. The manner in which the information is received or discovered does not displace this requirement. Legal advice confirms that information contained within a HOD claim can form the basis of a Part 8A complaint despite the fact that it may not expressly identify itself as a complaint.

Information contained within a HOD claim form that satisfies the criteria of a Part 8A complaint is specifically excluded from the protection of the *Privacy and Personal Information Protection Act 1998*.

Despite this, HOD claim forms may contain personal information unrelated to the complaint. For this reason, once a complaint has been identified the officer submitting the HOD claim should be required to submit a separate report outlining the circumstances of the injury. Any direction or request to submit such a report would be in line with clause 49 of the *Police Regulation* and the *NSW Police Force Code of Conduct and Ethics* that states an employee

must report the misconduct of other NSW Police Force employees.'

This document will form the basis of the complaint which will then be subject to the normal complaint handling process.

Police firearms complaints

CPN 05/11 *Assessment and investigation of the safe keeping of firearms* requires that non-safe storage of police firearms should be treated as a criminal matter in the first instance.

Therefore, if any inculpatory evidence is identified requiring evidence based investigation, the matter must be referred to the CMT.

Equity officers

In the Part 8A complaint context, if equity officers are used their role is an advisory one.

Using information from carriage service providers in complaint investigations under Part 8A

Triage officers must consider the following regarding information included in correspondence they receive during triage. See Part 4 CMT evidence based investigations for more detail on the use and dissemination of such material.

Section 178 of the *Telecommunications (Interception and Access) Act 1979* allows the NSW Police Force to obtain, use and further disclose information from carriage service providers where these records are reasonably necessary for criminal law enforcement.

This means that information from carriage service providers may not be obtained, used or disclosed in complaint investigations under Part 8A that do not involve a criminal allegation.

Information includes call charge records, reverse call charge records, subscriber checks, cell dumps and statements of accounts. For more detail, see the corresponding section in Part 4 on CMT evidence based investigations and CPNs 07/07 *Advice on the dissemination of telecommunication intercept material to the NSW Ombudsman and PIC* and 07/08.

Part 2 Resolution

Resolution managers

The role of the resolution manager is to:

- manage the resolution in a manner that allows swift, fair, impartial, equitable and discrete resolution of complaints
- to establish the facts about the complaint and make recommendations about management action
- achieve as far as possible, complainant satisfaction in respect to handling their complaint
- achieve as far as possible, subject officers satisfaction in respect to handling the complaint.

Matters referred for resolution do not typically warrant the formality, complexity and authoritative decision making associated with evidence based investigations. Consequently, such matters do not require the resources of a CMT, or the application of evidenced based techniques such as sworn statements, records of interview or directive memorandums.

Some matters referred for resolution may be complaints about criminal conduct. These have been referred to the resolution manager because the triage process did not reveal any inculpatory material indicating that the allegations may have some substance.

Resolution managers should focus on quickly gathering material to quickly establish what occurred and to swiftly and effectively remedy the problems raised in the complaint.

While resolution managers are allowed great flexibility in managing the resolution of the complaint, it is expected that the PSDO or commander / manager will be consulted where the circumstances of the matter change to a degree that will adversely impact on the original instructions. This includes the identification of an offence, new issues arising or the emergence of integrity concerns relative to the processes being undertaken such as a conflict of interest.

It is not expected that resolution managers will satisfy complainants where the outcome requested by the complainant is unreasonable. If a complainant is difficult to contact, the finalisation of the matter should not be unnecessarily delayed. The final correspondence to the complainant should provide the opportunity for the complainant to contact the resolution manager within 14 days to discuss whether the complainant is satisfied.

Confidentiality

Complaint information must be managed so that its integrity is protected at all times. This includes officers treating all information which comes to them in an official capacity as strictly confidential. Complaint information should be secured accordingly. This includes security of documents, computer information and other formats. Triage officers should ensure information is provided to resolution managers in a secured manner. PSDOs should also monitor security of information handled by resolution managers. See security information in Confidentiality in Part 1 Triage and Part 3 Complaint Management Team.

Steps in complaint resolution

Informal enquiry, alternate dispute resolution (ADR) or other resolution

When resolution managers receive a file a number of inquiries will probably have already been conducted during triage and records of those inquiries should be on the file already.

Examples of material that is often reviewed during the triage process and which may already form part of the file are:

- correspondence from the complainant
- records of conversations with the complainant
- CCTV footage – includes police station holdings such as charge room and reception area footage, as well as footage from other external sources including licensed premises etc. where footage is readily accessible. This will be arguable on the merits of each situation
- court transcripts – used to clarify evidence presented at court, clarify magistrates comments etc.
- ICV footage – used to confirm or deny allegations of rudeness, unlawful searches etc.

Examples of other material that may have been viewed during triage process include:

- references to COPS/charge/custody records – COPS events may confirm that police did take action, or provide an explanation for not taking a particular action where the allegation is one of inaction. Similarly, events and charge records may provide sufficient information to allow a complaint to be declined and left to the determination of a court
- references to vehicle diaries – used to confirm police attendance at incidents and people who have been conveyed in police vehicles etc
- CCRs – call charge records can be used to assess the validity of allegations
- workplace correspondence - exhibits, CIDS/CAD records, tasking sheets, work returns and other information
- references to notebooks/duty book details – these holdings may provide evidence of actions taken and the decision making processes of police involved in the complaint
- references to rosters – can be used to confirm if certain police were working when the incident subject of a complaint occurred.

The first step in resolving a matter is to understand the background of the matter and why it has been referred for resolution. Reviewing this material will assist in developing a strategy to manage the matter and should always be done before the resolution manager considers speaking to a complainant or a subject officer.

Speak with the complainant / victim

Although the triage officer may have already spoken to or otherwise contacted the complainant, the resolution manager may need to further clarify matters with the complainant as the resolution process progresses.

In communicating with the complainant, resolution managers should aim to:

- give the complainant the opportunity to tell their story and to vent their frustration
- understand what outcome the complainant is seeking
- give clear advice about how the process works
- manage the complainant's expectations.

Many complainants / victims simply want some acknowledgement of their complaint and the opportunity to be heard by the NSW Police Force.

Some complainants may not wish to be active participants in the resolution process, however the process should be explained to them and their participation encouraged.

When considering whether an apology is suitable in the circumstances, you may offer an apology on behalf of the NSW Police Force, but not on behalf of individual officers (unless the officer has given their consent).

IPCs should be instructed not to discuss the matter beyond the purpose of resolving the complaint, to liaise with the IWSU or to address related welfare concerns.

Further guidance on interacting with complainants / victims is provided in complaint resolution troubleshooting and training materials, available via the PSC intranet, or by contacting education and development officers (EDOs). Information contained in these sources includes how to interact with uncooperative people, people who wish to speak with selected people only (eg commander) and other advice.

Speak with potential witnesses

A potential witness is a person who may have useful information to offer. Resolution managers need only speak to the number of potential witnesses that reasonably serves to resolve the complaint. Efficient, effective and appropriate outcomes based on satisfactory enquiries should drive the resolution.

Speaking with witnesses does not constitute a part of triage, so resolution managers should generally have no witness versions to further review at the time of receipt of the file (unless a version was gathered at an incident irrespective of a complaint being lodged).

Potential witnesses should be approached with an emphasis on problem solving, similar to complainants. They may have concerns and emotions that are similar to complainants and should be dealt with as sensitively as possible.

NSW Police Force employees who are witnesses should be instructed not to discuss the matter beyond the purpose of resolving the complaint or to address related welfare concerns.

Speak with subject officer/s

Subject officers are entitled to have complaints made against them dealt with in a swift, fair, impartial and equitable manner and are entitled to have the complaint handled discreetly. Matters referred for resolution should be of a kind that presents little problem in satisfying these concerns.

The management, care and welfare of the subject officer remain the responsibility of the commander / manager. Triage officers will instruct resolution managers when they must not speak to the subject officer.

Where a resolution manager speaks to the subject officer the aim of the discussion should be to speak openly about the allegations, with a view to understanding what has occurred, resolving the complainant's issues and where appropriate, identifying whether there are any management solutions that would assist in modifying the subject officer's behaviour. The skills employed are negotiation skills, not strictly investigative. The aim is to involve the subject officer in finding a solution to the problem and being accountable for their actions.

It is important to be fair during this process and the following should be undertaken.

- Explain the resolution process to the officer.
- Inform the subject officer of the allegation with sufficient information to be able to properly respond.
- Where a decision is made to record a sustained finding the subject officer should be advised of the finding and the relied on material.
- Provide the officer with support as appropriate (the related support package is unlikely to be necessary for resolution matters, but is an option).
- Provide an opportunity to participate in ADR where appropriate.

Subject officers should be instructed not to discuss the matter except for the purpose of resolving the complaint or to address related welfare concerns.

Welfare concerns should be minimised by the manner in which the process is managed, however each individual is different and subject officers must be advised of the availability of support services.

Resolution managers are required to report on subject officer satisfaction with processes and treatment during the informal enquiry / ADR.

Interviewing officers on sick report

There may be occasions where a resolution manager must speak with an officer on sick report. The obvious health and welfare of the afflicted officer are paramount. However, the NSW Police Force has an obligation to complete complaints in a timely and effective manner. In the event a resolution manager needs to speak to a police witness or subject officer on sick report, they should consult with the PSDO or commander / manager. The protocols detailed in Part 4 CMT evidence based investigations must be applied.

Determination of findings

Have enough enquiries been made?

In deciding whether sufficient inquiries have been conducted, the resolution manager must be satisfied all reasonable steps have been taken and all relevant material has been considered.

Selecting a finding

Identifying and recording a finding is required, as a matter of administration, in respect of all complaint matters. The three options are:

- sustained
- not sustained
- resolved.

The test to be applied is –Are you reasonably satisfied all reasonable steps have been taken and only relevant information been considered?

If the resolution manager is reasonably satisfied that police conduct requiring non reviewable management action has occurred, '**sustained**' is to be recorded.

If the resolution manager is **not** reasonably satisfied that conduct requiring non reviewable management action occurred and no action is to be taken, '**not sustained**' is to be recorded.

If the resolution manager is **not** reasonably satisfied that conduct requiring non reviewable management action occurred, but the matter was the subject of formal NSW Police Force ADR or informal conflict resolution, '**resolved**' is to be recorded.

If 'Resolved' is recorded it indicates that the NSW Police Force has taken responsibility for resolving this issue.

At the moment c@ts.i does not have the functionality to record 'Resolved' as an organisational action so it will be recorded as a finding. This will be amended in the future.

The finding is to be reported in the final Resolution Report, with the complainant to be advised of the finding.

If any doubt arises as to the meaning or use of any of the above information, please consult with the PSC, Employee Management Consultancy Unit.

Mandatory Resolution Outcome Report

Issue: *c@ts.i number and complaint issues being addressed*

Background: *Brief details of complaint.*
The report needs to provide brief details of the allegation. Full details (if required) can be obtained from the original complaint document

Brief details of relevant information gathered
Resolution managers do not need to summarise all of the information they have gathered. Only brief details are required.

Reference to COPS event and notebook numbers etc
Where COPS events have been used in decision making, or particulars from a complainant or subject officer have been recorded in a notebook etc, only the reference numbers for those holdings is required. Statements do not need to be summarised or paraphrased and these documents do not need to be attached as an annexure.

Comment: *Outcome and Findings*
The report needs to articulate the outcome of the resolution manager's enquiries. If making a sustained finding, the resolution manager should declare: *I am reasonably satisfied that the conduct the subject of the finding did occur as outlined in my report.*

Action taken
Action taken or to be taken as a result of the complaint must be included in the report.

Complainant satisfaction
Complainant satisfaction with the action taken in relation to their complaint must be included in the report.

The resolution report must include the outcome requested by the complainant, the outcomes offered by the resolution manager to the complainant and record whether the complainant is satisfied with the action taken or proposed to be taken.

Subject officer satisfaction
Subject officer satisfaction with processes and their treatment during the informal enquiry/ADR must be included in the report.

Recommendation: *Recommended management action*

.....
Signature

Section 163 of the *Police Act* resolution manager recommendations

It is unlikely that a resolution manager will need to recommend invoking section 163. The gravity of types of information whose publishing could be contrary to the public interest is low in matters referred for resolution.

However, it is a consideration and resolution managers should familiarise themselves with the application of section 163 in Part 3 CMT and Part 4 CMT evidence based investigations. Resolution managers should be in a position to recommend invoking section 163 as required.

PSDO or equivalent quality review

On completion of the resolution report, the PSDO has a number of functions to perform as part of the quality review process. They must review the complaint. As a guide to conducting a quality review, consider the following points.

- All complaint issues have been addressed.
- Conclusions are sound eg. linked to information, and are articulated clearly
- Outcomes are fair and proportionate.
- Complainant and subject officers have been or will be advised of outcomes and action.
- Witnesses have been or will be advised of the conclusion of the matter.
- Actions and decisions have been undertaken in a manner consistent with these *Guidelines*.

In all cases, the resolution manager should be advised of the quality review outcome.

In cases where the quality is inadequate, the resolution manager should have the inadequacies explained to them and be given additional instructions.

Where the quality is satisfactory, the resolution manager should be advised. This advice could include suggestions for improvements in the future. Notes on the conduct of the quality review may be made by the reviewing officer in an accountable book.

If the PSDO is unavailable, a similarly experienced and appropriate officer should be selected by the command to perform the review function.

Other issues resolution managers must consider

Managing false complaints made against police

If it is apparent during resolution that a false complaint may have been made, immediately consult with the commander / manager concerning its subsequent management. The related behaviour may amount to an offence under the *Police Act* and / or the *Crimes Act*.

When inculpatory evidence is presented indicating that a complaint about a NSW police officer is false, the original complaint should be completed as required and the false complaint matter should be investigated. As this implicates changed circumstances, particularly the need for an evidence based investigation, the false complaint investigation should be referred to the CMT.

See Part 3 on CMT and Part 4 on CMT evidence based investigations.

Responding to untruthfulness

If any belief forms during resolution that an officer may have been untruthful in relation to the handling of the complaint, this belief should immediately be reported to the PSDO or commander / manager for further instruction. A response to the issue will be required. This means triage processes described in Part 1 would necessarily be applied to the 'discovery' of untruthfulness. Untruthfulness in this context is more than being evasive or not being fully frank and forthright.

Application of triage processes should include consideration of whether or not the truthfulness amounts to, or given more information may amount to an offence, such as *Providing False or Misleading Information* under section 167A(2), or other legislation. Depending on the circumstances of the matter, untruthfulness may become the most serious issue to be addressed in the complaint.

If inculpatory evidence has been identified in this regard, an evidence based enquiry may be necessary, which requires referral to the CMT. See administration for the handling of this matter on c@ts.i.

Disclosure of a complainant's identity

The identity of a Part 8A complainant must only be disclosed for legitimate reasons. Section 169A of the *Police Act* provides the authority for the identity of complainants to be disclosed in limited circumstances.

Disclosure is unlikely to be relevant to resolution matters, except for example, where mediation with all parties' involved (i.e. face to face discussion) might be a consideration and the identity of parties would be exposed.

See Part 3 CMT, Section 169A(a) - *Commissioner's Guidelines* (concerning Commissioner's conditions for disclosure of a complainant's identity) and the *Commissioner's guidelines interpretive document* available on the IWSU pages on the PSC intranet site.

Part 3 Complaint Management Team

This part describes CMT operation concerning the management of certain Part 8A complaints.

The triage officer may decline issues (with commander / managers approval), refer matters for resolution or refer matters to the CMT for evidence based investigation.

Given the nature of triage enquiries and requisite outcomes, matters referred to the CMT will usually require evidence based investigation. This will involve instances of criminal or non-criminal investigations. See Part 1 on triage. See Part 4 on CMT evidence based investigations.

Relevant administrative functions and instructions, such as c@ts.i concerns are detailed Part 6.

CMT role and membership

CMTs are mandatory for any command with police officers attached. They assist in satisfying complaint related legal and policy responsibilities, promoting related standards and exercising the commander / manager complaint delegation. This is done through monitoring, guiding, reviewing and endorsing evidence based investigations and determining any management action to be implemented following such enquiries.

CMTs have no corporately endorsed role in monitoring matters referred for resolution or for determining any related management action. If CMTs are used by commanders to assist this decision making, they must adhere to the 45 day timeframe given to resolve matters.

The core members of the CMT are the commander / manager, the crime manager (or equivalent such as the PSM for specialist commands), the executive officer (or equivalent), and the PSDO (or equivalent). CMTs may also invite local and specialist personnel as required.

Complaint delegation

The Commissioner has delegated his powers under Division 5 of Part 8A (investigation by Commissioner) to commanders / managers.

Commanders / managers set the tone for complaint handling in their commands and have ultimate responsibility for complaint management and investigation, not the other members of the CMT. Consequently, commanders / managers must ratify all CMT decisions.

The *Instrument of Delegation* can be found by selecting the Policies and Procedures icon on the Professional Standards Command (PSC) home page, then selecting the Legal Delegations of Authority icon.

CMT meetings

The CMT must meet regularly and at least as often as it takes to satisfactorily satisfy CMT functions and the exercise of the commander's complaint delegations. CMTs with ongoing evidence based investigations should meet at least fortnightly.

Minutes of each meeting are to be recorded. Any decision made outside a CMT meeting should be recorded and validated at the next CMT meeting. See the section on CMT tools below for more instruction.

It is best practice that a delegated officer is present at CMT meetings, rather than ratifying the recommendations of the remaining CMT members at a later time.

Criminal investigations under Part 8A – special consideration

All criminal investigations are bound by restrictions and obligations of legislation, particularly *Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA)*, the *Evidence Act 1995* and the *Code of Practice for C.R.I.M.E.*

When a CMT receives a complaint that involves a criminal allegation, they must commence a criminal investigation. They do not have any discretion.

The CMT must ensure that all legislative and policy obligations are met during a criminal investigation as outlined in Part 4 CMT evidence based investigations.

It is critical CMTs ensure criminal investigations into police conduct are not jeopardised by, for example, the use of directed interviews and other non-criminal methods in criminal investigations and statute of limitations passing without acceptable explanation.

At the conclusion of a criminal investigation, an investigator has discretion to determine whether or not sufficient evidence exists to cause proceedings to be instituted against a person and the CMT has a role in reviewing this conclusion. However, authority from appropriately delegated officers is required under section 148 of the *Police Act*. This delegation differs from the one above. In this case, delegated officers are NSW Police Force members occupying senior executive service positions and each assistant commissioner in a specialist support command.

See more detail below under 'Investigation review and certification'.

Considerations for all CMT managed investigations

In leading and otherwise managing investigations, the following considerations and / or actions are to be applied to all evidence based investigations (criminal and non-criminal).

Confidentiality

Integrity of complaint information must be protected at all times. Legislative requirements exist with regard to the disclosure of the identity of a complainant (section 169A and *Commissioners guidelines*). This is supported by an additional legal requirement that officers treat all information which comes to them in an official capacity as strictly confidential (clause 75 of the *Police Regulation*).

Creating and maintaining procedures for the safe management and storage of complaint information is necessary to maintain confidentiality. The procedures and systems may include:

- ensuring that all hard copy complaint related information is stored in a secure area that is only accessible by staff who have a right to access that material, including files, folders, computer spreadsheets, information contained on whiteboards or any other complaint related material
- ensuring that investigators securely store any complaint related material in either locked cabinets or other secure areas
- holding CMT meetings or other meetings where complaints are discussed in locations where conversations cannot be overheard
- using appropriate methods to deliver confidential correspondence eg. handed personally by the commander or executive officer or using secure mail
- not using computers that are accessible to all staff unless it is absolutely necessary
- ensuring that only authorised officers are placed on the access list for complaints on c@ts.i that have a caveat.

CMTs should instruct investigators accordingly and to take steps to ensure investigators are able to physically secure complaint records.

Legislative and other timeframes

CMTs are to take steps to ensure compliance with relevant timeframes.

Statutory limitations that apply to commencing criminal proceedings generally, apply to matters involving police as subject officers. The statute of limitations that applies to summary matters must be considered while managing the investigation of a criminal allegation and criminal proceedings, when appropriate, must commence within the stated time.

Section 145 of the *Police Act* requires an officer conducting an investigation to conduct the investigation in a timely and effective manner having regard for the circumstances of the complaint.

The NSW Police Force time frame for completing matters subject to evidence based investigation is 90 days from the 'received date'. This includes 21 administrative days. See Part 6 Administrative support functions for more detail on received date, timeliness and measurements.

Initial CMT responsibilities on receiving referral of a matter

Apply Complaint Allocation Risk Appraisal (CARA) guidelines

Upon receipt of a complaint, CMTs must apply the *CARA Guidelines* to notifiable matters. If a notifiable evidence based investigation is transferred to another command, CARA must be applied again by the new command. Both include completion of CARA A forms. CMTs must ensure the investigators of notifiable matters are given a CARA B form to complete and return at the first opportunity, not left in the file with the investigator without CMT review. See Part 6 Administration support functions for more instruction.

In some cases, the full extent of possible risks and conflicts of interest may not be known until CMT members are aware of complaint details. If not identified beforehand, this will be revealed during the CMT appraisal of triage information.

Conduct appraisal of triage information

While conducting an appraisal of triage information, it is not appropriate to look beyond actions that have already been taken in the triage process. However, if not done during triage, obtain and consider any records of the subject officer having been subject to any previous reviewable management action and, or issue of a Warning Notice. This will better inform CMT instructions to the investigator given any new sustained matter must be notified to the IRP. See Part 5 concerning management action and Police Notice 08/02 for more information.

The appraisal includes:

- confirming issues to be addressed (face value and actual issue/s requiring a response)
- confirming CMT referral is the most appropriate way to manage the response to the allegations, i.e. there is inculpatory evidence requiring evidence based investigation or the commander has exercised referral discretion
- that legislative administrative requirements have been / will be satisfied (*Police Act* obligations).

Declined matters require only commander / manager endorsement. If the CMT systematically reviews such decisions, some of the benefits of these *Guidelines* may be undermined.

