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5 February 2014

Mr Chris