In extraordinary circumstances where a complaint document has been referred directly to a CMT, the CMT should task an appropriate officer with applying the procedural and administrative requirements of the triage process as set out in Part 6 Administrative support functions.

Apply interim risk management strategies as required

In appropriate circumstances commanders may need to take interim management action while managing a CMT evidence based investigation. Taking interim management action is legally provided for in section 171(2) ('...action on a complaint may be taken otherwise than under this Part...')

Interim management action can be taken at any time in relation to a complaint matter until final management action is determined and implemented. It is critical that any action taken is clearly recorded as interim management action to differentiate between this action and final management action. Taking interim management action does not prevent a commander from taking final management action as the interim management action is taken in response to an identified risk during the management of the complaint allegation.

Risk management action may include; a change of duties, additional supervision, rostering with more experienced staff, rectifying systemic or procedural practices, referring recommendations on organisational issues to responsible commands, suspension, and any other management action that appropriately alters relevant risks.

In all these instances, the CMT must monitor any change of circumstance during the investigation of the complaint and amend interim management action where required. Consult *Interim management action guidelines* for further instruction. Advice can also be provided by the PSC, Employee Management, Consultancy Unit on 40699 / 8234 5699.

Suspension of an officer with or without pay is an interim risk management action. For more guidance on the authority to instigate this action, on related processes and to locate the relevant policy documents, contact the PSC, Employee Management, Consultancy Unit on 40699 / 8234 5699.

Using information from carriage service providers in complaint investigations under Part 8A

Section 178 of the *Telecommunications (Interception and Access) Act*, allows the NSW Police Force to obtain, use and further disclose information from carriage service providers where these records are reasonably necessary for criminal law enforcement. This means that information from carriage service providers may **not** be obtained, used or disclosed in complaint investigations under Part 8A that **do not involve a criminal allegation**. This includes, call charge records, reverse call charge records, subscriber checks, cell dumps and statements of accounts.

Where this material is identified as a factor in a complaint, CMTs (and investigators) must apply CPNs 07/08 and 07/07 which are available on the PSC intranet site.

Handling adverse judicial comments or conclusions (if not done during triage)

During civil or criminal court proceedings the judiciary may make adverse comments concerning police officers conduct who have already been the subject of an associated Part 8A complaint investigation, finalised prior to the matters being dealt with at court.

When a court makes strong criticism of police in a matter, it is a NSW Police Force responsibility, among other things, to consider the judicial findings and evidence on which they are based, and to consider the judicial findings in light of the previous police investigation and any varying evidence presented between the two forums.

These are actions that can be completed during triage. Prior to addressing any issue that falls into these circumstances, consult CPN 07/03. It provides advice and guidance to commanders / managers, triage officers and CMTs on how to respond to adverse comments, including whether or not reinvestigation is required.

Police firearms complaints

CPN 05/11 requires that non-safe storage of police firearms should be treated as a criminal matter in the first instance. In this regard, CPN 05/11 must be considered. See the PSC intranet.

Review complaints for reprisal complaints ('payback') evidence

If not done during triage, CMTs must consider whether or not they have received a reprisal or 'payback' complaint. The complaint may amount to offences under the *Police Act* and *Protected Disclosures Act*.

To identify a reprisal complaint consider whether the current complaint is about the conduct of an officer who previously made a certain type of complaint (a 'protected disclosure' or 'protected allegation') and whether the current complaint appears to have been made in reprisal for that complaint.

Refer to CPN 04/03 and to the available on the IWSU site, accessed through the PSC intranet site. Further advice may be sought from the IWSU.

Consider the need for PSC assistance

In some cases an investigation may be of such a type that a CMT may feel it is appropriate to apply to the PSC for assistance. All CMTs and related complaint handling areas need to ensure they are aware of the acceptance criteria for complaint investigations conducted by PSC before they submit a request for assistance. Criteria for acceptance vary. For advice, contact the Director, Operations at PSC on 40699 / 8234 5699.

Integrity testing

CMTs and the investigators should consider at an early stage, the utility of using controlled operations (criminal allegations) and integrity testing (complaint matters) as investigation strategies where appropriate.

The PSC *Application for Assistance* form is available on the PSC intranet.

Equity officers

In the Part 8A complaint context, if equity officers are used their role is an advisory one.

Directed interviews with senior officers under clause 8(1) of the *Police Regulation*

It is a requirement that officers investigating a complaint should be of equal or greater rank than the subject officer. Only in exceptional circumstances should this rule be deviated from. Where exceptional circumstances occur, it should only be after careful consideration by the CMT of the appropriateness of the interview, including a risk appraisal of the possibility of undue influence being exerted by the senior officer over the interviewing officer. Where the senior officer is unwilling to participate in an interview or assist an internal investigation without being directed to do so it will be necessary to have a more senior officer direct that officer to participate in the process.

See Part 4 CMT evidence based investigations for more information.

Also see CPN 05/05 *Role of senior executive service officers in Part 8A complaint interviews* on the PSC intranet which informs parties of the roles and responsibilities of senior executive officers regarding directions issued under clause 8 of the Police Regulation.

Complaints involving superintendents

If one superintendent is handling a complaint against another superintendent, the relevant region or specialist command CMT 'own' the complaint and manage the investigation and investigator. Staff from the command at which the superintendent subject officer is attached should not have access to or any role in the complaint.

Select appropriate investigator

When selecting an appropriate investigator the CMT must consider:

- their skill and capability
- their workload, leave, training and other commitments and
- any conflicts of interest for the selected officer (see *CARA Guidelines*).

Select appropriate investigation supervisor and / or mentor

A supervisor should be assigned to every CMT complaint investigation where appropriate. This will be influenced by investigator experience and related conditions. It is good practice for CMT instructions in this regard to be recorded. In some cases the commander may appoint themselves as the supervisor or mentor.

Among other things, supervisors should:

- acknowledge the terms of reference
- offer advice and guidance throughout the investigation
- assist the investigator to develop an investigation plan as required
- assist the investigator to conduct the investigation in an impartial and effective manner, consistent with any investigation plan
- monitor and check the progress of the investigation
- ensure variations to the investigation are approved by the CMT
- assist in the use of c@ts.i and e@gle.i
- ensure status reports and extension reports are prepared and submitted on time
- comply with written advice from the commander regarding the completion date and ensure the investigation is completed by the due date
- review the final investigation report before submission to the CMT.

The CMT may also appoint an investigation mentor to provide additional guidance. The mentor is distinct from the supervisor in that the mentor's assistance is less 'hands on'.

When selecting appropriate officers the CMT must consider:

- their skill, capability and willingness to perform the role
- their workload, leave, training and other commitments and
- any conflict of interests for the selected officer (see *CARA Guidelines*²).

Supervisors / mentors could be crime managers, PSDO or experienced investigators.

² Completion of CARA forms by supervisors and mentors is not mandatory. However, it is clearly the intention of the NSW Police Force that staff involved in complaint management and investigation activities identify, declare and participate in the management of any conflicts of interest. This includes investigation supervisors and mentors.

Identify content of mandatory terms of reference

The terms of reference template replaces the 'Investigators Agreement' and is available on the PSC intranet. Use of that template is mandatory in all CMT evidence based investigations.

The template provides a means of communicating instructions to investigators from the CMT concerning the conduct of the investigation, the scope of activities etc.

The CMT prepares the document and provides it to the commander to sign the associated direction, then to the investigator to sign the acknowledgement section, then to the supervisor to do the same where a supervisor has been appointed.

Investigators must also be instructed by CMTs of the need to submit regular status reports and to submit extension reports for matters that appear likely to exceed the 90 day standard. Submission must be prior to the 90 day standard passing. Where notifiable matters are concerned, the CMT is expected to notify the NSW Ombudsman of extensions and reasons given by investigators.

The corporately preferred templates for the terms of reference, status reports and extension reports are available on the PSC intranet site.

Identify any need for an investigation plan

An investigation plan is recommended for all complex investigations and should be submitted to the CMT for approval. The plan may be as simple as a list of proposed tasks or activities taking into account such variables as; the nature and complexity of the complaint, resources required, any anticipated costs and constraints that may impact on that investigation. Deviations from the investigation plan must be submitted to the CMT for approval.

The CMT **must** review the plan as submitted and only accept it when:

- the time frame for task completion can be met
- all available evidence will be gathered
- all reasonable avenues of investigation will be undertaken
- the proposed interview style is appropriate to the allegation and
- due consideration of all risks has been made.

Promote use of chronology

A chronology is recommended for all CMT managed investigations. The CMT does not need to review or endorse the chronology. However, the CMT should promote their use and benefits to the investigator in preparing their final report and substantiating investigative actions as required.

The corporately preferred chronology format is on the PSC intranet site.

Instruct investigator

Provide the investigator with:

- the hard copy file (or a copy thereof)
- the terms of reference document as prepared by the CMT
- any instructions concerning an investigation plan, resources or other instruments
- a form to access c@ts.i
- the support package for any officer interviewed in complaint investigations (or an instruction for the investigator to access and provide the support package on the intranet).

Further detail on managing IPCs, witnesses and subject officers, and the support packages is provided below.

Ongoing monitoring of functions and considerations

Review progress at CMT meetings

To enable effective monitoring, guiding and other responsibilities, the CMT should meet regularly enough to satisfy its responsibilities. CMTs with ongoing evidence based investigations should meet at least fortnightly.

The CMT must consider:

- the original objectives of the investigation
- the activity undertaken, as reported (personally or in the status report)
- the proposed activity, content and context
- whether the action taken is lawful, complete and competent
- continuously monitor and discuss risks to identify the effectiveness of ongoing strategies and the need for new strategies.

It is expected that CMTs will take action in a timely manner to remedy or mitigate any area of concern they identify. See CMT tools for agenda, minutes and other information.

The corporately preferred extension request report format is on the PSC intranet site.

Ongoing management of IPCs and internal witnesses during an investigation

It is incumbent on the commander / manager to maintain an environment where all members of the NSW Police Force are confident they will receive appropriate protection and support during the complaint process. This continues to be relevant in ongoing complaints given the possibility of new IPCs coming forward during the investigation and the possibility of new risks concerning NSW Police Force employees who serve as witnesses in the prosecution of police.

IPCs added to c@ts.i records after receipt are not automatically notified to IWSU. Contact must be made with the IWSU in such cases and arrangements made for communicating all necessary information.

The ongoing identification and application of interim risk management strategies are a consideration.

For more information see above on notifications to the IWSU and the PSC intranet site concerning internal witnesses.

Identifying anonymous complainants

Authority to conduct inquiries into the anonymous complainant's identity must be obtained from the Commander, PSC. Any submissions will need to be endorsed by the region commander, or equivalent, prior to their referral to the PSM, PSC. The PSM, PSC will then provide advice to the Commander, PSC on the matter.

See CPN 07/09 *Identifying anonymous complainants* for instructions.

Disclosure of a complainant's identity

The identity of a Part 8A complainant must only be disclosed for legitimate reasons. Briefly, consideration includes; the protection of information under Clause 75 of the *Police Regulation*, protection of complainant identity under section 169A, providing information with the complainants consent and without it, the provision of advice to complainants and the circumstances under which this action may be approved.

In the event an investigator or any other party poses the question of disclosing the identity of a complainant, the CMT must apply the information set out in the corresponding section of Part 4 concerning conducting evidence based investigations. The documents *Police Act Section 169A(a) Commissioner's Guidelines* (concerning Commissioner's conditions for disclosure of a complainant's identity) and the *Commissioner's guidelines interpretive document* are available on the IWSU page on the PSC intranet site.

Managing the subject officer

Subject officers are entitled to have complaints made against them dealt with in a swift, fair, impartial and equitable manner and are entitled to have the complaint handled discreetly.

The management, care and welfare of the subject officer remain the responsibility of the commander / manager and are not transferred to the investigator. The commander and CMT, where appropriate must ensure the subject officer is:

- made aware they are the subject of a complaint unless there are valid reasons for withholding this information
- advised of the complaint allegation, where determined appropriate
- given an opportunity to respond to the allegation
- provided with regular updates as to the progress of the investigation (timely regular information is essential to minimise officer anxiety)
- advised of the outcome of the investigation
- advised of the justification for a sustained finding
- provided with information and support including, if appropriate an indication of likely management action and the availability of welfare and support agencies.

Assist in facilitating interviews of officers on sick report

The CMT role is to monitor and guide any action taken under this heading, and should instruct the investigator to keep the CMT informed of any related situation and arrangements involved in interviewing an officer on sick leave.

Part 4 concerning the conduct of evidence based investigations provides further details concerning the protocol for interviewing officers in criminal and non criminal investigations who are on sick report or who have been suspended.

Searching lockers or other receptacles within NSW Police Force premises

Lockers and other receptacles within police premises are owned by the NSW Police Force. Therefore a right exists for the NSW Police Force to search those receptacles, when it is deemed appropriate to do so, at any time. The NSW Police Force allows its employees to store personal belongings in some of those receptacles, specifically lockers. However, the NSW Police Force does **not** have a general right to open or inspect the personal property of any employee stored within a receptacle inside police premises.

Access to the personal property of an employee can be granted in two ways:

- consent of the owner of the property or
- by virtue of a lawfully issued search warrant.

The searching officer must conduct the search discreetly taking into account the welfare of the subject officers. Where any doubt exists, legal advice must be acquired.

Conducting a search of lockers could be relevant in criminal and non criminal investigations (eg 'missing' paperwork).

The CMT role in this situation is to monitor and guide any investigative decision to access NSW Police Force employee lockers or other receptacles relative to a CMT managed complaint and to facilitate access to legal advice. For more detail see Part 4 CMT evidence based investigation.

Responding to untruthfulness

If any belief forms that an officer has been untruthful in relation to the handling of the complaint, a response to the issue will be required. This means triage processes described in Part 1 must be applied to the 'discovery' of untruthfulness. Untruthfulness in this context is more than simply being evasive or not being fully frank and forthright.

Consideration of whether or not the truthfulness amounts to, or given more information, may amount to an offence, such as *Providing False or Misleading Information* under section 167A(2), or other legislation. Depending on the circumstances of the matter, untruthfulness may become the most serious issue to be addressed in the complaint. See Part 6 Administrative support functions for c@ts.i instructions.

Investigation review and certification

CMT quality review of the investigation

The investigation report must be submitted as stipulated in Part 4 CMT evidence based investigations. CMTs, or an appropriate officer tasked by the CMT are responsible for quality reviewing and assuring the content of investigation reports.

On receiving the investigation report the CMT must consider:

- if the investigation is thorough
- that all available evidence has been identified and obtained
- that all reasonable avenues of investigation/inquiry have been undertaken
- that all inquiries have been conducted lawfully
- if the findings are supported by the content of the investigator's report (further detail below)
- that any recommendations made are appropriate and if the CMT agrees or not

- that if beyond the agreed time frame sufficient detail is provided to account for the delay in completion
- any submissions relevant to section 163 and whether the commander has invoked section 163 for the required identified documents (further detail below)
- if any action to satisfy section 150 of the *Police Act* is outstanding and if so, to ensure legislative compliance (further detail below)
- when to advise the subject officer of the outcome (in light of any earlier CMT decision to withhold advising the officer of the existence of the matter).

It is expected that CMTs will take action in a timely manner to remedy or mitigate any area of concern they identify. Some of the above points are expanded below.

The review and outcomes must be recorded in CMT minutes, a file note or the quality review report and included on c@ts.i.

Review of investigator's finding/s

Each CMT evidence based investigation issue requires a finding of either **sustained** or **not sustained**. As the investigation report satisfies administrative reporting obligations, the findings recorded in the investigators report, including reporting on criminal matters, are based on the balance of probabilities (noting that the satisfaction of 'beyond reasonable doubt' would present such strong evidence as to go beyond satisfying the balance of probabilities standard).

The standard moves along a sliding scale³ depending on the seriousness of management action proposed. The finding is determined and consequently reviewed by the CMT, by:

- identifying the issue under consideration
- identifying the elements of the issue (proofs if criminal)
- conducting an analysis of the interviews and other evidence to determine the truth and validity of the information gathered
- identifying and considering the significance of the consequences of a sustained outcome.

If the CMT is unable to confidently assess the report and identify evidence supporting the reported finding, the investigator must be tasked with addressing areas of concern. The CMT may disagree with the investigators finding, but not on the basis of a deficiency without any attempt to correct it.

In addition, if a sustained matter is destined for notification to the IRP, the CMT must consider the strength of evidence must be higher for reviewable action than if non-reviewable management action is being considered. See Part 5 Complaint outcomes and management action.

³ *Briginshaw v Briginshaw*, (1938) 60 CLR 336
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Requirements under the *Commission for Children and Young People (CCYP) Act 1998*

A sustained finding triggers notification of certain complaints to the Commission for Children and Young People under the CCYP Act. This includes complaints where children are complainants, victims, or are substantially involved in the situation about which the complaint is made. CMTs must consider CPN 08/01 *Notification of certain complaints to the Commission for Children and Young People (CCYP)* in this situation.

All matters subject to notification to CCYP are to be fully documented and recorded on the c@ts.i system. CMT minutes for relevant matters must record decisions made to notify, or not notify, the CCYP, including the reasons for the decision. These decisions must form part of the section 150 notification to the Ombudsman.

CPN 08/01 provides definitions, conditions, and exceptions to the requirements under the CCYP Act. When c

Note: CPN 08/01 refers to category 1 and 2 matters. These references are sourced from CCYP material and are correct references therein. They have no relationship to old Part 8A categories. Also see c@ts.i user guides available on the PSC intranet site for related instructions.

Commander's certification of the investigation

The commander has the ultimate responsibility for the investigation. They must certify that:

- they accept that the investigation has been conducted in a timely and effective manner
- sufficient inquiries have been conducted and
- appropriate techniques and methods have been used.

The commander must also state that they accept the findings of the investigator for each complaint issue and will consider any recommendations when deciding their response.

The commander is further required to attempt to remedy any concerns that the subject officer may have about the timeliness of the investigation, the communication strategies used by the investigator, and the conduct of the investigator and CMT. If there is any dissatisfaction, they also need to report their action to resolve it.

Commencing criminal proceedings (section)

Delegated officers include NSW Police Force members occupying senior executive service positions and each assistant commissioner in a specialist support command. CMTs, local area commanders and others with some complaint related delegations not listed **do not have** authority to institute criminal proceedings against police under section 148. CPN 03/03 *Approval to institute proceedings against a police officer* provides detailed instruction on the exercise of this delegation. The CPN and the *Instrument of Delegation* are available on the PSC intranet.

In the context of section 148 commencing criminal proceedings, the CMT role is to:

- monitor and assist related processes, including actions consistent with CPN 03/03
- monitor legislated and corporate timeframes (including progress towards statutes of limitation)
- continue managing staff involved
- confirm the NSW Ombudsman is notified by the delegated officer when criminal proceedings are authorised and commenced and
- ensure c@ts.i is updated with this action.

The commencement of proceedings using criminal infringement notices (CINs) are not expressly articulated in CPN 03/03. However, for the purpose of applying section 148, CINs are considered to be appropriate proceedings. Therefore, section 148 approval is required for their use with police suspects. The practicalities of this would make the use of CINs in this case unlikely.

Detail on further issues requiring consideration by the approving officer is available in CPN 03/03.

In all cases where approval to institute proceedings has been granted by a delegated officer, the PSM of that delegated officer is required to send a copy of the written authorisation to PSC, Employee Management, Quality & Review Unit.

Managing false complaints made against police

The CMT role is to determine the commands response to complaints believed to be false. Relevant offences are section 167A(1) *making false complaint about conduct of police officer or giving false information* and section 314 of the *Crimes Act false accusation...intending that person to be the subject of an investigation of an offence....*

When evidence is presented indicating that a complaint about a NSW Police officer is false, further investigation should be undertaken. If the matter is already being managed by the CMT, they must attend to the administrative and reporting obligations in respect of the complaint and also manage the allegation that the complaint is false.

The NSW Police Force considers the protection of its officers from false complaints to be a high priority and the most significant consideration for the CMT will usually be the likelihood of establishing proof that the complaint was knowingly false.

More instruction on this action is included in Part 4 CMT evidence based investigations.

Also see Part 6 Administrative support functions concerning declined records in relation to the Memorandum of Understanding (MOU) dealing with vexatious and other complaints, and the non recording of subject officer names.

Investigation outcomes and management action

After investigation the CMT must initiate the appropriate management action in response to a complaint.

No management action is to be taken without a commander / manager's approval.

Matters subject to CMT management (generally evidence based investigation) are more likely to be referred for reviewable management action when sustained than those referred for resolution. However, non reviewable management action may also be appropriate to the circumstances.

Outcomes for complaint parties and management action options are detailed in Part 5 Complaint outcomes and management action. Interim management action is discussed above.

Invoking section 163

The role of the CMT is to assist the commander in their assessment of section 163 considerations as described below.

The authority to invoke section 163 has been delegated by the Commissioner to; local area commanders, members of the NSW Police Force senior executive service,⁴ each assistant commissioner in a specialist support area, Director of Foundational Studies / Education Services, Director of Continuing Education and police officers of the rank of superintendent or above in command or management of a specialist area (excepting the deputy commissioners and Executive Director, Corporate Services). This delegation applies to officers for whom they are responsible.

No other officer may invoke the section, however investigators are expected to make recommendations that identify critical police information and provide sufficient information to allow the delegated officer to make an informed decision about invoking the section.

What are the implications of section 163?

Section 163 applies to 'police information' provided to the NSW Ombudsman in accordance with requirements under Part 8A or the *Ombudsman Act 1974*.

The delegated officer may, at any time identify information provided to the Ombudsman as 'critical police information'. To do this the delegated officer must be of the opinion that the publication of that information may; prejudice an investigation, prejudice the prevention of crime or otherwise be contrary to the public interest.

When any information is provided to the NSW Ombudsman, pursuant to their Act, the NSW Ombudsman may not publish that information before the expiry of 21 days. The information may be published by the NSW Ombudsman after that time unless it is identified and justified by a delegated NSW police officer as critical police information.

⁴ Referred to in Section 33(1) and (2) of the *Police Act*.

It is unlikely that all documents within a complaint will be considered as critical police information, therefore it is inappropriate for section 163 to be invoked over all investigative documents. The Commissioner or a delegated officer must identify the relevant documents or affected sections of any document when invoking section 163 and provide reasons why the section is being invoked. The reasons need to include why the information is considered critical police information and how its publication may; prejudice the investigation of crime, prejudice the prevention of crime or be contrary to the public interest.

If section 163 is invoked it can be rescinded, the NSW Ombudsman may then publish that information as it is no longer considered critical police information.

Regardless if section 163 has been invoked, the NSW Ombudsman may include critical police information in any report submitted to the presiding officer of each House of Parliament and may provide a copy of that report to the Minister if of the opinion the circumstances warrant its publication.

What is critical police information?

Critical police information is defined as information whose publication may:

- prejudice the investigation of crime, eg. the publication of otherwise confidential police investigative methodology or
- prejudice the prevention of crime, eg confidential security arrangements or
- otherwise be contrary to the public interest.

The public interest will depend on the circumstances in which the question arises. The public interest is a term for which there is no single or precise definition. However, as a general concept it has been described as referring to considerations of the good order and functioning of the community and government affairs for the wellbeing of citizens. It can also be described as the 'common good' or the benefit of the community in general. This also includes the proper functioning of the NSW Police Force.

Examples of where the publication of information could be contrary to the public interest could include information that:

- deals with national security
- contains sensitive police intelligence or information including; the location of covert police premises or surveillance sites, police methodologies or techniques, information about offences not yet subject of legal proceedings
- discloses the identity of; a police source, witnesses or their family if there is a genuine threat to their safety, a police undercover operative with an assumed identity, the use of an undercover operative in an ongoing investigation, or material relating to the identity of a participant in a controlled operation
- might facilitate the commission of other offences or allow offenders to avoid detection by taking evasive action

- is conditionally provided by another law enforcement agency or other source, i.e. that the information will not be disclosed
- relates to serious allegations the subject of ongoing investigations
- encourages the commission of offences against the laws of the state
- adversely affect the security, discipline or good order of a correctional centre
- compromises or jeopardises any ongoing investigation or operation, or the safety of any law enforcement officer
- discloses the sexual history of a complainant or witness.

Managing false complaints made against police

Knowingly making a false complaint about the conduct of a police officer may constitute an offence under the *Police Act* and / or *Crimes Act*. The role of CMTs is to address the original complaint and related records, and manage any investigation into the false complaint allegation. Investigative guidance on the matter is included in Part 4 CMT evidence based investigations.

Subject officer satisfaction

Investigators are required to report on subject officer satisfaction. This satisfaction relates only to the management of the investigation and not the outcome. It includes the timeliness of the investigation, the communication strategies used by the investigator and the conduct of the investigator and CMT.

Directed interviews with senior officers under clause 8(1) of the *Police Regulation*

It is a requirement that officers investigating a complaint should be of equal or greater rank than the subject officer. Only in exceptional circumstances should this rule be deviated from. Where exceptional circumstances occur, it should only be after careful consideration by the CMT of the appropriateness of the interview, including a risk appraisal of the possibility of undue influence being exerted by the senior officer over the interviewing officer. Where the senior officer is unwilling to participate in an interview or assist an internal investigation without being directed to do so it will be necessary to have a more senior officer direct that officer to participate in the process.

Also see CPN 05/05 on the PSC intranet which informs parties of the roles and responsibilities of senior executive officers regarding directions issued under clause 8 of the *Police Regulation*.

This section provides advice and guidance to facilitate the direction to the interviewee.

Directing a more senior officer to answer questions during a complaint related interview

Pursuant to clause 8 (1) of the *Police Regulation* officers are to promptly comply with all lawful orders from those in authority over them. This clause only applies to officers who have authority over other officers, i.e. more senior in rank. As with all officers, a senior officer may be directed to respond to questions or other requests and at the end of the interview be directed not to discuss the interview with certain persons. If a senior officer agrees to co operate and answer questions about the complaint it will not be necessary to issue any formal direction.

Where the senior officer requests an official direction, a more senior officer will need to direct them, either personally or through correspondence to answer the questions asked by the interviewer, to comply with other requests and to comply with the direction about not compromising the integrity of the investigation. The direction should also include a reminder of the welfare services available to the interviewee.

CMT tools

Agenda

Must include:

- proposed location, time and date
- acceptance of previous meeting minutes
- all new complaints received
- status of current investigations
- management action for completed investigations
- consideration of any other CMT related business.

The corporately preferred template for CMT agendas is available on the PSC intranet.

Mandatory assessment form / minutes

The CMT must maintain meeting minutes that serve as accountable records of the decisions made during the life of a complaint. These minutes, including personnel involved in the decisions reached must be scanned into c@ts.i. CMT decisions can also be made independent of meetings, with members considering complaints as they arise. Each decision made independent of meetings must still be documented and validated at the next CMT meeting.

Executive officers may develop single sets of minutes for each CMT meeting. Only the relevant extract accounting for the above points must be available on the c@ts.i record.

The mandatory template for minutes is available on the PSC intranet.

Mandatory terms of reference

The terms of reference template replaces the 'Investigators Agreement' and is available on the PSC intranet.

The mandatory template for terms of reference is available on the PSC intranet.

Decision Making Framework

If the Decision Making Framework is used to assist the commander / manager and CMT make decisions surrounding management action, the checklist should be attached to the hard copy file.

The Decision Making Framework can be located on the PSC intranet site which also contains information on how to apply the Framework. There are a number of scenarios that the Decision Making Framework can be applied to select the appropriate action.

Part 4 CMT evidenced based investigations

The triage officer may identify inculpatory evidence requiring evidence based investigation, or the commander / manager may use their discretion to refer a matter to the CMT to test a complaint allegation through evidence based investigation. An evidence based investigation is gathering and documenting evidence that may later be considered in formal proceedings in accordance with the rules of evidence of the various forums in which the proceedings are to be heard. This style of investigation is applied by the CMT to both criminal and non criminal investigations. The investigator is required to reach a finding for each issue in the investigation, regardless of the nature of the allegation (criminal or non criminal), which is justifiable from the obtained evidence. Findings for evidence based matters must be recorded as either **sustained** or **not sustained**. The CMT review the investigation report and either accept or overturn the investigator's finding/s. If the CMT disagree with the finding, this should be discussed with the investigator. If the finding is overturned, the reasons must be minuted.

The delegated officer (commander / manager equivalent) maintains ownership of the management of the complaint and responsibility for the investigation of the complaint at all times. Any conflicts of interest must be declared, firstly by the CMT, using the complaint allocation risk assessment (CARA) process (form A) and secondly by the investigator (form B) after receiving the initial briefing for the complaint. See Parts Triage and Part 3 CMT for more information on these matters.

Investigator's role

The investigator's role is to find all relevant information relating to a complaint, analyse and reach valid conclusions about the truthfulness of the allegation(s), make recommendations about the findings, prepare and forward the investigation report to the person/people overseeing the management of the complaint.

Investigator's obligations include:

- conducting the investigation impartially in a timely and effective manner
- complying with confidentiality requirements
- complying with instructions from the investigation supervisor, mentor, commander/ manager, or CMT consistent with local instructions
- declaring any conflict of interest (investigators of notifiable matters must complete CARA form B).

Investigation supervisor and mentor roles

The CMT may appoint an investigation supervisor to assist in the management of the investigation. This decision may be influenced by issues including the complexity of the matter and experience of the investigator. Commanders should provide written advice to the nominated investigation supervisor outlining their expectations of the supervisor and the completion date.

The investigation supervisor's role in complaint management is to:

- acknowledge the terms of reference document
- offer advice and guidance throughout the investigation
- assist the investigator to develop an investigation plan
- assist the investigator to conduct the investigation in an impartial and effective manner, consistent with the investigation plan
- monitor and check the progress of the investigation
- ensure variations to the investigation are approved by the CMT
- assist in the use of c@ts.i and e@gle.i
- ensure status reports and extension reports are prepared and submitted on time
- comply with written advice from the commander regarding the completion date and ensure the investigation is completed by the due date
- review the final investigation report before it is submitted to the CMT.

The CMT may also appoint an investigation mentor to provide additional guidance. The mentor is distinct from the supervisor in that the mentor's assistance is less 'hands on'.

Confidentiality of investigations

Any investigation conducted under Part 8A must be managed and conducted to protect the integrity of the investigation at all times. Legislative requirements exist with regard to the disclosure of the identity of a complainant (section 169A and *Commissioners guidelines*). This is supported by an additional legal requirement that officers treat all information which comes to them in an official capacity as strictly confidential (clause 75 of the *Police Regulation*). Investigators are required to secure all investigation papers and other material in locked and secured cabinets. Investigators may withhold the provision of statements and interviews from people as necessary to ensure the integrity of an investigation is maintained. They may provide them, if requested to interviewed people at the completion of the investigation.

A privilege is attached to any document that comes into existence during a Part 8A investigation. The exceptions are proceedings that concern the conduct of an officer or in a review of an administrative action. For more information, see section 170 of the *Police Act*.

See below for more information concerning the operation of confidentiality concerning the complainant's identity. Part 3 CMT provides more information on command security measures.

Legislative timeframes

Statutory limitations that apply to commencing criminal proceedings generally, apply to matters involving police as subject officers. The statute of limitations that applies to summary matters must be considered while managing the investigation of a criminal allegation and criminal proceedings, when appropriate must commence within the stated time.

Section 145 of the *Police Act* requires an officer conducting an investigation to conduct the investigation in a timely and effective manner having regard for the circumstances of the complaint. The NSW Police Force has set a time frame of 90 days for the completion of all CMT managed investigations.

Investigating criminal allegations

Where a complaint is made that alleges a police officer has engaged in criminal behaviour and inculpatory evidence is identified during triage, the CMT must direct that a criminal investigation is to be conducted. The CMT has no discretion. The investigation differs in no way to any other criminal investigation, regardless of the fact that the person subject of the allegation is a police officer. This includes prima facie and 'beyond reasonable doubt' standards. However, additional administrative functions and some legislative restrictions must be considered.

All criminal investigations are bound by restrictions and obligations of legislation, particularly *LEPRA*, the *Evidence Act* and the *Code of Practice for C.R.I.M.E.*

It is recommended that investigators, on request permit the presence of a support person during a criminal interview provided that they do not interfere with the process.

Section 281 of the *Criminal Procedure Act* 1986 requires that any admission during official questioning in regards to any indictable offence must be electronically recorded. (This does not apply to indictable matters that can be dealt with summarily). An admission that is not recorded electronically is not admissible unless it can be established that there was a reasonable excuse, eg. the ERISP machine was broken or the interviewee did not consent to the interview being electronically recorded.

Audio and video recordings must have the consent of all people engaged in this context otherwise the recording is a breach of the *Surveillance Devices Act* 2007.⁵

⁵ An Act to regulate the installation, use, maintenance and retrieval of surveillance devices; to repeal the *Listening Devices Act* 1984 and for other purposes.

The additional requirements that apply to a criminal investigation into police conduct are:

- reporting obligations of Part 8A
- greater restriction on the decision to commence criminal proceedings against NSW police officers than there is in the case of non police suspects by virtue of section 148. This involves gaining authorisation to institute proceedings by delegated officers. See the section below on Commencing criminal proceedings.

Police suspects are also provided a NSW Police Force support package.

Custody issues

The need to have authority to commence criminal proceedings impacts on the manner in which criminal investigations are conducted, particularly with regard to the application of custody rights (Division 3 of Part 9 of *LEPRA*). The fact that a person is a police officer does not alter the fact that the rights defined in Division 3 apply, when required.

The requirements of Section 99(2) of *LEPRA* (regarding restrictions on arrest to commence proceedings), make it unlikely that a police officer will be arrested in order to commence criminal proceedings. Generally, the preferred method of commencing proceedings against a police officer will be the service of a future court attendance notice.

The arrest of a person where an investigating officer responds to an incident (that usually involves swift commencement of proceedings, eg. PCA) and suspects on reasonable grounds that a person has committed an offence, is not affected by the fact that the person is a police officer (except section 148 delegation approval applies).

When an investigator has sufficient evidence to establish an offence against a police officer but has yet to interview that officer the application of custody rights must be considered (Division 3 of Part 9 of *LEPRA*).

Division 3 of Part 9 of *LEPRA* does not apply when:

- a person voluntarily attends a police station or speaks with police at another location and
- the person is subject of a criminal investigation and
- the investigator does not believe there is sufficient evidence to establish the offence for which they wish to conduct an investigative procedure.

However the provisions of the *Code of Practice for C.R.I.M.E.* apply.

Under these provisions the person is introduced to the custody manager who explains that they are free to leave, they may seek legal advice and notify someone else that they are at the station and that the investigating police must return the person to the custody manager if they determine that person is no longer free to leave. The custody manager will make a record of the voluntary attendance of the person on the P773 form (*Details of Person at a Police Station Voluntarily*).

For more information, see Police Service Circular 01/14 *Questioning Suspects*⁶ and the *Code of Practice for CRIME-People at a Police Station Voluntarily*.

Away from a police station the person should be afforded the same rights within the *Code of Practice C.R.I.M.E.* However in most instances it will not be possible for an independent custody officer to ensure the person is advised of their rights. The investigating police will need to be able to demonstrate that the person was afforded their rights and that they understood them. A record made in a notebook may suffice. The officer should be given an opportunity to endorse the entry as correct by signature. However, the officer is not obligated to do so. Record any refusal.

Division 3 of Part 9 of *LEPRA* applies when:

- a person voluntarily attends a designated place of custody to participate in an interview and
- the interviewing police are of a belief that there is sufficient evidence to establish the offence for which they wish to conduct the investigative procedure.

In this situation, the person must be introduced to the custody manager who is to ensure compliance with legislative and policy obligations and procedures.

When investigators are speaking with a person away from a police station and investigators believe there is sufficient evidence to establish the offence for which they wish to conduct an investigative procedure, that person should be afforded the custody rights, as best as possible of Division 3 of Part 9 of *LEPRA*. This is to ensure procedural fairness is afforded to the person.

In most instances away from the police station it will not be possible for an independent custody officer to ensure the person is given their rights and the person cannot be taken to a designated place of custody merely for the purpose of affording them their rights (eg when executing a search warrant and the suspect is not under arrest).

Therefore, the investigating police will need to be able to demonstrate that the person was afforded their rights at that time and location, and they understood them. A record made in a notebook detailing the conversation may suffice. Seek endorsement by the interviewee of the notation, but do not direct that it occur. If they decline to endorse the notation, make a record.

⁶ Police Service Circular 01/14 appears in Police Service Weekly 28 May 2001

Commencing criminal proceedings (section 148)

This section gives practical instruction on legal advice provided in CPN 03/03. It also addresses the Instrument of Delegation concerning authorisation by NSW Police Force senior officers, including NSW Police Force members occupying senior executive service positions and each assistant commissioner in a specialist support command. Both are available on the PSC intranet.

When it appears to an investigating officer that there is sufficient evidence to warrant the prosecution of a police officer for any offence, the investigating officer must cause appropriate proceedings to be instituted. Before actually commencing the proceedings they must have authority from the Commissioner (via delegation). The investigator has discretion to determine whether or not sufficient evidence exists to cause proceedings to be instituted against a person.

Sufficient evidence would be where there is admissible evidence capable of establishing each element of the offence (*prima facie*), which is capable of achieving a reasonable prospect of conviction. For more detail see CPN 03/03. Simple analysis of the offence and the evidence, and comparison of the two should provide investigators with the necessary conclusions.

Investigators are entitled to make recommendations concerning whether or not proceedings should be instituted. The CMT may agree or disagree with the investigator's assessment of the evidence. In any case, relevant information including mitigating circumstances from both the investigator and the CMT should be disclosed to the approving officer for their consideration in the context of the public interest.

Commencing proceedings using CINs is not expressly articulated in CPN 03/03. CINs cannot be issued to police.

Detail on further issues requiring consideration by the approving officer is available in CPN 03/03.

The standard of proof applicable to criminal matters generally, is applicable to criminal investigations into police conduct

The investigating officer must submit a report seeking authority to commence proceedings. A brief of evidence and a completed P812 *NSW Police Force Authority to Institute Proceedings* must be attached with the report for consideration of the delegated officer. The investigating officer can include an opinion as to whether authority to commence proceedings should be granted. The delegated officer will consider the *Office of the Director of Public Prosecutions (ODPP) Guidelines* for the commencement of proceedings when making their determination, taking account of matters of public interest (available on the PSC intranet site).

If approval to commence proceedings is not authorised (by the delegated officer) a covering report by the delegated officer with the brief of evidence and report by the investigating officers must be forwarded to the ODPP for review. The investigating officer will be notified of the decision by the delegated officer to authorise or not authorise the commencement of proceedings. In addition, when authorised to do so, the investigator in most cases will commence those proceedings with a future service court attendance notice.

The protocols for the service of future court attendance notices, or other court attendance notice processes whereby court proceedings are commenced, must be followed. This includes the brief handling and ODPP disclosure requirements. The investigating officer is required to submit a report to the **Police Prosecutions Command** advising them that criminal proceedings have been commenced against a police officer. That command will refer notifications and documents to the Special Crime Unit, ODPP who will take carriage of the prosecution.

The NSW Ombudsman must be notified by the delegated officer when criminal proceedings are authorised and commenced. The CMT must ensure c@ts.i is updated with this action.

If an investigating officer is unsure if there is sufficient evidence to establish an offence, or of the correct offence for the facts of the investigation they may submit a request for legal advice. The report must be submitted through the commander or CMT who will forward the request to Legal Services, either the Manager Operational Legal Advice Unit or the legal officer attached to their specialist command area. Legal Services only may forward the brief to the ODPP.

The advice of the ODPP is not binding and delegated officers may choose not to authorise the commencement of criminal proceedings even if the ODPP recommends commencing proceedings. Any decision by a delegated officer to act against the advice of the ODPP must be reviewed by a more senior officer. The final decision on whether criminal proceedings will commence will remain with the most senior officer reviewing the application.

When requesting legal advice about sufficient evidence or correct offence (while planning to commence proceedings), manage the time involved in this process and request the advice be provided urgently. Time remaining under the applicable statute of limitations must be considered.

Disagreeing with legal advice

Where investigators or others disagree with NSW Police Force or ODPP legal advice stating there is insufficient evidence to commence proceedings, a section 148 application may still be made. Attach any application to the relevant legal advice and the reasons for disagreeing with the advice.

Police conduct – common offences

The following are offences commonly implicated in investigations into police conduct. This list is not definitive. For any guidance on the below or other offences, consider obtaining legal advice.

Police Act 1990

Section 200	Bribery or corruption.
Section 201	Neglect of duty.

Crimes Act 1900

Section 59	Assault occasioning actual bodily harm
Section 61	Common assault prosecuted by indictment
Section 61L	Indecent assault
Section 91H	Production, dissemination or possession of child pornography (see below <i>Criminal Code Act 1995</i> (Commonwealth) – the Commonwealth offence may be more appropriate where child pornography is found to have been viewed on the internet.)
Section 178BA	Obtaining money etc. by deception
Section 178BB	Obtaining money etc. by false or misleading statements
Section 249B	Corrupt commission or rewards
Section 308H	Unauthorised access to or modification of restricted data held in computer (summary offence)
Section 315	Hindering investigation etc.
Section 317	Tampering etc. with evidence
Section 319	Pervert the course of justice
Section 546C	Resisting etc. police

Privacy and Personal Information Protection Act 1998

Section 62	Corrupt disclosure and use of personal information by public sector officials
Section 63 (1)	Offering to supply personal information that has been disclosed unlawfully

Firearms Act 1996

Section 39	General requirement
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Criminal Code Act 1995 (Commonwealth)

Section 474.19	Using a carriage service for child pornography material ⁷
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⁷ Any admission made by an accused person in the course of official questioning about any Commonwealth offence must be electronically recorded. Such admission that is not electronically recorded is not admissible unless it can be established that there was reasonable excuse why the admission could not be electronically recorded (eg. ERISP broken).

Police witness obligations during criminal investigations, coronial matters and critical incidents

The NSW Police Force and the community have an expectation that police officers will provide statements when they are witnesses to criminal offences, can assist in a coronial investigation or during a critical incident investigation. Providing statements and subsequently giving evidence in court is a key function of being a police officer regardless of whether or not the accused/suspect is a civilian or a police officer. In all circumstances police should execute their duties impartially in accordance with the functions outlined in section 6 of the *Police Act* and which they have sworn or affirmed to uphold in their oath of office.

Where the investigation involves police officer conduct, police who are witnesses may be reluctant to provide a formal statement to investigators. Advice was sought from the Crown Solicitor in relation to this matter. The advice confirms that it would generally be lawful for a senior officer to direct an officer who has witnessed a critical incident, a criminal offence or a matter related to a death to provide a formal statement in relation to the matter.

What is the format for police statements where another police officer (or former officer) is the subject of the investigation?

The format for the statement is **no** different where a police officer or former officer is the subject of the investigation. The statement will identify the author by name and age, contain the usual jurat and be signed and witnessed as required by the *Criminal Procedure Act* and *Local Courts (Criminal and Applications Procedure) Rule 2003*.

When can a police officer be directed to provide a formal statement?

The investigator should consider the following process where a police officer, **who is not the subject of the investigation, refuses to provide a statement** during a criminal, coronial or critical incident investigation.

1. During the conduct of the investigation police may be asked to provide a statement.
2. If the police officer refuses to provide a statement they should be reminded of their responsibilities as a police officer under sections 6 and 7 of the *Police Act*, the *Code of Conduct and Ethics* and *Statement of Values*.
3. Advise the officer that if they will not voluntarily provide a statement they can be given a lawful direction to provide a statement under clause 8(1) of the *Police Regulation*.
4. If required, direct the officer to provide a statement concerning their knowledge of the matter.

Where a Part 8A investigation is in progress, a decision to give a direction should be made in consultation with the CMT. In determining whether an officer should be directed to provide a statement the CMT should consider the significance of the statement to the criminal brief, the reason the officer is reluctant to provide a statement and any other relevant matters the CMT deems appropriate.

If an officer is reluctant to provide a statement because it might incriminate them in a criminal matter the officer should not be directed to provide a statement. A direction in this circumstance may not be lawful. Advice should be sought concerning the most appropriate course of action in this instance. In any case a police officer who is a suspect in a criminal matter should not be directed to provide a statement or participate in an interview unless a decision has been made not to pursue criminal proceedings.

For more detailed information on conducting a Part 8A investigation when criminal proceedings are in progress or pending refer to CPN 04/05.

Unsworn / administrative staff

All members of NSW Police Force including unsworn / administrative employees have an obligation to report misconduct of any other employee under the *Code of Conduct and Ethics*. In addition there are legislative requirements relating to the reporting of corrupt conduct by public officials.

Misconduct by an unsworn employee may involve conduct which occurs whether an employee is on or off duty.

The obligation for unsworn staff under the *Code of Conduct and Ethics* includes reporting misconduct or conduct of a criminal nature by police or other employees that would require a criminal investigation.

In criminal investigations into the misconduct of sworn or unsworn employees that occurs outside the workplace, unsworn employees are to be treated as a member of the public, i.e. they cannot be directed to provide a statement.

In criminal investigations into the misconduct of sworn or unsworn employees that occurs in the workplace, an unsworn manager, supervisor or employee can be asked to provide a report about an incident they have witnessed. They cannot be directed to provide a report.

Inquiries relating to this issue should be directed to the PSC on 40699 / 8234 5699.

Searching lockers or other receptacles within NSW Police Force premises

Lockers and other receptacles within police premises are owned by the NSW Police Force, therefore a right exists for the NSW Police Force to search those receptacles at any time, when it is deemed appropriate. The NSW Police Force allows its employees to store personal belongings in some of those receptacles, specifically lockers.

The NSW Police Force does not have a general right to open or inspect the personal property of any employee stored within a receptacle inside police premises. Access to the personal property of an employee can be granted in two ways:

- consent of the owner of the property or
- by virtue of a lawfully issued search warrant.

When the owner of the property provides consent such consent should be recorded in writing, verified by signature of the officer consenting to the search and retained by the searching officer.

The searching officer must consider whether it is prudent to:

- video tape the search
- conduct the search in the presence of the owner of the property, an Association representative, or an independent officer.

The searching officer must conduct the search discreetly taking into account the welfare of the subject officer/s.

When the investigator believes that consent will not be granted or the owner of the property does not consent a search warrant will be required, albeit that consent is provided to enter the premises. A search warrant authorises its applicant to enter a premises **and** to search for things described within.

Consent to enter the premises will always be granted, where the premises are controlled by the NSW Police Force.

Conducting a search of lockers could be relevant in criminal and non criminal investigations. Obtaining warrants will only be possible for certain offences.

In situations where investigators are unclear of related powers or responsibilities, e.g. circumstances where no consent is given by the owner of the property or a search warrant is not issued, it is advisable to seek legal advice.

Investigating non criminal allegations

After triage enquiries and referral to the CMT, CMT members may agree an evidence based investigation is necessary for an allegation of serious misconduct not amounting to a criminal offence.

Investigators are not bound by the rules of evidence and as such those restrictions are removed when conducting a non criminal evidence based investigation. Investigators may, as an example, cross examine a witness during interview or engage in leading questioning techniques. Techniques must still be lawful.

There remains a requirement on the investigator to ensure that procedural fairness is afforded to the officer subject of the investigation and that the investigation is conducted ethically. Procedural fairness, among other things requires that a person has a reasonable opportunity to respond to an allegation made against them.

Investigators cannot hold out a false representation to a subject officer during questioning. The officer does not have a specific right to seek legal advice or be accompanied by a friend or support person but those provisions should be considered by investigators prior to conducting interviews.

The use of intelligence and information from external providers, particularly from telecommunications service providers cannot be used for non criminal investigations when legislative restrictions state the information can only be used for criminal investigations.

The standard of proof for non criminal matters is the civil standard, i.e. balance of probabilities. This means that something is more likely than not to have happened. A sliding scale is applied to the standard of proof where it needs to be demonstrated to a higher degree of probability that the suspect action or misconduct occurred. The more significant the consequences, eg. reviewable as opposed to non reviewable action, the higher the standard of evidence required to make a sustained finding.

Interviews conducted during a non criminal investigation need to be recorded. Interviews may be handwritten, typed, audio and / or video recorded. Audio and video recordings must have the consent of all persons engaged otherwise the recording is a breach of surveillance device legislation except to record a refusal to consent to the recording of an interview by a member of the NSW Police Force in connection with the commission of an offence.⁸

A NSW police officer may be ordered by a senior officer to obey a lawful order. The order may include the officer participating in an interview, answering questions or demonstrating an action that is reasonably necessary during questioning. Investigating officers must consider the welfare of the subject officer prior to commencing any non criminal interview. Where appropriate make allowances for fatigue or other extenuating factors that may impact negatively on the officer being interviewed.

When the investigating officer is junior in rank to the officer to be interviewed the CMT should attempt to make alternate arrangements. When this is not possible a direction signed by a more senior officer, i.e. more senior in rank may be served on the interviewee at the beginning of the process. See CPN 04/02 *Directed interviews with Senior Officers under clause 8(1) of the Police Regulation* for more detail.

⁸ *The Surveillance Devices Act* is an Act to regulate the installation, use, maintenance and retrieval of surveillance devices; to repeal the *Listening Devices Act 1984* and for other purposes.

A common practice for non criminal investigations is the use directive memoranda or calling for reports from officers. Inevitably this process needs clarification of the response by the officer, requiring further questioning by the investigator. In these instances it is more practical to commence a recorded interview, handwritten, typed or audio recorded. See Investigation tools.

Investigations involving criminal and non criminal allegations

When an investigation includes allegations that are both criminal and non criminal the initial enquiries must be directed to the criminal allegations. The CMT will direct that a criminal investigation is to be conducted. The CMT has no discretion. Once the criminal investigation is finalised, existing and any new non criminal issues arising from the criminal investigation should be addressed.

The identification and application of interim risk management strategies are a consideration. Interim risk management strategies are used to address the circumstances of the complaint. They are not disciplinary actions. Their determination is a matter for the commander / CMT, but investigators may recommend such strategies as required. See Part 3 CMT.

Moving between criminal and non criminal evidence based investigations

In every case where a criminal allegation exists, a criminal investigation is to be conducted prior to non criminal enquiries.

An allegation of criminal behaviour found not to meet prima facie, may still be **sustained** if on the balance of probabilities it is appropriate. This is because the standard of 'reasonable doubt' has been discounted (because prima facie has not been met) but the balance of probabilities can still be applied. The balance of probability standard applies because the requirement to record a finding exists outside the criminal arena and the next appropriate standard of proof is the civil standard.

Where a criminal investigation ceases with no criminal proceedings commenced, as agreed to by the delegate (commander / manager), it may be further investigated from a non criminal perspective. This should be done where the investigator has avenues of enquiry to progress through non criminal methods, eg. directed interview, gathering of other previously inadmissible evidence, and all reasonable steps have not yet been taken to reach a conclusion.

If an investigator expects that it will be necessary to cease a criminal investigation during the subject officer interview, they need to make arrangements to ensure the commander / manager has or is able to exercise their responsibility in approving the criminal investigation's cessation.

Moving from criminal to non criminal interviews

An interview for a non criminal allegation may immediately follow an interview for a criminal allegation but only when the:

- interview of the criminal allegation finalises the criminal investigation;
- investigator is aware of CMT instructions in this situation; and
- investigator ensures the officer being interviewed understands they have moved from a criminal investigation to a non-criminal investigation (the test being the officer's understanding, not the investigators).

If the investigator is uncertain about any of these points, they should not proceed until the issue/s is resolved.

If the non-criminal interview does follow the criminal interview, there should be a clear and reasonable break in the process. The length of the break may be determined or influenced by the above three points and other circumstances.

If the officer is in custody, they must be released from custody before commencing any non-criminal investigative procedures. The subject officer may seek legal advice or speak to someone regarding welfare issues during the break if the investigator believes the integrity of the non-criminal investigation will not be compromised. Given the investigation is now non criminal, there is no *entitlement* to legal representation. However, there is no prohibition against legal practitioners acting as support persons during interviews of police under certain conditions. See the *Support package for police officers interviewed in relation to a complaint* on the PSC intranet site

Managing witnesses and complainants during an investigation

Internal witnesses

Internal witnesses are any NSW Police Force sworn and administrative personnel who may be provided assistance from the IWSU. Investigators must refer all internal witnesses, including complainants to the IWSU.

Managing any internal witness or complainant remains the responsibility of their commander / manager unless the commander / manager is the subject of the complaint. Investigators can assist by monitoring witness and complainant welfare and liaising with the commander / manager and or with the CMT as required.

The identification and application of interim risk management strategies are a consideration. Interim risk management strategies are used to address the circumstances of the complaint. Their determination is a matter for the commander and CMT, but investigators may recommend such strategies as required. See Part 3 CMT.

Considerations in respect of managing all internal and external complainants

It is essential that the complainant is properly consulted and treated courteously with sensitivity and respect. The expectations of the complainant should be sought by investigators. The scope and limitations of the investigation should also be explained, through an outline of related policies and procedures. An explanation of relevant law may also assist. Contact with the complainant should clarify their issues (if not already done in triage) and identify expectations.

The integrity of the investigation must be maintained at all times. NSW Police Force complainants (and witnesses) should be advised to assist in that process by not discussing the complaint or the investigation unless for the purpose of progressing the investigation or for welfare purposes.

Managing subject officers during an investigation

Subject officers are entitled to have complaints made against them dealt with in a swift, fair, impartial and equitable manner and are entitled to have the complaint handled discreetly.

The management, care and welfare of the subject officer remain the responsibility of the commander / manager. This responsibility is not transferred to the investigator. The commander and CMT, where appropriate must ensure the subject officer is advised of certain information.

Investigators may be tasked with undertaking related communication and should, at any rate understand NSW Police Force obligations to subject officers.

As instructed by the commander / manager and / or CMT, the subject officer should be:

- made aware they are the subject of a complaint unless there are valid reasons for withholding this information
- advised of the complaint allegation, where determined appropriate
- given an opportunity to respond to the allegation
- provided with regular updates of the progress of the investigation (timely regular information is essential to minimise officer anxiety)
- advised of the outcome of the investigation
- advised of the justification for a sustained finding
- provided with information and support including, if appropriate an indication of likely management action and the availability of welfare and support agencies.

Legal Practitioners acting as support officers for police officers subject to non criminal interviews

The *Support package for police officers being interviewed in relation to a complaint* identifies the conditions of use for legal practitioners as support people in interviews of police.

While there is no legal entitlement to a legal representative, there is also no legal prohibition to one being present. Therefore, a legal representative may act as a support person provided they do not interfere with the conduct of the interview.

Having established this, it is incumbent on the investigator to ensure that any legal representative present as a support person is made fully aware of their responsibilities as set out in the support package.

Any decision to remove a support person must be justified, recorded and the CMT should be advised as soon as reasonably practical.

Support package for police officers interviewed in relation to a complaint

The *Support Package for police officers interviewed in relation to a complaint* is a document that informs police officers of their rights and responsibilities in regards to complaint and criminal investigations. It also guides the use of legal practitioners as support people during interviews of police. The package is located on the PSC intranet site.

In evidence based investigations, the *Support Package* should be handed to subject officers prior to interview by investigators whether it is accessed via the intranet or handed to investigators with the file.

Investigators must balance the integrity of the investigation and the needs of the police officer being interviewed when determining the most appropriate time to provide the *Support Package*. The investigator's decision must be recorded in the investigation chronology outlining the reasoning for the decision.

If the investigation is of a covert nature, the support package should be given to the police officer just prior to being interviewed. Investigators must allow time for the information to be read and if required, legal advice to be obtained. See Part 4 on conducting evidence based investigations regarding custody rights.

Interviewing officers on sick leave and suspended from duty

There are occasions during police complaint investigations (criminal and non criminal) when an investigating officer will be required to interview police officers who are on sick leave. The obvious health and welfare of the afflicted officer are paramount, however there is a legal obligation to complete an investigation in a timely and effective manner. This will most often involve conducting an interview with all people identified during the investigation. This section applies to subject officers and police witnesses on sick report and police officers suspended from duty.

The CMT should be kept informed by the investigator of any situation and any arrangements involved in interviewing an officer who is on sick leave.

When it is necessary to interview a police officer who is absent from duty on sick leave in respect to a police complaint investigation, the following procedures for criminal and non criminal interviews will apply.

Criminal interviews

- The investigating officer will contact the officer to be interviewed and seek from that person their consent to be interviewed while on sick leave.
- If consent is forthcoming arrange a mutually agreeable time and location for the interview to take place.
- The investigating officer is to clearly indicate to the police officer to be interviewed that it is a criminal investigation, not a police complaint (formerly referred to as 'departmental inquiry') investigation and they will **not be directed** to answer questions.
- If consent is not forthcoming, the investigator is to consider the sufficiency of evidence to proceed with the criminal matter without that interview. This should involve the CMT. If there is insufficient evidence to proceed, in consultation with the CMT, the criminal investigation may be deferred or discontinued. If it is deferred, non criminal procedures would not be undertaken given risks posed to the deferred criminal matter. If the criminal enquiry is discontinued, non criminal investigation would commence and the procedures below are to be applied.

If the officer to be interviewed produces a medical certificate, advice should be sought from the Police Medical Officer (PMO).

Non criminal interviews

- The investigating officer will contact the officer to be interviewed and seek from that person their consent to be interviewed while on sick leave.
- If consent is forthcoming arrange a mutually agreeable time and location for the interview to take place.
- The investigating officer is to consider the need to provide travel arrangements for the officer to be interviewed.
- If the interviewing officer forms the opinion before or during the interview that to continue would be detrimental to the health or welfare of the officer, the matter is to be treated as if the officer on sick leave has not consented to being interviewed.
- If the officer on sick leave declines to be interviewed, the investigator is to seek the consent of the officer to obtain advice from their treating physician on fitness of the officer to take part in an interview.

- If the treating physician has no objection to the officer on sick leave being interviewed, the investigating officer is to inform the PMO of that fact, together with the full particulars of the officer to be interviewed and the reason why the officer is to be interviewed. Subject to any advice given by the PMO, the investigating officer should direct, or if junior in rank cause to be directed, the officer on sick leave to attend a particular place at a particular time for the purpose of being interviewed.
- If the officer on sick leave declines to consent to their treating physician being contacted by the investigating officer, or the treating physician is of the view that the proposed interview should not take place the PMO is to be advised.
- On receipt of such advice, the PMO should consult with the treating physician. If agreement cannot be reached about the suitability for the police officer on sick leave being interviewed, the PMO is to consider obtaining an independent medical assessment. Considering the outcome of this process the PMO may consent to the investigating officer, or if junior in rank a more senior officer, directing the officer to attend a particular place at a particular time for the purpose of being interviewed.
- When directing an officer to attend for an interview while on sick leave, the investigating officer is to consider the need to provide travel arrangements for the officer to be interviewed.
- A review of a decision not to interview a police officer on sick leave shall be undertaken by the investigating officer at such time or times as advised by the PMO.
- If the PMO agrees with a decision by the treating physician that the officer is unfit to be interviewed the investigator is not to interview the officer. When or if the officer returns to duty from sick leave, interviewing the officer can be reconsidered if appropriate.
- The investigating officer is to clearly indicate to the police officer to be interviewed that they will be subject to a non criminal investigation.

An investigation shall not be unduly delayed owing to the inability to interview a police officer on sick leave. If the investigating officer, after consultation with the PMO believes that there is no likelihood of interviewing the officer on sick leave in a reasonable period of time, the investigation should be completed as far as practicable and submitted to the relevant CMT for consideration.

Using information from carriage service providers in complaint investigations under Part 8A

Section 178 of the *Telecommunications (Interception and Access) Act*, allows the NSW Police Force to obtain, use and further disclose information from carriage service providers where these records are reasonably necessary for criminal law enforcement.

This means that information from carriage service providers may not be obtained, used or disclosed in complaint investigations under Part 8A that do not involve a criminal allegation. This includes; call charge records, reverse call charge records, subscriber checks, cell dumps, and statements of accounts.

Where this material is a factor, investigators must apply CPNs 07/07 and 07/08 available on the PSC intranet site.

Managing false complaints made against police by members of the public

Legislation

Section 314 of the *Crimes Act* provides that a person who deliberately makes a false accusation about another person, intending that person to be the subject of an investigation of an offence, is liable to imprisonment for 7 years. The proofs of the offence for section 314 of the *Crimes Act* are:

1. Defendant
2. Made an accusation
3. Intending a person to be the subject of an investigation of an offence
4. Knowing that other to be innocent of the offence.

Section 167A - *Offence of making false complaint about conduct of police officer or giving false information*. This section makes it an offence to knowingly make a false complaint against a police officer. The proofs of the offence for section 167A (1) are:

1. Defendant
2. Made a complaint under part 8A
3. Knowing the complaint to be false.

A 'no adverse' finding is insufficient cause to act pursuant to this section. Proceedings for an offence against section 167A may be instituted at any time within two years after the offence is alleged to have been committed as per section 167A (3).

Application of section 148 to false complaint investigations

Section 148 applies to circumstances arising from the investigation of a complaint under Part 8A. Section 148 is not limited to the Part 8A matter being investigated. It applies equally to other matters arising from the investigation of the complaint.

The effect of section 148 (1) is that, if sufficient evidence exists to warrant the prosecution of any person for an offence, you must cause appropriate proceedings to be instituted against the person. This includes false complaints.

There is no discretion under this section for an investigator to decide whether or not to institute proceedings if sufficient evidence exists to warrant prosecution.

However, when it is a police officer involved, no proceedings are to be undertaken without the approval of the Commissioner as per section 148 (3).

Investigating false complaints

When evidence is presented indicating that a complaint about a NSW police officer is false, further investigation should be undertaken. If the matter is already being managed by the CMT, they should also manage the allegation that the complaint is false. If the initial complaint is in triage then the triage officer can consider both the initial complaint and the allegation that the complaint is false. Anyone found to have 'knowingly' made a false complaint against a police officer may have committed an offence and prosecution of the person responsible for the false complaint must be considered.

When a complaint is determined to be unfounded, the finding itself does not provide sufficient evidence to establish the commission of an offence relating to a false complaint. Where necessary, an investigation needs to be undertaken to establish *prima facie* at criminal standard.

The standard principles for considering any investigation apply, i.e. nature and circumstances of the offence, likelihood of proving the offence, victim needs, community needs. The NSW Police Force considers the protection of our officers from false complaints to be a high priority and the most significant consideration for the CMT will be the likelihood of establishing proof that the complaint was knowingly false.

Mental health considerations

In circumstances where a complainant allegedly has a mental illness difficulties may arise in proving that a person knowingly made a false complaint. If an investigator is of the opinion that mental health is a factor, enquires should be conducted to deduce the extent of the illness and any impact it may have on the person's ability to know that what they were alleging was false at the time they made the complaint.

However, mental illness does not preclude a person from being subject of legal process. If a person is brought before the court, it is up to the court to decide, based on the evidence presented if the condition is such that it negates the person's ability to be held to account for their conduct at the time they made the complaint.

Evidentiary issues

Section 170 restricts the admissibility of documents brought into existence for the purposes of Part 8A to certain proceedings and circumstances. Importantly, section 170 does not apply to a document comprising a complaint. When compiling a brief of evidence under section 167A or section 314 of the *Crimes Act*, legal advice should be obtained concerning the impact of section 170 on the brief.

Proceeding to charge

Any person found to have knowingly made a false complaint against a police officer, may have committed an offence. Prosecution of the person responsible for lodging the false complaint must be considered. Under section 148 (1) discretion in the matter may be removed.

An investigator will consult with the CMT, PSDO or the commander / manager to jointly assess whether sufficient evidence exists to warrant prosecution.

If a clear decision cannot be reached, consideration should be given to consulting a PSM or equivalent. Legal advice can be sought as required.

Directed interviews with senior officers under clause 8(1) of the *Police Regulation*

It is a requirement that officers investigating a complaint should be of equal or greater rank than the subject officer. Only in exceptional circumstances should this rule be deviated from. Where exceptional circumstances occur, it should only be after careful consideration by the CMT of the appropriateness of the interview, including a risk appraisal of the possibility of undue influence being exerted by the senior officer over the interviewing officer. Where the senior officer is unwilling to participate in an interview or assist an internal investigation without being directed to do so it will be necessary to have a more senior officer direct that officer to participate in the process.

Also see CPN 05/05 on the PSC intranet site which informs parties of the roles and responsibilities of senior executive officers regarding directions issued under clause 8 of the *Police Regulation*.

This section provides advice and guidance to facilitate the direction to the interviewee.

Directing a more senior officer to answer questions during a complaint related interview

Pursuant to clause 8 (1) of the *Police Regulation* officers are to promptly comply with all lawful orders from those in authority over them. This clause only applies to officers who have authority over other officers, i.e. more senior in rank. As with all officers, a senior officer may be directed to respond to questions or other requests and at the end of the interview be directed not to discuss the interview with certain people. If a senior officer agrees to cooperate and answer questions about the complaint it will not be necessary to issue any formal direction.

Where the senior officer requests an official direction, a more senior officer will need to direct them, either personally or through correspondence, to answer the questions asked by the interviewer to comply with other requests and to comply with the direction about not compromising the integrity of the investigation. The direction should also include a reminder of the welfare services available to the interviewee.

The appropriate format for the direction is on the PSC Intranet site under Forms – Direction to Senior Officers.

Use of Senior Executive Officers in directed interviews

Who is a senior executive officer?

A NSW Police Force senior executive officer for the purposes of these *Guidelines* is any police officer who is a member of the NSW Police Force Senior Executive Service (SES) by virtue of Section 33 of the *Police Act*. A member of the SES can only be above the rank of superintendent.

Role of senior executive officers in complaint interviews

Senior executive officers may be present at complaints interviews for reasons that may include:

- to issue a direction to the involved officer if that officer is of a senior rank to the interviewer
- as an observer for the NSW Police Force due to the complexity or political sensitivity of the matter
- as part of senior management responsibilities
- to ensure that no undue influence is exerted by the interviewee (senior officer) over the junior interviewing officer.

In all cases the role of the senior executive officers and their understanding of it in the complaint interview must be established by the CMT prior to the interview.

Selecting the most appropriate senior executive officer to give a direction

CMTs should be alert to the risks of compromising an investigation and should not approach a senior executive officer to issue a direction if this might result in a conflict of interest, eg. if they are to be present as a support person for a senior colleague or for any other reason where a conflict of interest or a perception of a conflict of interest may exist.

Responsibilities of senior executive officers at complaint interviews

Senior executive officers present at complaint interviews are required to state for the record their role and their reason for being present. They should act consistently with their stated role during the interview and avoid creating situations where any deference given to their senior rank by others may compromise an investigation.

Interviews to be recorded

All complaint interviews in which senior executive officers are present are to be recorded by ERISP if agreed to by the interviewee.

Does the senior officer or senior executive officer need to be present at the complaint interview after giving a direction?

It is not necessary for the officer giving a direction to be present at the interview. If a written direction has been given and the officer who issued it is not present, the investigator should ensure the interviewee endorsed the direction as read and understood. The investigator may wish to include the direction in either the typed or electronically recorded interview and confirm that the interviewee understands the direction. A copy of the endorsed direction should be provided, if appropriate to the interviewee. The original endorsed direction will need to be maintained as an investigation record and scanned onto c@ts.i.

Disclosure of a complainant's identity

In the event CMTs are called upon by an investigator or other relevant party to consider disclosing the identity of a complainant, the following is to be applied.

The identity of a Part 8A complainant must only be disclosed for legitimate reasons. This section discusses the legislation and Commissioner's guidelines for the appropriate disclosure of a complainant's identity and the advice that should be provided to complainants on the issue.

What legislative provisions apply?

All information that a person learns in an official capacity, including the identity of complainants is protected under Clause 75 of the *Police Regulation*. This clause requires all NSW Police employees to:

- treat all information official information as strictly confidential
- only divulge police information with proper authority
- observe the strictest secrecy in regard to NSW Police business.

Section 169A provides the authority for the identity of complainants to be disclosed in limited circumstances. Section 169A was introduced to expand the legislated protection of a complainant's identity which had previously been limited to the period of an investigation. Under section 169A a complainant's identity must be protected but can be disclosed:

- according to guidelines established by the Commissioner
- with the consent of the complainant
- when required by the *Police Act* or any other act
- for the purposes of any legal proceedings before any court or tribunal.

The guidelines established by the Commissioner for the purposes of section 169A are available on the intranet and all complaints practitioners must familiarise themselves with them.

Disclosure with the complainant's consent

As established under section 169A the consent of the complainant can allow for the disclosure of their identity. If complainant consent is given, the consent should be in writing and a copy of the consent is to be attached to the complaint file and c@ts.i.

Disclosure *without* a complainant's consent

The section 169A guidelines allow disclosure of a complainant's identity to support the effective management of a complaint. The consent of a complainant is not required for disclosures covered by the section 169A guidelines. For example, a CMT may disclose it to an investigator and the investigator may disclose it to an officer providing them support, eg. a PSM or legal advisor. However, even under the Commissioner's guidelines appropriate consideration must be given as to whether it is necessary to disclose a complainant's identity. For example, in some cases advice can be sought on how to manage a complaint without the advisor knowing the complainant's identity.

Section 169A also allows the release of a complainant's identity 'for the purposes of any legal proceedings before any court or tribunal' and 'when required by the *Police Act* or any other act'.

Requests under the *Police Act* or any other act are most likely to be made by the PIC or the Ombudsman who have several legislative provisions available to them to support such requests. Because there are a number of sources of this authority, an understanding the legislative provision is imperative to ensure an appropriate response. Seek further information from the requesting agency on the purpose of their request and if necessary, get advice from Legal Services.

Providing advice to complainants

Complainants need to be aware that although their identity will be managed on a confidential basis their identity might still be disclosed in accordance with the provisions of section 169A. They should also be in no doubt that their identity will be disclosed, if required to ensure the effective management of their complaint.

This information can be provided to any complainant but must be provided to:

- complainants who have refused to consent to the disclosure of their identity
- people who complain orally on the condition they remain anonymous.

Part 8A does not allow a police officer to guarantee that a complainant's identity will not be released.

See Part 3 CMT, *Police Act Section 169A(a) Commissioner's Guidelines* (concerning Commissioner's conditions for disclosure of a complainant's identity) and the *Commissioner's guidelines interpretive document* available on the Internal Witness Support Unit pages on the PSC intranet site.

Responding to untruthfulness

If any belief forms during the investigation that an officer may have been untruthful in relation to the handling of the complaint, a response to the issue will be required. This means triage processes described in Part 1 Triage would necessarily be applied to the 'discovery' of untruthfulness. Untruthfulness in this context is more than being evasive or not being fully frank and forthright.

Application of triage processes should include consideration of whether or not the truthfulness amounts to, or given more information, may amount to an offence such as *Providing False or Misleading Information* under section 167A(2) or other legislation. Depending on the circumstances of the matter, untruthfulness may become the most serious issue to be addressed in the complaint.

Investigators are to bring any 'discovery' of untruthfulness to the attention of the CMT immediately to allow prompt assessment of the situation and determine how to manage it.

Investigation tools

Investigation terms of reference (criminal & non criminal)

The investigation terms of reference template replaced the Investigation Agreement on the PSC intranet. It is mandatory for every evidence based investigation to have a completed terms of reference.

The terms of reference provide certain complaint information, define the scope of the investigation and establish responsibility for the investigation.

CMTs determine the content of terms of reference. Once finalised, the document is given to the investigator with the hard copy file (or copy thereof). The investigator is to review the complaint and terms of reference, endorse the terms of reference and return it for further endorsement.

The mandatory terms of reference template is available on the PSC intranet site.

Investigation Plan

An investigation plan is recommended for all complex investigations and should be submitted to the CMT for approval. The plan may be as simple as a list of proposed tasks or activities, taking into account such variables as: the nature and complexity of the complaint; resources required; any anticipated costs and constraints that may impact on that investigation. Deviations from the investigation plan must be submitted to the CMT for approval.

The corporately preferred template is available on the PSC intranet site.

Chronology (criminal & non criminal)

Maintenance of a chronology for evidence based investigations is recommended. The chronology allows investigators to record:

- activities undertaken
- advice sought from the CMT, PSDO or PSM
- contact with the complainant, witnesses or subject officer
- submission of status reports
- any decisions made regarding the investigation.

A chronology also assists in the preparation of the final investigation report.

The corporately preferred chronology template is available on the PSC intranet.

Notice to Interview

The notice should include details about the interview including:

- time and date
- location
- names and contact details of interviewer/s.

The Notice to Interview letter and instructions for its completion are located on the PSC intranet site.

Verbal clause 8(1) direction given to interview police officers (non criminal)

The direction given to police officers pursuant to clause 8(1) of the *Police Regulation* for an officer to comply with a non criminal complaint interview is:

As this is a police complaint investigation you are ordered (directed), pursuant to Clause 8(1) of the Police Regulation 2008, to truthfully answer the questions I ask you. Do you understand that?

If a directed interview is conducted, the investigating officer must clearly inform the interviewee that they are not under arrest but are bound to remain by virtue of a lawful direction to do so under clause 8 of the *Police Regulation*.

Police officers are not required to answer a direction that is protected by 'legal professional privilege'. Any direction in these circumstances is not lawful. This applies where the police officer is the client or a third party, such as a witness and only where the privilege actually applies.⁹ They can be asked about the whole incident but not what was specifically said in the interview with their solicitor.

A template containing relevant opening questions, consent to interview questions and closing questions is available via the PSC intranet.

Directive memoranda (non criminal)

A common practice for non criminal investigations is the use of directive memoranda or calling for reports from officers. Inevitably this process necessitates clarification of the response by the officer, requiring further questioning by the investigator. In these instances it is more practical to commence an interview that is handwritten, typed or audio recorded.

The memoranda outlines the allegation issue being investigated and directs the officer, pursuant to clause 8 of the *Police Regulation* to provide information about the issue.

If the investigator can justify the use of this tool, it is only to be used for non criminal matters according to the following guidelines:

- multiple issues may be addressed as long as there is sufficient information to identify the incidents surrounding the complaint
- the identify of the complainant must not be divulged, pursuant to section 169A unless authorised to do so by the Commissioner
- the directive memoranda should be in writing with the date and time of service recorded
- the service of directives should, as far as possible be contemporary and the police officers should be separated until each has completed their report
- the investigating officer should properly supervise all police who are served directive memoranda to ensure there is no collaboration between them.

Any response to a directive memoranda should be accepted in the form presented, regardless of whether it contains irrelevant information or spelling and grammatical errors.

The template for a directive memorandum is available on the PSC intranet site under Forms.

Situation reports (most likely criminal)

In the complaint investigation context, a situation report is required for the arrest of a serving police officer. See the PSC intranet site for the template and instructions.

⁹ Fagan –v– State of New South Wales [2004] NSWCA 182.

Status reports (criminal & non criminal)

Investigators are to submit status reports at a frequency determined by the CMT. These reports advise the CMT of the progress of the investigation and the tasks which have been and are proposed to be completed. Status reports should also be used to report the reasons for any delay in completing the investigation, allowing the CMT to amend the projected completion timeframe if required.

The corporately preferred status report template is available on the PSC intranet.

Extension of investigation time frame (criminal & non-criminal)

The 90 day standard for completion of CMT matters may be, in extenuating circumstances extended by the CMT. The investigator must report any circumstance that is likely to impact on the investigation not concluding within the timeframes set. Approval for an extension must be sought from the CMT before the expiration of the investigation deadline. The report must include the time extension requested, the reason for the request and list the outstanding activities and the new proposed completion dates. Investigators should expect their reasons for extensions to be scrutinised. Commands are frequently called upon to account for consistent failure to achieve a corporate standard, especially one concerning timeliness of complaint investigations. Where notifiable matters are concerned, the CMT is expected to notify the NSW Ombudsman of extensions and reasons given by investigators.

The corporately preferred chronology template is available on the PSC intranet.

Investigation report

At the conclusion of the investigation an investigator is required to complete and submit a report that includes details of the complaint investigation.

The report and any annexure must provide the CMT with sufficient information about the investigation to allow them to make informed and appropriate outcome and action decisions. Relatively straightforward investigations will not require the detail of more complex and protracted investigations. Finalisation occurs after the CMT have quality reviewed the report and accepted the investigator's findings for each issue.

The corporately preferred investigation report templates are available on the PSC intranet.

An investigator's report should include the following details.

c@ts.i file number

All complaints are recorded on c@ts.i. Each is given a unique identifying number. This number must be included in all reports because it identifies the complaint and its category. If a complaint is resolved through a major investigation, the investigation name assigned may also be referenced in this section of the report.

Complaint by

The personal contact details of the complainant are recorded in this section of the report, including name, address and contact phone numbers. The inclusion of the complainant details in this report does not breach confidentiality requirements.

Subject officers

The details of the subject officers, as registered on c@ts.i are recorded including their full name, rank and station. The registered number of the subject officer is not to be recorded on the report. If the subject officer is a former officer the separation details need to be included.

Issues

The issue or issues for each subject officer must be recorded as they are registered on c@ts.i. The issues are determined by the CMT or may be issues arising. Issues arising are issues with police conduct that are additional to those in the complaint letter that are identified in the course of the investigation. This can include the identification of policy or procedural failures and in some cases, the identification of untruthfulness in officer responses to the investigation. Any issue arising is to be reported to the CMT. Subject to CMT instruction, the investigation should address these new issues. If there is more than one issue and more than one officer, ensure officers are linked to relevant issues.

All issues and any matters arising should be accounted for irrespective of the related finding and outcomes.

Complaint details

Identify any issues previously investigated, referred elsewhere for investigation, or otherwise addressed by the NSW Police Force.

The investigator may decide to include a brief summary of the complaint or any other relevant factors such as the history of the issue to place the report in context.

Relevant law and policies

Text should link the issues and any matters arising with relevant legislative provision or policy. This assists in placing the allegation/s in the context of misconduct and in identifying the scope or nature of that misconduct.

Evidence

Provide an overview of the evidence obtained during the course of the investigation. Reference any attachments.

It would obviously include inculpatory and exculpatory evidence. Depending on the type of investigation, the investigator should comment on the admissibility of the evidence for criminal proceedings and consider the standard of proof required for the nature of the allegation.

Findings

Each CMT investigation issue requires a finding of either **sustained** or **not sustained**. The standard moves along a sliding scale¹⁰

All complaint allegations are determined on the balance of probability, the civil onus of proof and each identified issue must be found as **sustained** or **not sustained**. The general application of this standard is that something is more likely to have happened than not. Managerial action, if warranted, will be based on this standard of proof. For more serious complaint allegations the higher the level of probability is required to determine the finding, especially where it is anticipated that reviewable action may result. This notion was considered in *Briginshaw v Briginshaw* (1938) 60 CLR 336, where the more serious the matter under considerations, the more stringent the requisite degree of satisfaction.

If a complaint allegation involves criminal conduct, the criminal standard of proof (beyond reasonable doubt) applies to the consideration of instituting criminal proceedings. The matters and factors to be considered in reaching a decision whether or not to prosecute are outlined in *Guideline 4 of the Prosecution Guidelines* of the DPP.

Recommendations

Only commanders / managers have authority to determine management action against a NSW Police Force employee. Investigators are not to implement any action, including counselling without clear approval from the commander / manager.

Where a criminal investigation is concerned, any recommendation to commence criminal proceedings would be included here. Remember the delegation to institute proceedings rests with all assistant commissioners.

Recommendations for management action related to criminal and non criminal investigation outcomes would also be included here. These are:

- no further action
- non reviewable action, per schedule 1, *Police Act*
- reviewable action, per section 173
- dismissal or removal by virtue of section 80(3) or 181D.

If management action recommendations are to be made, all facets of the investigation and the officer's complaint history should be taken into consideration, These can be provided by the CMT.

The management actions that can be considered by the commander / manager or CMT include the above options.

¹⁰ *Briginshaw v Briginshaw*, (1938) 60 CLR 336

Investigators may also make recommendations about further communication with the complainant and concerning organisational actions, such as improvements to policies or systems at corporate and local levels. For example, an investigator might recommend modifying a roster, altering a policy or procedure or updating a computer system.

Examples of possible complaint outcomes for complainants, the organisation and witnesses that the investigator could consider are below.

- Organisation – command wide issues, systems, SOPs or legislation.¹¹
- Complainant - acknowledgement letter, explanation, apology on behalf of the NSW Police Force, the command or officers with their consent eg. an apology on behalf of x for y circumstances as perceived by the complainant, or specific undertakings eg. to return property. In relation to complainant for whom inculpatory evidence exists of them having made a false complaint, outcomes for such complaints should differ accordingly.
- Witnesses - advice that the matter has concluded or their involvement is no longer required. No information on management action or any other detail is to be given to witnesses in this context, nor is their satisfaction sought.

Ensure any good police work is recognised. Investigators and commanders must be certain of their judgment in this regard.

General comment

The investigator may make general comments that may assist the CMT make decisions about outcomes. This may include, reference to timeliness of the investigation, contact with the complainant, mitigating circumstances that may exist contributing to the behaviour or conduct leading to the sustained finding or any other relevant comment.

Section 163 - investigator recommendations

Section 163 applies to ‘police information’ provided to the NSW Ombudsman in accordance with requirements under Part 8A or the *Ombudsman Act*.

The delegated officer may, at any time, identify information provided to the Ombudsman as ‘critical police information’. To do this the delegated officer must be of the opinion that the publication of that information may prejudice an investigation or prejudice the prevention of crime, or otherwise be contrary to the public interest.

Investigators may recommend this section be invoked where critical police information is identified. The specific documents or attachments containing that information must be identified. Grounds for recommending withholding such information must also be stated.

¹¹ s145(2) *Police Act* – ‘If the complaint under investigation is indicative of a systemic problem involving the NSW Police Force generally, or a particular area of the NSW Police Force, the investigation may extend beyond any police officer to whom the complaint relates...’ to the NSW Police Force generally, or to other police officers and other members of the NSW Police Force. [s145(2)(a) and (b)].

Critical police information is defined as information, where publication of that information may:

- prejudice the investigation of crime, eg. the publication of otherwise confidential police investigative methodology or
- prejudice the prevention of crime, eg. confidential security arrangements or
- otherwise be contrary to the public interest.

The public interest will depend on the circumstances in which the question arises. The public interest is a term for which there is no single or precise definition. However, as a general concept it has been described as referring to considerations of the good order and functioning of the community and government affairs for the wellbeing of citizens. It can also be described as the 'common good' or the benefit of the community in general. This also includes the proper functioning of the NSW Police Force.

Examples of where the publication of information could be contrary to the public interest could include information that:

- deals with national security
- contains sensitive police intelligence or information, including the location of covert police premises or surveillance sites, police methodologies or techniques or information about offences not yet subject of legal proceedings
- discloses the identity of; a police source, witnesses or their family if there is a genuine threat to their safety, a police undercover operative with an assumed identity, the use of an undercover operative in an ongoing investigation or material relating to the identity of a participant in a controlled operation
- might facilitate the commission of other offences or allow offenders to avoid detection by taking evasive action
- is conditionally provided by another law enforcement agency or another source i.e. information will not be disclosed
- relates to serious allegations the subject of ongoing investigations
- encourages the commission of offences against the laws of the state
- adversely affects the security, discipline or good order of a correctional centre
- compromises or jeopardises any ongoing investigation or operation or the safety of any law enforcement officer
- discloses the sexual history of a complainant or witness.

Templates for an investigator's report provide the wording to use when recommending to the delegated officer that the restriction on the NSW Ombudsman to publish critical police information be invoked.

Section 150 (complainant satisfaction)

This section can only be completed after the conclusion of the investigation and consideration of management or other action.

The NSW Police Force is obliged to comply with a requirement to advise the complainant of outcomes and of action taken or to be taken, and report on complainant satisfaction with the action taken to the NSW Ombudsman. Communication with the complainant in this regard is often undertaken by the investigator. See Part 6 Administrative support functions.

CMT minutes for all matters subject to notification to CCYP must record decisions made to notify, or not notify, the CCYP, including the reasons for the decision. These decisions must form part of the section 150 notification to the Ombudsman.

Where telecommunication interception and access material is used in the assessment and/or investigation of a complaint pursuant to Part 8A, see CPNs 07/07 and 07/08.

Subject officer satisfaction

This satisfaction relates only to the management of the investigation and not the outcome. It includes the timeliness of the investigation, the communication strategies used by the investigator and the conduct of the investigator and CMT.

The template for an investigator's report provides a sample of how to report the satisfaction or otherwise of the subject officer.

Supervisory issues

An investigator should consider all factors that may have impacted on the behaviour or subject officers conduct, particularly any supervisory issues. If supervisory issues are identified as contributing factors, the action taken to address them must be reported in this section.

The investigator must indicate that they have conducted the investigation in an effective and timely manner. This would include acknowledging that sufficient investigation avenues have been explored, contemporary techniques and methods have been used and the investigation is complete. The acknowledgement also states that the findings reached are appropriate and supported by the evidence.

Commander's certification

The commander has the ultimate responsibility for how the investigation is conducted. They must certify that they accept the investigation has been conducted in a timely and effective manner, that sufficient enquiries have been conducted and that appropriate techniques and methods have been used. The commander must also state that they accept the findings of the investigator for each complaint issue and will consider any recommendations when deciding their response.

The commander is also required to attempt to remedy any concerns that the subject officer may have about the timeliness of the investigation, the communication strategies used by the investigator and the conduct of the investigator and CMT. If there is any dissatisfaction they also need to report their action to resolve it.

Note: Investigators should, where any act or case is concerned check referencing standards and adjust their style accordingly. Supervisors or other local quality reviewers should assist in improving the presentation of reports where quality is lacking.

Sources of advice

For advice on all matters, including the conduct of the investigation, investigative practice and process advice firstly consult members of the local CMT, commander, executive officer, crime or investigations manager, PSDO or other nominated personnel.

Thereafter, the region PSM can be contacted for investigative advice.

For additional advice concerning processes and administrative concerns, contact the PSC Employee Management Consultancy Unit on 40699 / 8234 5699.

For advice concerning c@ts.i contact the c@ts.i Business Team on 40699 / 8234 5699

For advice concerning internal complainants and witnesses, contact the IWSU on 56533 / 92656533

For legal advice contact Operational Legal Advice Unit on 79243 / 9689 7243. For after hours legal advice contact the DOI on 54408 / 9265 4408.

Important things to remember

This is a summary. Do not rely on this list alone to guide the conduct of an investigation.

1. If the allegation is criminal the matter should be conducted like any other criminal investigation. You do not have any discretion.
2. The investigation of non criminal issues should not be conducted until after the criminal investigation has concluded.
3. There is no need to direct an officer to participate in a police complaint interview when they are willing to participate voluntarily.
4. An investigation plan is recommended for all complex investigations and where appropriate, for non criminal investigations and must be submitted to the CMT for approval. The plan may be as simple as a list of proposed tasks or activities.
5. It is best practice that the complainant where possible, be interviewed prior to completing the investigation plan.
6. Investigators are to submit status reports to advise the CMT of the progress of the investigation.
7. The provisions of Part 9 and Section 99 of *LEPRA* apply equally to a police officer as they do to any other member of the public.
8. The provisions of Part 9 do not apply if a person attends the police station voluntarily to assist with enquiries, is free to leave at any time and would not be arrested if they attempted to leave. In these circumstances complete a *P773 Details of Person at a Police Station Voluntarily* form.
9. In relation to criminal investigations the subject officer has the same rights as any member of the public. This means they do not have to do anything unless legislation requires it.
10. There must be a clear and reasonable break between any criminal phase of your inquiry and the non criminal interview, along with an explanation sufficient to demonstrate to the police officer that they are subject to two separate procedures.
11. It is recommended that investigators, on request permit the presence of a support person during criminal and non criminal interviews provided that they do not interfere with the process.

Part 5 Complaint outcomes and management action

This Part provides information and guidance on complaint outcomes and on the determination and implementation of non reviewable management action, reviewable and other appealable management action. For more information see the PSC intranet site.

The delegated authority for determining management action rests with commanders of the rank of superintendent or above or their civilian equivalent.

Complaint outcomes

Examples of possible complaint outcomes for complainants, the organisation and witnesses that the investigator could consider are below.

- Organisation - command-wide issues, systems, SOPs, legislation.
- Complainant - acknowledgement letter, explanation, apology on behalf of the NSW Police Force, the command or officers with their consent eg. an apology on behalf of x for y circumstances as perceived by the complainant¹²; or specific undertakings eg. to return property. In relation to complainants for whom inculpatory evidence exists of them having made a false complaint, outcomes for such complaints should differ accordingly.
- Witnesses - advice that the matter has concluded or their involvement is no longer required. No information on management action or any other detail is to be given to witnesses in this context. Nor is their satisfaction to be sought.

Possible outcomes for NSW police officers also include management action.

Types of management action

There are two broad categories of management action which are legislated under Part 9 of the *Police Act*. They are:

- non-reviewable action
- reviewable and other appealable action.

¹² The NSW Ombudsman's Office has information on 'Apologies by Public Officials and Agencies.'

Non reviewable action

Non reviewable action is defined under section 173 (1) as action referred to in Schedule 1. Types of action listed under Schedule 1 include:

- coaching
- mentoring
- training and development
- increased supervision
- counselling
- reprimand
- warning
- retraining
- personal development
- performance enhancement agreements
- non disciplinary transfer
- change of shift
- restricted duties
- recording of adverse findings.

These actions are implemented at the local level to address less serious misconduct with the intention to correct the officer's behaviour. Non reviewable action does not need to be determined by an IRP.

There is no avenue for appeal against non reviewable action at the Industrial Relations Commission (IRC); however it may be subject to review at the local level through the next line of command such as a region commander.

No management action is to be taken against an officer without the approval of the manager or commander.

Responsibilities of commanders implementing non reviewable management action for police officers transferred or seconded

During the course of a complaint investigation, police officers subject to a complaint may be transferred or seconded to a command different from the one where the misconduct occurred.

This section clarifies the responsibilities of commanders:

- at the location where the subject officer was attached at the time the misconduct occurred
- at the location where the subject officer is attached at the time non reviewable management action is to be implemented.

Reviewable and non reviewable action

This section only relates to matters where a commander has decided to implement non reviewable action under section 173 and Schedule 1 of the *Police Act*. Matters considered for reviewable action under section 173 must be notified to the IRP for consideration.

Commanders' responsibilities – one-off action

The commander of an officer at the time the officer engaged in misconduct (Commander A), will determine the appropriate non reviewable management action. This ensures that the decision is made by the commander with the greatest knowledge of the circumstances at the time the misconduct occurred.

If an officer, currently subject to an investigation transfers or is seconded from Command A to Command B, Commander B is obliged to take any non reviewable action as determined by Commander A at the conclusion of the investigation. This only relates to matters where adverse findings are reached during the investigation.

It is the obligation of Commander A to ensure the investigation is completed and any resulting non reviewable management action is communicated to Commander B as soon as practical. It is important commanders endeavour to complete these actions in a timely manner, taking into consideration the subject officer's welfare and the effect delays may have upon the performance of the officer at their new location.

Commanders' responsibilities – ongoing action

If Commander A determines that an ongoing plan such as a conduct management or remedial performance program is required for the ongoing management of the officer, it should be negotiated between the two commanders.

Consideration should be given to timeframes and any improved conduct or performance of the officer since arriving at their new location. It may be decided a plan is not necessary due to an extended period of investigation or a delay in deciding appropriate management action.

If there is disagreement between the commanders in respect to the implementation of a conduct management or remedial performance program, the decision rests with Commander B, as they have current responsibility for the ongoing management of the plan.

Subject officer's right of review

If the subject officer is dissatisfied with the proposed non reviewable action they may seek to have the matter reviewed. This review would be conducted by the next line of command of the commander responsible for the officer at the time they engaged in misconduct.

Record Keeping

Documentation must be maintained by the commander who determines the non reviewable management action. Official correspondence to the officer, such as a *Warning Notice* must be prepared by the commander of the location where the officer was attached at the time the complaint was initiated. The commander who implements the action on behalf of another, must advise the original commander when and what action has been implemented.

For more information on conduct management and remedial performance plans, see the Employee Management pages of the PSC intranet and / or contact the PSC Employee Management Consultancy Unit on 40699 / 8234 5699.

Appealable management action

Appealable action is action that can be appealed at the IRC on the basis that it is harsh, unjust and unreasonable. There are three types of appealable action which are legislated under the *Police Act* and include:

- section 173 reviewable action
- section 80(3) dismissal of probationary constables
- section 181D loss of commissioner's confidence.

How is appealable action implemented?

When a commander wishes to implement section 173 or 181D appealable action against an officer it is **mandatory** for the matter to be discussed at the IRP or Commissioner's Advisory Panel (CAP). For certain matters it is mandatory to submit a notification to the IRP or CAP. Refer to the PSC intranet site or Police Circular 08/02 for a list of conditions that constitute a mandatory notification to the Employee Management Process Unit.

The IRP and CAP are administered by the Process Unit. To notify a matter to the Process Unit a *P762 Notification form* and supporting documentation (together with the required number of copies) must be submitted. A copy of this form is located on the PSC intranet site. The Employee Management Process Unit can be contacted on 51014 or 9697 1014 for assistance.

The administration functions associated with section 80(3) dismissal of probationary constables are handled by the Office of the Professional Standards Manager, Corporate Services.

Internal Review Panel

The role of the IRP is to consider matters that have been notified to the Process Unit and make recommendations to the decision maker in relation to appropriate management action under section 173 or *Police Regulation*. The aim of the IRP is to ensure these types of management action are consistently applied across the NSW Police Force.

The process for initiating appealable action is undertaken by the officer's commander who refers sustained matters to an IRP. The IRP considers the issues and determines the most appropriate management action. Each matter is considered on a case by case basis and the outcomes of an IRP vary accordingly. The officer's commander is the decision maker for section 173 and is responsible for implementing the action.

Internal Review Panel recommendations

Recommendations advocated by an IRP include:

- no further action
- section 173 non reviewable action
- section 173 reviewable action
- clause 55 of *Police Regulation* (relating to remedial performance programs).

For further information relating to the IRP refer to the PSC intranet site.

Implementing section 173 reviewable action

Section 173 reviewable action includes:

- deferral of an officer's increment
- reduction in rank
- disciplinary transfer
- permanent removal from specialist duty
- forced payment of compensation to the NSW Police Force where the officer has been negligent
- any other action (other than dismissal) that the Commissioner considers appropriate.

Prior to implementing reviewable action the commander must submit a notification to the Process Unit. The matter will be discussed at an IRP where a recommendation for reviewable action may be made.

Also, prior to implementing the recommended action the officer must be served with a *Show Cause Notice* in accordance with section 173(5). The Process Unit administers the preparation of a *Show Cause Notice*, which is then referred to the command for service on the officer. The commander is responsible for checking the accuracy of the information in the *Show Cause Notice*. Procedures for serving Notices on officers who are on sick leave are on page 89.

The officer has seven days from the date of service of the Notice to indicate if they will be making representations in response to the allegations of misconduct or unsatisfactory performance against them. The officer then has a further 21 days to provide a response to the *Show Cause Notice* served on them. There is no obligation on the officer to respond to the Notice.

The officer's response should be directed to their commander, who will decide whether to proceed with reviewable action based on the officer's representations. The commander is to advise the Process Unit of their determination so that arrangements can be made for an Order pursuant to section 173(6) to be prepared, or for return of the matter to the IRP. If the commander decides to proceed with reviewable action an Order in accordance with section 173(6) **must** be served on the officer prior to implementation of any action. Although the Process Unit administers the preparation of the Order, once again the commander is responsible for the accuracy of the information in the Order. Procedures for serving Orders on officers who are on sick leave are on page 89.

The officer has 21 days from the date of service of the Order to lodge an appeal to the IRC for a review of the Order on the grounds that the Order is harsh, unjust or unreasonable.

If no appeal is lodged, no management action can be taken until the expiration of the 21 day appeal period, or if an appeal is lodged no action can be taken until the appeal process at the IRC has been finalised. It is the responsibility of the commander to ensure the reviewable action is implemented.

What happens if a commander decides not to implement section 173 reviewable action?

As decision makers for the implementation of section 173 reviewable action, commanders may accept or reject the advice of the IRP. A commander may choose not to implement section 173 reviewable action as recommended by an IRP. They may also choose not to implement section 173 reviewable action as a result of representation submitted by the subject officer. If this is the case, the commander is required to forward a written submission to the Director, Employee Management so the matter can return to an IRP for further consideration. If no agreement can be made at that level, the commander must discuss the matter with their next line commander and an agreement reached. The Director, Employee Management is to be informed in writing of the final outcome.

Further information in regards to commander's requirements in respect of this issue is available in information sheets on the PSC intranet site.

Summary of steps in the section 173 reviewable action process

- Sustained finding/s determined from a CMT investigation.
- Matter falls within the provisions of Police Notice 08/02 relating to mandatory notifications, or appealable management action sought.
- P762 notification, supporting documents and required number of copies submitted to Process Unit.
- Matter scheduled for discussion at IRP.
- IRP recommends 173 reviewable action.
- Commander to liaise with the Process Unit for preparation of *Show Cause Notice*.
- *Show Cause Notice* to be checked for accuracy and signed by commander.
- Signed *Show Cause Notice* to be served on officer.
- Officer given seven days to indicate if will respond to Notice then further 21 days to respond.
- Response provided, commander to consider response.
- Advise Process Unit of determination.
- If continuing with reviewable action, Process Unit to prepare *Order* pursuant to section 173(6).
- *Order* to be checked and signed by commander and served on officer.
- Await 21 day appeal period or finalisation of matter at IRC before implementing reviewable action.
- If not proceeding with reviewable action, the commander is required to forward a written submission to the Director, Employee Management and the matter will return to IRP for further consideration.

Implementing section 80(3) dismissal of probationary constables

In the case of section 80(3) dismissal action, please contact the Office of the Professional Standards Manager, Corporate Services for information.

Commissioners Advisory Panel

The CAP considers notifications to the Process Unit to make recommendations as to the appropriateness of management action under section 181D loss of Commissioner's confidence. The CAP is established under section 181H to 'assist in the exercise of the Commissioner's functions under section 181D'.

The Commissioner is the decision maker for the application of section 181D action. For further information relating to the CAP refer to the PSC intranet site.

Section 181D loss of Commissioner's confidence

The Commissioner has the legislative power in accordance with section 181D(1) to remove an officer in whom he has lost confidence having regard to their conduct, integrity, competence or performance.

Following a recommendation by the CAP for section 181D action, a *Show Cause Notice* pursuant to section 181D(3)(a) is prepared by an external legal firm. This Notice outlines the grounds upon which the Commissioner is considering removing the officer, together with supporting documentation. All documents are referred by the Director, Employee Management to the Commissioner for consideration.

If the Commissioner is considering removing the officer based on the information in the section 181D(3)(a) *Show Cause Notice* and supporting documentation, the Commissioner will issue the Notice by signing it. The signed Notice will be forwarded to the officer's commander for service. Procedures for serving Notices on officers who are on sick leave are on page 89.

The officer has 21 days from the date of service of the Notice to make written representations in response to the Notice. Once a response has been provided by the officer it is forwarded to the Commissioner who makes a determination whether he has lost confidence in the officer.

The Commissioner will not make a decision to remove the officer until the officer has been provided with an opportunity to provide written submissions in response to the Notice. However, there is no obligation on an officer to provide such written submissions.

What happens if the Commissioner has lost confidence in an officer?

If the Commissioner has lost confidence in the officer's suitability to remain a police officer (after taking into consideration the grounds contained in the *Commissioner's Notice* pursuant to section 181D(3)(a), supporting documentation and the officer's written submissions in response to the Notice), a removal *Order* pursuant to section 181D(1) will be prepared by the Process Unit. Attached to the Order is a *Statement of Reasons* which is a document expressing the reasons for the Commissioner's decision to remove the officer. The *Order* and *Statement of Reasons* is provided to the Commissioner for signature and forwarded to the officer's commander by the Process Unit for service on the officer. Procedures for serving Orders on officers who are on sick leave are on page 89.

Removal of the officer takes effect from the date the Commissioner signs the Order.

The officer has 14 days from date of service of the *Order* to appeal the decision at the IRC on the basis the officer's removal is harsh, unjust or unreasonable.

What happens if the Commissioner has not lost confidence in an officer?

If the Commissioner has not lost confidence in the officer a *Warning Notice* pursuant to section 173 may be issued and the matter may be returned to an IRP for consideration of reviewable action. If that occurs the section 173 reviewable process should be followed. If a Commissioner's *Warning Notice* is issued, it is served with a *Statement of Reasons* formally advising the officer of the grounds upon which the Commissioner's determination was made. **Where a Commissioner's *Warning Notice* and *Show Cause Notice* pursuant to section 173(5) are issued both documents MUST be served at the same time.**

Summary of steps in the section 181D process

- Sustained finding/s determined from a CMT investigation.
- Matter falls within the provisions of Police Notice 08/02, or appealable management action sought.
- P762 notification, supporting documentation and required number of copies submitted to Process Unit.
- Matter scheduled for discussion at CAP.
- CAP recommends section 181D loss of commissioner's confidence.
- Process Unit administer preparation of section 181D(3)(a) *Show Cause Notice* and supporting documentation which is then forwarded to Commissioner for consideration.
- If Commissioner is considering removing officer, *Show Cause Notice* signed.
- *Show Cause Notice* served on officer and copy of supporting documentation provided to officer.
- Officer has 21 days to respond to Notice.
- Response received, forwarded to Commissioner for consideration.
- If Commissioner has lost confidence in officer, *Order* will be issued.
- *Order* and *Statement of Reasons* prepared by Process Unit.
- *Order* and *Statement of Reasons* signed by Commissioner.
- *Order* and *Statement of Reasons* served on officer by officer's commander.
- If Commissioner has not lost confidence, the Commissioner may wish to issue a *Commissioner's Warning Notice* and / or the matter may be returned to the IRP for consideration of alternative management action.
- Where a *Commissioner's Warning Notice* and *Show Cause Notice* pursuant to section 173(5) are issued, both documents MUST be served at the same time.

Making conclusions about appropriate management action

The Decision Making Framework available on the PSC intranet may assist in determining the appropriate management action. In relation to complaint / conduct considerations, issues covered include organisational and community expectations, implications, impact and injury.

For example, commanders / managers or CMTs should at least consider:

- the seriousness of the issue/s, the circumstances of the complaint and evidence obtained
- the officer's performance history, complaint profile, risk factors and past responses to management intervention
- the officer's position, attitude and level of cooperation
- effectiveness of existing and intended management intervention
- the appropriateness and use of possible management actions
- the need to address systemic issues
- customer satisfaction to the extent possible
- any mitigating circumstances.

Actions may also be classed as 'pending' and reflected as such on c@ts.i if they need to be put on hold or suspended until another action or activity has happened or been completed. This could be because another investigation is in progress or CMTs are waiting for legal advice, a judicial outcome from a court hearing or tribunal, or a decision from the commander of the subject officer or an IRP. CMTs may also be waiting for a medical assessment.

Serving Show Cause Notices under sections 173(5)(a) and 181d(3)(a) and Orders under sections 173(1)(d) or 181d(1) of the *Police Act*, on police officers on sick leave.

On occasion, an officer may be on sick leave when the Notice Order has been issued and is available for service. The health and welfare of an officer are matters that should form part of any consideration as to whether the Notice or Order should be served, however, there is also an interest in bringing matters of this nature to finality, both for the officer, other involved parties and the NSW Police Force.

When it is necessary to consider serving a Notice or Order on an officer who is absent from duty on sick leave the following procedure should apply.

- The officer in possession of the Notice or Order will contact the officer on sick leave and seek from that person their consent to be served with the Notice or Order while on sick report.
- If consent is forthcoming arrange a mutually agreeable time and location for the documents to be served.
- The officer in possession of the document is to consider the need to provide travel arrangements for the officer on sick leave.
- If the officer in possession of the document forms the opinion that the service of the document would be detrimental to the health of the officer on sick leave, the matter is to be treated as if the officer on sick leave has not consented to service of the documents.
- If the officer on sick leave declines to be served with the documents, the officer in possession of the Notice or Order should seek the consent of the officer on sick leave to obtain advice from their treating physician on fitness of the officer to be served with the documents.
- Following this point, it will be necessary to involve the Police Medical Officer (PMO). Prior to the PMO becoming involved, the officer on sick leave's Commander MUST advise the officer in writing, that any act or omission determined to deliberately mislead a health professional will be considered a breach of the Code of Conduct and Ethics.
- If the treating physician has no objection to the officer on sick leave being served with the documents, the officer in possession of the document is to inform the PMO of that fact, together with the full particulars of the officer on sick report, and the reason why the officer is required to be served with the Notice or Order. Subject to any advice given by the PMO, the officer in possession of the document should direct, or if junior in rank, cause to be directed, the officer on sick leave to attend a particular place at a particular time for the purpose of being served.
- If the officer on sick leave declines to consent to their treating physician being contacted by the officer in possession of the document, or if the treating physician is of the opinion that the document should not be served, service should not be affected and the PMO should be advised.
- On receipt of such advice, the PMO should consult with the treating physician, and if agreement cannot be reached about the suitability for the officer on sick report to be served with the notice, the PMO is to consider obtaining an independent medical assessment. Considering the outcome of this process the PMO may consent to the officer in possession of the document, or if junior in rank, a more senior officer, directing the officer on sick leave to attend a particular place at a particular time for the purpose of being served with the Notice or Order.
- When directing an officer on sick leave to attend a place in order that the document can be served the officer in possession of the document is to consider the need to provide travel arrangements for the officer on sick leave.
- A review of a decision not to interview a police officer on sick leave shall be undertaken by the officer in possession of the document at such time or times as advised by the PMO.

- If the PMO agrees with a decision by the treating physician that the officer is unfit to be served with the documentation, the documents are NOT to be served. If or when the officer returns to duty from sick leave, serving the documents can be reconsidered if appropriate.

The implementation of reviewable management action for matters under consideration of section 173 and 181D should not be unduly delayed owing to the inability to serve an order personally.

If the PMO consents to the service of the Order for matters involving reviewable action under section 173 of the *Police Act*, there is provision for service of the final Order to be effected by post under section 173(6), *if personal service is impracticable*. In these circumstances it is recommended that registered mail is used to affect postal service.

If difficulty is being experienced serving a Notice under section 181D(3)(a), or an order under section 181D(1), due to the medical situation of the officer, advice should be sought from the Process Unit, Employee Management.

If the officer in possession of the Notice concludes after consultation with the PMO that there is no likelihood of the documents being served in a reasonable period of time, the Process Unit, Employee Management, should be advised.

If it is concluded that due to the medical situation of the officer, the proposed reviewable management action under section 173 should be varied, a written submission should be forwarded to the Director, Employee Management, so that the matter can be given further consideration. (See Information Sheet 06/03 on the PSC Intranet Site).

Assistance

For assistance concerning the instigation of reviewable and non reviewable management action, contact the PSC Employee Management Consultancy Unit on 40699 / 8234 5699.

For assistance concerning the instigation, authorisation and processing of suspensions, contact the Quality & Review Unit, Employee Management, PSC on 40699 / 8234 5699.

For assistance in regards to the processing of reviewable and appealable management action and of related mandatory notifications, contact the Process Unit, Employee Management, PSC on 51014 / 9697 1014.

Officers who have been served with a *Show Cause Notice* or an *Order* pursuant to section 173, 181D or 80(3) are advised to contact the legal division of the Police Association of NSW on 9265 6777 or a legal representative of choice.

Part 6 Administrative support functions

Triage

The following provides guidance on administrative actions that support triage, resolution and CMT managed investigation processes. All documents referenced in these *Guidelines* can be found on the NSW Police Force intranet, many are on the PSC site.

Delegation

The commander / manager has ultimate responsibility for complaint management. Consequently, commanders / managers (or PSMs where appropriate) must ratify all resolution outcomes.

Correspondence management & TRIM

All complaint related correspondence received and / or sent must be:

- created as a document
- contained within the newly created TRIM file
- scanned or entered onto c@ts.i as a c@ts.i document
- physically placed within the c@ts.i folder.

All complaint letters assessed as Part 8A complaints must be recorded on TRIM. Create a new file for the complaint and retain the complaint letter document within the new file.

At no time is the identity of the complainant, subject officer or any other person associated with the complaint to be included in the TRIM file or document title.

All complaint letters must be recorded as a document in TRIM as:

- public relations – complaints - incident (assault etc) at (location) on (date) if from an external source – c@ts.i P0800000 – organisational unit managing complaint
- personnel – complaints - incident (assault etc) at (location) on (date) if from an internal source - c@ts.i P0800000 - organisational unit managing complaint.

The TRIM record must reflect that the hardcopy document (original or copy) is enclosed within the c@ts.i file. The physical file should remain at the command responsible for managing the complaint. There may be cases where the complaint will be transferred to another command.

Security classification of complaints

The following is a guide to the classification of complaint correspondence

Highly protected – PSC use for covert matters.

Protected – default security for complaints. This will be adequate for most complaints.

In confidence – unlikely to be adequate for complaint correspondence.

Storage of records / complaint information

Creating and maintaining procedures for the safe management and storage of complaint information is necessary to maintain confidentiality. The procedures and systems may include:

- ensuring that all hard copy complaint related information is stored in a secure area that is only accessible by staff who have a right to access that material including; files, folders, computer spreadsheet, information contained on whiteboards or any other complaint related material
- ensuring that investigators securely store any complaint related material in either locked cabinets or other secure areas
- holding meetings in locations where conversations cannot be overheard
- using appropriate methods (hand delivery or secure mail) to deliver confidential correspondence
- not using computers that are accessible to all staff unless it is absolutely necessary
- reminding complainants and witnesses of the need to maintain confidentiality and to discourage them from openly talking about the complaint, their involvement in it and its existence.

c@ts.i administration

In most cases the executive officer will create, update and manage entry of c@ts.i data. If another person is tasked with entering this data, that person must be suitably trained and have appropriate access.

All complaints, notifiable and not, are to be recorded on c@ts.i. Face value and actual issues are to be recorded in the 'Issues List'. Face value is what the complaint document articulates, actual issue is what triage might have clarified the issue to be if not what was stated in the first instance, eg. after triage, 'corruption' may amount to a policy breach, or waste of NSW Police Force resources. See c@ts.i user guides on the PSC intranet.

Receipt on c@ts.i – Resolution

Complaints referred for resolution are to be receipted on the LMI stream. See c@ts.i Resolution User Guide for more detail on c@ts.i use issues.

In most cases the executive officer will create and update c@ts.i data. There are two exceptions.

- Resolution managers are expected to record on c@ts.i the fact the resolution has concluded and the matter has been referred to the PSDO for quality review. The process is simple, however if assistance is required resolution managers should consult the c@ts.i user guides. The executive officer can also offer assistance. If that person is unavailable, the c@ts.i Business Team may be able to assist.
- PSDOs are expected to record on c@ts.i the outcome of the quality review. See section on PSDO or equivalent quality review in c@ts.i.

Receipt on c@ts.i – CMT managed investigations

Complaints referred for evidence based investigation are to be receipted in c@ts.i P stream. Easy movement between P and LMI streams via downgrade / upgrade functions is possible. See *c@ts.i CMT Stream User Guide*.

c@ts.i receipt timeframes

Receipt timeframes are:

- fourteen working days to receipt on c@ts.i in general terms
- three working days for receipt on c@ts.i where an investigation has commenced prior to a complaint being receipted on c@ts.i eg. PCA).

At least basic details should be receipted on c@ts.i where the above has not been met. Reasons for delay are to be recorded on c@ts.i, including reasons the commander / manager believes are outside their control.

Timeframes

Resolution

The corporate standard for completing matters referred for resolution is 45 calendar days. However, resolution managers should attempt to resolve matters as soon as possible.

Extensions should not be necessary, but if any delay is identified, the resolution manager must report the circumstances to the PSDO or commander / manager.

CMT managed investigations

From the received date:

- 90 days for the conduct of CMT evidence based matters
- 21 calendar days for all aspects of CMT managed complaint administration (receipt, registration, assessment, including transfers).

Date received

The received date is the date on which the first NSW Police Force command received the correspondence.

The received date is not:

- the date received by a particular command within a group unless it is the first command in the NSW Police Force to receive the correspondence
- the date on which any external complaint document was written
- the date on which any internal complaint report was created (if not given to anyone it is not yet received)
- the date on which the c@ts.i record was created (this is the receipted date).

If the complaint is an internal report, the received date would be the date the report was received by a supervisor or other person to whom the report is submitted. As a general rule, if the complainant has recorded a date on the complaint letter, but there is literally no way of establishing the received date through phone calls or other means, allow two working days for delivery and record that date. Commands are expected to correct any incorrect date. See c@ts.i user guides for c@ts.i use.

Timeliness measurements

The corporate standard for completing matters referred for resolution is 45 calendar days. This is measured from the received date to the (first) closed date.

For CMT matters which will be in the P stream, timeliness is measured from the 'Received date' to the completion of 'investigation outcome' (date of the first generated section 150 report).

Referral to CMT

If a matter is referred to the CMT as a result of triage the executive officer is to be advised. That officer will ensure the complaint is included on the CMT agenda.

If at any time during resolution a matter requires referral to the CMT, the resolution manager should advise the executive officer to include the complaint on the next CMT agenda. If the matter is urgent, an extraordinary CMT should be convened. The resolution managers should cease action on the matter until instructions are received from the CMT.

If the complaint already exists in the LMI stream it will require upgrading to the P stream.

If a record of a CMT referred matter is being created for the first time, receipt the matter in the P stream.

Notifications to the NSW Ombudsman

Issues notifiable to the NSW Ombudsman are notified electronically through c@ts.i following completion of triage. See the c@ts.i user guides for instructions.

Notification to the NSW Ombudsman is based on the face value issue. The notification decision should not shape the NSW Police Force response. NSW Police Force notification decisions should include reference to the Class or Kind criteria upon which the notification is based. See c@ts.i user guides.

The mandatory assessment / minute form is available on the PSC intranet.

Declined matters

The decision to decline a matter is an outcome of the triage process. Declined matters will be recorded within the LMI stream of c@ts.i. This is possible through 'Actions List'. See c@ts.i user guides.

Once resolution has commenced it is not possible to 'decline' a matter. The exception to this rule is where the resolution manager has found that insufficient triage inquiries were conducted prior to forwarding the file for resolution consistent with triage requirements. In those circumstances the matter should be referred back to the triage officer to be declined.

Declined matters require commander / manager endorsement **not** CMT endorsement. However, if CMT has a matter not yet declined and the CMT determines it is appropriate to do so, record this on c@ts.i, record all documents relied upon on c@ts.i and communicate with the complainant. LMI stream in c@ts.i may be used if not already started in P stream. See c@ts.i user guides.

Note 1: If a complaint is assessed to be frivolous, vexatious or not made in good faith, the triage officer may make or cause an application to be made to the PSC requesting that the complaint not be registered against the subject officer's name. The PSC will consider the request and seek agreement from the NSW Ombudsman, where appropriate.

Note 2: If declining a matter on the basis that the issues will be explored in criminal court proceedings, eg. alternative redress, commands must have a reasonable belief that the issues will in fact be explored in that jurisdiction. For example, allegations of racist language by police during an arrest may be noted during proceedings, but may not be explored to the extent necessary to satisfy Part 8A complaint requirements.

Documents to be recorded on c@ts.i

All PIC and NSW Ombudsman correspondence is to be put on c@ts.i.

Declined matters

All documentation relied upon to make the decision to decline must be uploaded / scanned into the c@ts.i system.

The command must also send correspondence to the complainant outlining the reasons for declining the complaint and upload / scan this document onto c@ts.i. Advice may also be given by phone or in person. This should be recorded.

Matters referred for resolution

Non notifiable matters

If a matter is non notifiable to the NSW Ombudsman only upload / scan the complaint document and resolution report onto c@ts.i.

Notifiable matters

If a matter is notifiable, upload copies of all material relied upon and referred to in the resolution report. The NSW Ombudsman conducts a full review of these types of matters and requires the source data for the purposes of that review. The only exception is COPS data which the NSW Ombudsman can access directly through the COPS system

CMT managed matters

CMT declined matters

A copy of all documents relied upon must be attached to the c@ts.i record.

CMT notifiable matters

A copy of all documents relied upon must be attached to the c@ts.i record. This includes minutes, terms of reference documents, reports etc.

CMT non notifiable

All documents relied upon by the CMT to manage the matter must be attached to the c@ts.i record. This is based on the position that if a CMT is managing a matter it will most likely involve an evidence based enquiry, not the fact it is not notifiable. For example, in the case of non notifiable matters, the matter is not notifiable to the NSW Ombudsman, but the commander may have decided a notification to the IRP is possible via the PSC, Employee Management, Process Unit. The Process Unit will need all documents relied upon.

PSC supports the position that investigators should be attaching documentation to c@ts.i as their investigation progresses, eg. status reports, records of interview, investigation report etc. It is not appropriate for this to be left until after the investigation is complete.

In the context of evidence based investigations, any document that is not available in its original electronic form or is modified from that original form through the addition of notations, signatures or other means must be scanned to c@ts.i.

Referral to IWSU

All IPCs must be recorded as such on c@ts.i. This includes sworn and unsworn employees.

Notification occurs electronically through c@ts.i. See c@ts.i user guides. However, early notification to the IWSU by phone, fax or mail may be beneficial in preserving confidentiality and reducing possible victimisation of the complainant. The addition of IPCs after receipt on c@ts.i must be manually notified to the IWSU.

Mandatory reporting person

Mandatory reports are reports on police conduct made as a result of:

- day to day supervisory functions
- a corporate review, eg CMF or failed prosecutions
- a senior officer relaying complaint information reported to them consistent with Clause 49 of the *Police Regulation*.

In these cases, the report author is not recorded as an IPC on c@ts.i. In the case of a senior officer relaying complaint information as per clause 49 of the *Police Regulation*, the officer who originally reported the information to the senior officer is recorded as the IPC.

The mandatory reporting person is represented as 'reporting person' in c@ts.i receipt screens. See c@ts.i user guides.

Reprisal complaints

The management of reprisal complaints is detailed above. Executive officers should record the basis for the CMTs concern in this regard in the minutes and on c@ts.i in the complaint description. Meanwhile, the NSW Police Force response to the complaint proceeds as described above.

Untruthfulness

Where untruthfulness is identified as an additional issue against the existing subject officer, it must be recorded in the c@ts.i Issues List see c@ts.i user guides. If it is identified as an issue against other officers new c@ts.i records must be receipted accordingly.

Requirements under the Commission for Children and Young People Act (CCYP)

NSW Police Force obligations in complying with *CCYP Act* requirements include recording corresponding data in c@ts.i and where dictated in CPN 08/01, notification of certain matters to the Commission for Children and Young People. This includes complaints where children are complainants, victims or are substantially involved in the situation about which the complaint is made.

All matters subject to notification to CCYP are to be fully documented and recorded on the c@ts.i system. CMT minutes for relevant matters must record decisions made to notify, or not notify, the CCYP, including the reasons for the decision. These decisions must form part of the section 150 notification to the Ombudsman.

Definitions, related conditions and exceptions are detailed in CPN 08/01. The CPN refers to category 1 and 2 matters. These references in the CCYP context have no relationship to old Part 8A categories. They are correct references in the context of CCYP procedures. Also see c@ts.i user guides available on the PSC intranet site for related instructions.

Closure - c@ts.i and file

How the matter is handled will determine processes relating to closure. Close the file according to existing procedures.

Declined matters require 'No Action' recorded in the Action List on c@ts.i. See c@ts.i user guides for more detail.

Forward finalised files to PSC Records as per existing arrangements.

Disagreement with NSW Ombudsman assessment

Triage officers may receive correspondence which includes a NSW Ombudsman assessment. The NSW Ombudsman assessment must be considered. If the triage officer questions that assessment, the command must liaise with the nominated NSW Ombudsman contact and discuss the situation. Commanders / managers and PSMs where appropriate will determine that command's position on the assessment.

It is reasonable to expect the NSW Ombudsman assessment to identify under what criteria a matter is notifiable to that office. If the command questions the NSW Ombudsman notification decision, requesting the NSW Ombudsman to articulate the precise notification criteria being applied may assist in resolving the situation.

If the NSW Ombudsman requires an investigation, the NSW Police Force must respond. This does not interfere with the instructions provided above on when to refer a matter for resolution and when to refer it to the CMT.

The Ombudsman may also suggest the scope or nature of the investigation that office requires. It is possible this may be done subject to resolution processes. The NSW Police Force should consider these suggestions. A failure to account for specific concerns may lead to deficiency correspondence from that office.

PIC monitored matters

The PIC sometimes notifies the PSC when their staff are monitoring NSW Police Force investigations and when a copy of the final report is requested. In such cases, the PSC advises the PIC when monitored matters are complete. Commands do not need to send any documents or documentation to PIC.

PIC take-over of complaints

By law, the PIC may decide to take over the investigation of a Part 8A complaint. If this occurs, the matter is no longer considered to be a Part 8A complaint unless otherwise directed by PIC. As a result the reporting obligations in connection with section 150 no longer apply.

Following notification of a PIC take over, commands must update c@ts.i with certain detail. See CPN 07/12 *Finalising complaints where Police Integrity Commission (PIC) take over a Part 8A investigation* and c@ts.i user guides for detail on related administrative requirements.

For further assistance, contact the PIC Liaison Unit on en 40699 or 8234 5699. Contact c@ts.i Support on en 40699 or 8234 5699 if you require c@ts.i assistance. Further advice may be sought from your region PSM or the PSC Employee Management Consultancy Unit.

Police access to their complaint histories

See Police Circular 04/05, 17 May 2004 and the NSW Police Force Handbook (Chapter R then Access IA records).

Resolution

Recording information during resolution

As a general rule, evidence based techniques such as sworn statements, records of interviews or directive memorandums should not be used when resolving matters.

Notes in a notebook or duty book may be the extent of records made of conversations and other actions undertaken during resolution. Notes may include:

- time
- date
- who is being spoken to
- why they are being spoken to
- summary of the information they offer.

If possible have all parties sign relevant entries, keeping in mind they cannot be made to sign.

Where the resolution manager refers to records such as exhibit books, rosters, police notebooks, they must provide some identifying feature to allow this record to be accessed at a later date if necessary, eg. when the NSW Ombudsman conducts a section 160 audit. For example, the notebook and page numbers should be referenced in the resolution report instead of copied and uploaded / scanned. COPS and other electronically maintained data do not need to be uploaded to the c@ts.i system. The NSW Ombudsman and PIC already have access to this data.

Recording findings

Findings are reported in mandatory resolution reports and recorded for all matters on c@ts.i.

Responding to transfer of resolution manager and / or subject officer/s

If a resolution manager or subject officer transfers to another location, ownership of the complaint file remains with the officer's former command. If the resolution manager is the transferring officer, the investigation will be reassigned to another resolution manager agreed to by the commander / manager. If an officer is seconded from their base unit to a specialist team, the host region is responsible for administration / investigation of the complaint.

PSDO or equivalent quality review in c@ts.i

Resolution managers will notify the PSDO in c@ts.i that the matter is ready for quality review.

PSDOs are expected to record the outcome of the quality review in c@ts.i PSDO Quality Review as per c@ts.i instructions.

Deferring or suspending resolution matters

There should be no need to defer or suspend resolution matters. If the need does arise, see Capacity to defer or suspend investigations in these *Guidelines*.

Managing section 150 reports

Non notifiable matters do not require a report to be sent to the NSW Ombudsman.

Notifiable matters require a section 150 report. The resolution report template provided with these guidelines and notified electronically via c@ts.i satisfies this requirement. See c@ts.i user guides.

Consistent with section 150(c), the Commissioner:

- (c) 'must provide the Ombudsman with:
 - i. a copy of the finalised report, and
 - ii. advice as to any action already taken, and as to the Commissioner's decision concerning any action to be taken, as a result of the complaint, and
 - iii. advice as to whether or not the complainant is satisfied with the action taken, or to be taken, as a result of the complaint.'

Any failure on the part of a complainant to respond to such enquiries should be reported as a failure to respond. Assumptions as to the failure meaning satisfaction or dissatisfaction should not be made.

Notification to the CCYP is unlikely in resolution matters, but possible. Decisions made to notify, or not notify, the CCYP, including the reasons for the decision must be recorded. These decisions must form part of the resolution report which satisfies the section requirements.

CMT managed investigations

CMT disagree with referral for CMT managed investigation – refer for resolution

If no evidence based investigation has commenced, the CMT can advise the triage officer of the decision and appoint a resolution manager. The original triage officer or CMT are to instruct the resolution manager to conduct informal enquiry / ADR consistent with Part 2 Resolution. The CMT is to ensure this occurs. No time is to be wasted in the referral as the 45 days standard will apply. The matter will be receipted in the LMI stream if not already in the P stream. If a P stream record exists, downgrade to LMI stream. The CMT has no further role in the matter.

If an evidence based investigation has commenced and it results in having no substance, the CMT can complete all responsibilities and close the matter as appropriate. Recording the matter as 'declined' would be inappropriate and referring it for resolution would generally be unnecessary where the investigator could be tasked along similar lines without wasting time on reallocating the file.

CARA, pdfs & c@ts.i

CARA form A must be included in the assessment notification (pdf) sent to the NSW Ombudsman at the time of assessment completion on c@ts.i. *CARA form B* is expected to be added to c@ts.i soon after the matter is allocated to the investigator and is to be included in the final report sent to the NSW Ombudsman (section 150 report). See *CARA Guidelines* and c@ts.i user guides.

Multiple c@ts.i referencing for complex investigations - cross commands / regions with multiple subject officers

Steps to manage complex matters

The efficient management of complex matters can be achieved by:

- separating the investigation into manageable components
- appointing a managing command to oversee the investigation
- appropriate use of multiple c@ts.i records.

Before managing a matter in this way, approval must be given by a region commander or delegated PSM who will designate the managing command according to CARA guidelines.

Responsibilities of managing commands

Once designated as a managing command, the command must:

- monitor the progress of the investigations
- ensuring quality control and consistency (particularly in regard to management action) is maintained
- ensure that all matters are finalised by the assigned investigating commands.

Criteria

The following criteria should be used to guide decisions as to whether investigations require multiple c@ts.i references.

1. Multiple c@ts.i references should not be used for a complaint unless exceptional circumstances exist that would significantly affect the timeliness of a resolution or investigation.
2. Involvement of a large number of officers (at least 20) from more than one command / region.
3. The investigation involves officers who can be dealt with promptly by non reviewable means as well as other officers facing serious misconduct allegations, court proceedings or reviewable sanctions expected to exceed 12 months. Each group of officers can be dealt with under separate c@ts.i references.
4. The investigation must be able to be separated into manageable components.

When multiple c@ts.i references are used they must be linked on the c@ts.i system.

If a complaint originates at a temporary, special or major event such as the Royal Easter Show the investigation will be conducted for logistical reasons at the command where the subject officer is permanently attached. The only exceptions are where special organisational arrangements are made to cover the event, or where for other reasons all involved commanders agree on another course of action.

Recording management action, criminal proceedings and no action

All action taken by commands in response to a complaint is expected to be recorded on c@ts.i. This includes all management action, criminal proceedings and related action, and no action. See c@ts.i user guides.

Capacity to defer or suspend investigations

Under section 148A(1) the Commissioner or NSW Ombudsman may, at any stage during an investigation of a complaint, decide to conclude the investigation by taking no further action with respect to the complaint having regard to matters that each thinks fit as per section 148(3). In this case, the Commissioner or NSW Ombudsman must notify the other of that decision as per section 148(2), must notify the complainant as per section 148(4) and the Commissioner may if it is appropriate, notify the subject officer as per section 148(5).

There is no capacity in c@ts.i to formally defer or suspend investigations. Where the above is applied eg. a key witness is inaccessible for a lengthy period of time but the CMT wishes to keep the option of continuing the investigation or revisiting that line of enquiry. The CMT should update all necessary records, include these records on c@ts.i and provide advice as required above. If the matter is PIC monitored, the PIC must be advised.

Section 150 report pdfs to be sent to the NSW Ombudsman

Non notifiable matters do not require a report to be sent to the NSW Ombudsman.

As soon as a CMT is satisfied with the investigation and the investigation report is ratified by the CMT, the section 150 report can be provided to the NSW Ombudsman. The section 150 report for CMT managed notifiable matters must consist of a covering letter and supporting materials (no covering letter required for resolution section 150 reports). Include in the section 150 report pdf (which is used to satisfy the reporting obligation):

- any documents and reports which include the review and certification of the investigation
- any documents and reports outlining decision making concerning the investigation and outcomes including CMT minutes
- any material considered necessary by the investigator, commander, CMT, IRP, Commissioner or other NSW Police Force officers concerning the investigation and outcomes.

The NSW Police Force requires that at least the following documents are included in the section 150 report pdf.

- Commander's covering letter detailing satisfaction of s150 obligations
- Complaint document
- Investigator's reports
- Investigation documents
- CMT Minutes
- *CARA A* and *CARA B* forms

The NSW Ombudsman should be notified of any actual and intended action and any intention to **change** action already reported. Do not wait for court, IRP or related outcomes before forwarding the section 150 report to the NSW Ombudsman. The NSW Police Force has committed to meeting section 150 reporting obligations before notifying matter to the IRP. Advising the NSW Ombudsman that the reviewable action is being considered meets the section 150 reporting obligations.

CMTs should not assume the lack of any reply from a complainant equates with satisfaction. Report any failure on the part of a complainant to respond to satisfaction enquiries in the section 150 report.

CMT minutes for all matters subject to notification to CCYP must record decisions made to notify, or not notify, the CCYP, including the reasons for the decision. These decisions must form part of the section 150 notification to the Ombudsman.

The corporately preferred template for section 150 report covering letters for CMT matters is available on the PSC intranet site.

Section 150 report, telephone intercept material and other information from carriage service providers

In relation to satisfying section 150 reporting obligations and any subsequent enquiries by oversight bodies, and the use of any telecommunication intercept or access material or other information obtained from carriage service providers, eg. call charge records (CCRs), account records etc. during the investigation.

For further information see CPNs 07/07 and 07/08. Related procedural enquiries may be directed to the PSC Employee Management Consultancy Unit.

Registered sources and role in complaints

Difficulties have arisen, in relation to complaints when registered sources have become either witnesses or complainants in complaint investigations. In order to adhere to the best practice principles during a complaint investigation, see CPN 07/10 *Protection of Registered Sources when involved as either complainants or witnesses in complaint investigations*. This CPN provides guidance on the handling of source details in documents and when forwarding documents (section 150 reports) to oversighting agencies.

NSW Ombudsman deficiencies and other correspondence

The NSW Ombudsman may write to the command indicating dissatisfaction with a range of managerial, investigative and administrative decisions made in respect of a complaint. Commands are to consider the content and respond as indicated in the communication and within the time requested. If the criticisms and / or the timeframe for responding are disputed or other concerns exist, the command should speak with the NSW Ombudsman representatives indicated on the correspondence. Criticism may be valid deficiencies or suggestions for improving the commands response to the complaint. Where the content is factually incorrect, or outdated communicate this view so the NSW Ombudsman (and PSC) does not waste time waiting for and following up responses.

The PSC Employee Management Consultancy Unit also receives a copy of this correspondence for monitoring purposes.

Place all NSW Ombudsman correspondence and the command response on c@ts.i

Outcomes and management action

All action taken by commands in response to a complaint is expected to be recorded on c@ts.i. This includes all management action, criminal proceedings and related action and no action. See c@ts.i user guides.

Mandatory notification forms to the IRP and other administrative advice is available on the Process Unit pages of the PSC intranet site.

Assistance

Assistance in relation to the application of these guidelines should be sought from the PSC, Employee Management Consultancy Unit and / or the c@ts.i Business Team on 40699 / 8234 5699.



PSC
Professional Standards Command

NSW Police Force

Level 3 / 45 Clarence Street

Sydney NSW 2000

Phone (02) 8234 5699 Enet 40699

POLICE ACT SECTION 169A(a) COMMISSIONER'S GUIDELINES

These guidelines have been established by the Commissioner of Police for use in accordance with section 169A of the Police Act 1990. Section 169A is in Division 9 of Part 8A (Complaints about conduct of police officers) of the Police Act 1990.

Section 169A provides as follows:-

A member of NSW Police must not disclose to any person the identity of a complainant unless the disclosure is made:

- (a) in accordance with guidelines established by the Commissioner, or*
- (b) with the consent of the complainant, or*
- (c) in accordance with a requirement of or made under this or any other Act, or*
- (d) for the purpose of any legal proceedings before a court or tribunal.*

Pursuant to section 169A (a) of the Police Act 1990, a police officer or other member of NSW Police may disclose the identity of a complainant (being a person who has made a complaint about the conduct of a police officer) in accordance with the following guidelines:

1. To the Commissioner or to a member of NSW Police who, by delegation under section 31 of the Police Act 1990, may exercise some or all of the Commissioner's powers, authorities, duties or functions under Part 8A of the Police Act 1990 and clause 20, 22, 23 and 24 of the Police Regulation 2000.
2. To a member of NSW Police who, by delegation under section 31 of the Police Act 1990, may exercise the powers and duties of the Commissioner under section 173 and 73 (3) of the Police Act 1990 and, in so far as it may be necessary to do so, to members of NSW Police who are employed to administer Part 9 of the Police Act 1990 in respect of orders made under sections 181D and 173 or dismissal action taken under section 73 (3) of the Police Act 1990.
3. To a member of NSW Police who is required to participate in or act as a member of a Complaint Management Team, and to other members of NSW Police whose duties require them to research the investigation and nature of complaints or review or provide legal advice on the investigation of complaints under Part 8A of the Police Act.
4. To the police officer or police officers who are to carry out an investigation of a complaint under Part 8A of the Police Act 1990. In the course of an investigation into a complaint an investigating officer may, with the consent of the Complaint Management Team or the responsible delegate officer, disclose the identity of the complainant to another person providing the disclosure of the complainant's identity is necessary for the effective conduct of that investigation.

5. To officers of the Internal Witness Support Unit in the case where the complainant is a member of NSW Police.
6. Under these guidelines a member of NSW Police should not disclose the identity of a complainant, including the identity of an internal police complainant, to another member of NSW Police or other person unless for a purpose connected with the performance of a duty or function in relation to the complainant or the complaint.

In addition to the above guidelines, the following further guideline may apply:

Where a person, whether or not a police officer, makes an allegation to a police officer about the conduct of another police officer and for genuine reasons including the safety of the person making the allegation or for other reasons, that person does not want his or her identity disclosed the Commissioner or the Commissioner's delegate (being an officer holding or acting in the position of an Assistant Commissioner) may, where the allegation is to be the subject of an investigation, authorise and require the disclosure of the person's identity. In the exercise of their discretion under this guideline the Commissioner or the Commissioner's delegate will consider whether or not the disclosure of the identity of the person is necessary for the effective conduct of an investigation into the allegation and whether any risk or adverse outcome is likely to result from the disclosure of the person's identity. Where the Commissioner or the Commissioner's delegate authorises and requires the disclosure of the person's identity, such disclosure may be subject to any conditions or restrictions that the Commissioner or the delegate officer may see fit to impose.

These guidelines are established by approval of the Commissioner of Police and revoke all previous guidelines established by the Commissioner for the purpose of section 169A of the Police Act 1990.

Dated: 6 July 2005

Commissioner's guidelines interpretive document

On 6 July 2005 the Commissioner established new guidelines pursuant to section 169A(a) of the Police Act related to the circumstances when the identity of a complainant may be disclosed. The guidelines provide circumstances where the identity of a complainant may be disclosed. The disclosure must be justified in either CMT minutes or other appropriate documentation. This document provides detailed explanation about each guideline on the circumstance under which the identity may be disclosed.

Guideline 1.

To the Commissioner or to a member of NSW Police who, by delegation under section 31 of the Police Act 1990, may exercise some or all of the Commissioner's powers, authorities, duties or functions under Part 8A of the Police Act 1990 and clause 20, 22, 23 and 24 of the Police Regulation 2000.

This guideline allows disclosure, only where necessary, of a complainant's identity to all officers who by delegation can exercise certain functions and duties under Part 8A of the Police Act and under clause 20, 22 (power to suspend a police officer from duty), 23 (authorisation to prefer a criminal charge against a police officer) and 24 of the Police Regulation. It includes officers at various levels from deputy commissioners to local area commanders to PSMs. The instrument of delegation of authority is accessible from either the LAW or PSC intranet sites.

Guideline 2.

To a member of NSW Police who, by delegation under section 31 of the Police Act 1990, may exercise the powers and duties of the Commissioner under section 173 and 73 (3) of the Police Act 1990 and, in so far as it may be necessary to do so, to members of NSW Police who are employed to administer Part 9 of the Police Act 1990 in respect of orders made under sections 181D and 173 or dismissal action taken under section 73 (3) of the Police Act 1990.

This guideline is intended to allow disclosure, only where necessary, of the complainant's identity to those officers who have delegated authority to make an order under section 73(3) or section 173 and to all other officers involved in the process of consideration and application of orders pursuant to section 73(3), 173 or 181D.

Guideline 3.

To a member of NSW Police who is required to participate in or act as a member of a Complaint Management Team, and to other members of NSW Police whose duties require them to research the investigation and nature of complaints or review or provide legal advice on the investigation of complaints under Part 8A of the Police Act.

This guideline is intended to allow disclosure, only where necessary, to CMT members or persons who are called to participate in CMT deliberations. It also covers required disclosure to persons who research the investigation or nature of, or review or advise on, Part 8A complaint matters.

Guideline 4.

To the police officer or police officers who are to carry out an investigation of a complaint under Part 8A of the Police Act 1990. In the course of an investigation into a complaint an investigating officer may, with the consent of the Complaint Management Team or the responsible delegate officer, disclose the identity of the complainant to another person providing the disclosure of the complainant's identity is necessary for the effective conduct of that investigation.

This guideline deals with disclosure, only where necessary, to officers who are to investigate Part 8A complaints. It includes the further disclosure by investigating officers to other persons where it is necessary to do so to conduct an effective investigation into the complaint. If possible the consent of the complainant should be obtained, if not possible or consent is not forthcoming a delegated commander may authorise disclosure. It may be appropriate to advise the complainant that their identity is to be disclosed, the reason it is to be disclosed and when it is to be disclosed. The opinion of the complainant may be relevant to the decision of the commander when considering a disclosure after refusal by the complainant.

Guideline 5.

To officers of the Internal Witness Support Unit in the case where the complainant is a member of NSW Police.

The guideline is self explanatory and allows a member of a CMT or an investigator to disclose the identity of an internal police complainant to the IWSU.

Guideline 6.

Under these guidelines a member of NSW Police should not disclose the identity of a complainant, including the identity of an internal police complainant, to another member of NSW Police or other person unless for a purpose connected with the performance of a duty or function in relation to the complainant or the complaint.

The purpose of this guideline is to ensure that any disclosure of a complainant's identity is according to the principles of these guidelines on an as required or as necessary basis. The protection of the identity of a complainant is paramount to ensure the integrity of the management of any complaint allegation.

In addition to the above guidelines, the following further guideline may apply:

Where a person, whether or not a police officer, makes an allegation to a police officer about the conduct of another police officer and for genuine reasons including the safety of the person making the allegation or for other reasons, that person does not want his or her identity disclosed the Commissioner or the Commissioner's delegate (being an officer holding or acting in the position of an Assistant Commissioner) may, where the allegation is to be the subject of an investigation, authorise and require the disclosure of the person's identity. In the exercise of their discretion under this guideline the Commissioner or the Commissioner's delegate will consider whether or not the disclosure of the identity of the person is necessary for the effective conduct of an investigation into the allegation and whether any risk or adverse outcome is likely to result from the disclosure of the person's identity. Where the Commissioner or the Commissioner's delegate authorises and requires the disclosure of the person's identity,

such disclosure may be subject to any conditions or restrictions that the Commissioner or the delegate officer may see fit to impose.

There are likely to be situations where a person is willing to provide information about the conduct of a police officer on the proviso that the person's identity remains confidential. A demand for confidentiality by the person reporting the information cannot be met as statutory obligations exist and the complainant's identity may be disclosed.

To avoid the information being lost or reported anonymously this guideline is intended to provide a scheme whereby the Commissioner or a senior officer might assess the need for the disclosure of the person's identity against the strength or basis of the person's reasons for non-disclosure.

Depending on the outcome of this assessment the Commissioner or the delegate officer may or may not require the officer to whom the information was given to disclose the name of the person who gave the information.

Where a degree of concern exists, disclosure of the person's identity may be made subject to conditions, such as disclosure only to a designated investigating officer.

Where no such concern exists and there is a need to have the person identified for the purpose of effective investigation, the Commissioner or delegate officer may require disclosure of the person's identity. The reporting officer would then clearly be obliged to provide details of the person's identity.

Disclosure of the identity of a complainant to the Ombudsman

These guidelines do not provide for disclosure, under this section, to the Ombudsman. The Ombudsman has the legislative capacity to request further information, after the receipt of a copy of a finalised report. Section 151 allows the Ombudsman to request any information in connection with a complaint. The Commissioner may object to providing the information and if the grounds for the objection are well founded, to the satisfaction of the Ombudsman, the Ombudsman may withdraw the request.

Further information

Contact the PSC Complaint Management Support Unit Consultants, 40699 or 82345699.



NSW Ombudsman



**GUIDELINES AGREED BETWEEN
THE POLICE INTEGRITY COMMISSION
AND
THE OMBUDSMAN
AFTER CONSULTATION WITH THE COMMISSIONER
OF POLICE
UNDER THE POLICE ACT 1990**

These guidelines, agreed to on 11 August 2008,
are to take effect from 1 September 2008,
and their operation is to be reviewed after twelve months.

J Pritchard

Commissioner

Police Integrity Commission

B A Barbour

Ombudsman

INTRODUCTION

Part 8A of the Police Act concerns the handling of complaints about the conduct of police.

Defining conduct

Police conduct is broadly defined as "any action or inaction (or alleged action or inaction) of a police officer" (section 121).

Defining complaints

Part 8A of the Police Act applies to and in respect of complaints that allege or indicate police conduct which is:

- an offence (section 122(1)(a)).
- corrupt (section 122(1)(b)).
- unlawful (but not criminal or corrupt) (section 122(1)(c)).
- conduct that, although not unlawful (section 122(1)(d)):
 - is unreasonable, unjust, oppressive or improperly discriminatory in its effect.
 - arises from improper motives.
 - arises from a decision that has taken irrelevant matters into consideration.
 - arises from a mistake in law or fact.
 - is conduct of a kind for which reasons should have (but have not) been given.
- in accordance with a law or established practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect (section 122(1)(e)).

Because not all complaints about police conduct require formal oversight (for example, complaints about poor customer service or rudeness), Parliament has

enacted various provisions within Part 8A which permit the Police Integrity Commission and the Ombudsman, after consultation with the Commissioner of Police, to agree that certain types of complaints need not be notified to the Ombudsman. However, in accordance with obligations under section 160 of the Police Act, complaints which are not required to be notified may still be inspected by the Ombudsman to ensure that Part 8A is being complied with and to keep under scrutiny systems within the NSW Police Force for dealing with complaints.

The following agreements seek to give effect to the purpose behind these provisions. They ensure that allegations of serious misconduct receive rigorous civilian oversight, while allowing for the most appropriate and effective handling of less serious matters.

SECTION 121 AGREEMENT – NOTIFIABLE COMPLAINTS

The definition of "notifiable complaint" in section 121 allows the Police Integrity Commission and the Ombudsman to agree, after consultation with the Commissioner of Police, that only some types of complaints must be notified to the Ombudsman.

The Police Integrity Commission and the Ombudsman, after consultation with the Commissioner of Police, hereby agree that complaints alleging the following conduct (whether by a member of the public or an internal police complainant) must be notified to the Ombudsman:

1. Criminal conduct.
2. Corrupt conduct.
3. Conduct which is of a nature that, if substantiated, might warrant the taking of action under section 181D or section 80(3) of the Police Act, or "reviewable action" as defined by section 173 of the Police Act. This includes complaints referred for consideration by a Commissioner's Advisory Panel or Internal Review Panel which have not previously been notified.
4. Conduct indicating a lack of integrity¹.
5. Conduct causing or contributing to a failed prosecution, where the conduct is unreasonable or indicates serious incompetence. Factors to consider include:
 - a. the seniority of the involved officer
 - b. the reasons for failure or withdrawal of the prosecution
 - c. whether there are multiple failings on the part of the officer or a pattern of conduct involving a number of failed prosecutions
 - d. whether the proceedings concerned more serious criminal matters
 - e. whether there was a costs award made against the prosecution

- f. whether any adverse comment was made by a court about the conduct of police officers involved in the prosecution.
- 6. Unauthorised secondary employment in high risk industries².
- 7. Harassment, victimisation or unlawful discrimination³ of a member of the public.
- 8. Harassment, victimisation or unlawful discrimination⁴ of a member of the NSW Police Force, where the police officer(s) who is alleged to have committed the conduct has previously had similar complaints made against them, unless it is otherwise required to be notified to the Ombudsman under this agreement.
- 9. Detrimental action or reprisal (including any possible payback complaint) against a police officer or other person making a protected disclosure, a protected allegation, or a protected report.
- 10. Any unreasonable conduct (including a failure to provide customer service):
 - a. resulting in death
 - b. resulting in injury
 - c. resulting in significant⁵ financial loss
 - d. involving the discharge of firearms.
- 11. Any unreasonable conduct resulting in and/or from the search, arrest or custody of a person.
- 12. Complaints by complainants or subject officers about the way that matters dealt with in accordance with section 122(2) of the Police Act have been handled, but only where the Ombudsman requires that they be dealt with as notifiable complaints⁶.
- 13. Any complaint dealt with in accordance with section 122(2) of the Police Act which the Ombudsman or Police Integrity Commission, following consultation with the Police Commissioner, require to be notified⁷.

Other matters to be considered in dealing with complaints

Management matters

Sometimes, matters will arise that, while on one reading may be notifiable complaints, on full examination raise management matters that should not be the subject of external oversight. Examples include:

- one-off allegations that an officer was not ill while claiming sick leave; in the past complaints of this type have sometimes been notified to the Ombudsman as raising criminal issues.
- allegations of very minor misuse of police assets – which have also been notified to the Ombudsman as raising criminal issues.
- allegations of minor misuse of email, such as forwarding emails with rude, sexist or otherwise offensive content (but not unlawful content or content which would be restricted to adults⁸). These minor matters have been notified as raising harassment or discrimination issues.
- allegations of embellishments in police promotions applications – which have been notified as raising integrity issues.

It is not the intention of this agreement that matters of this type be notified to the Ombudsman. It is expected that there will be an appropriate local response to such matters.

In addition, there is no longer a requirement to notify the Ombudsman of complaints concerning incompetence only, where the complaints are not otherwise notifiable.

Complaints of this type, while they are not required to be notified to the Ombudsman, must be receipted and registered on the Customer Assistance Tracking System (c@ts.i) to allow auditing by the Ombudsman and Police Integrity Commission.

Performance matters

Matters that concern performance management only, such as unsatisfactory completion of a performance agreement or reports of unsatisfactory work diligence and output, will generally not be complaints under Part 8A of the Police Act, and should not be dealt with as complaints. These matters are also not required to be notified to the Ombudsman. Only where performance issues raise notifiable conduct matters is there a requirement to notify the Ombudsman.

Traffic matters

Many traffic offences, although technically criminal in nature, are not appropriate to be notified to the Ombudsman. Unless the alleged offence raises other notifiable issues, the Ombudsman only requires notification of major offences as defined in section 3 of the Road Transport (General) Act 2005.

SECTION 122(2) AGREEMENT - MATTERS WHICH NEED NOT BE TREATED AS COMPLAINTS

Background

The effect of section 122(2) is that the Police Integrity Commission and the Ombudsman, after consultation with the Commissioner of Police, may agree that certain kinds of complaints need not be dealt with in accordance with Part 8A. These matters therefore do not need to be notified to the Ombudsman.

This agreement under section 122(2) ensures that issues of police conduct that are not of a significant nature are not dealt with under the full provisions of Part 8A of the Police Act.

However, in accordance with section 160 of the Police Act, the Ombudsman may still inspect records relating to these matters. This is to ensure that Part 8A is being complied with and to keep under scrutiny the systems in place within the NSW Police Force for dealing with complaints. The current system for recording and managing these types of matters is the section 122(2) function of c@ts.i.

Agreement

The Police Integrity Commission and the Ombudsman, after consultation with the Commissioner, hereby agree that, subject to the conditions discussed below, matters other than notifiable complaints need not be dealt with under Part 8A of the Police Act.

Conditions:

1. Even if a matter is dealt with under section 122(2) of the Police Act, the NSW Police Force should take appropriate action in relation to it. This includes any investigation, conciliation and such managerial action as may be necessary in all the circumstances of the matter.

2. When advising complainants of the outcome of a matter dealt with under section 122(2) of the Police Act, if the complainant states that they are dissatisfied with the way the matter was dealt with, the NSW Police Force must advise the complainant that they may make a further written complaint about how the matter was handled. These complaints will only be recorded as notifiable complaints if required by the Ombudsman.

Similarly, when advising subject officers of the outcome of a matter dealt with under section 122(2) of the Police Act, if the subject officer states that they are dissatisfied with the way the matter was dealt with, the NSW Police Force must advise the subject officer that they may make a written complaint about how the matter was handled. These complaints will only be recorded as notifiable complaints if required by the Ombudsman.

3. Proper records must be kept of all matters dealt with under section 122(2) of the Police Act and any action taken in respect of them. In particular complaints made by members of the public (except for those matters referred to in Conditions 4 and 5 below which relate only to the issuing of traffic and parking infringement notices or to requests for reviews of criminal charges) must be receipted and registered on the Customer Assistance Tracking System (c@ts.i).

The NSW Police Force will survey to measure the satisfaction of complainants in the handling of matters that fall under the section 122(2) agreement. The survey will be conducted annually and at a minimum will include a random sample of contactable external complainants selected from the pool of complaints finalised in the preceding 6 month period. Survey results will be reported to the NSW Ombudsman and will also be published in the NSW Police Force Annual Report. The NSW Ombudsman will be consulted on the survey instrument and methodology.

4. Where the matter is only about the issuing of traffic or parking infringement notices and raises no other issues (for example, rudeness or a specific allegation of lack of integrity), the matter should be forwarded to the Infringement Processing

Bureau for review and need not be recorded on c@ts.i. If any other issues are raised, they shall be dealt with in accordance with these agreements.

5. Where a matter is only a legal representation for review of criminal charges and raises no other issues (for example, a specific allegation of lack of integrity) the matter should be referred to Prosecuting Services for consideration and need not be recorded on c@ts.i. If any other issues are raised, they shall be dealt with in accordance with these agreements.

Endnotes

¹ Including dishonest conduct, allegations of improper association, or allegations about conflict(s) of interests.

² These industries are nominated in the NSW Police Force's *Secondary Employment Policy and Guidelines* and include Security, Liquor, Commercial and Private Inquiry Agents, Gaming and Racing and Transport Industries.

³ Including discrimination on the basis of sex, race, marital status, age, disability, homosexuality, transgender and carer responsibilities.

⁴ Including discrimination on the basis of sex, race, marital status, age, disability, homosexuality, transgender and carer responsibilities.

⁵ In assessing whether a loss is significant, factors to be considered include the value of the goods, property or money involved and the financial position or means of the person who has sustained the loss. For example, a loss of goods of a small monetary value may be significant to a person who is without an income or who is on a pension.

⁶ These may include (but are not restricted to) complaints about:

- the assessment of the matter;
- the treatment of the complainant and/or subject officer;
- the outcome of the matter; or
- delays in dealing with the matter.

Condition 2 under the section 122(2) agreement sets out the obligations upon the NSW Police Force at the conclusion of a section 122(2) matter to advise complainants and subject officers, who state that they are dissatisfied, of their right to make a further written complaint about the handling of the matter. The Ombudsman will only require these matters to be dealt with as notifiable complaints where *substantial concerns arise about the police handling of the matter*.

⁷ This provision is designed to address the legislative difficulty created for matters that fall within the section 122(2) agreement. It ensures that, where appropriate, *individually identified matters* can still be oversighted or investigated by the Ombudsman under Part 8A of the Act.

⁸ Excluded content is any material that would be Category 1-Restricted, Category 2-Restricted or Refused Classification under the 'Guidelines for the Classification of Publications 2005' under the Classification (Publications, Films and Computer Games) Act 1995 (CTH).
<http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/E03BF15D1B9B9CDC CA25700D00284712?OpenDocument>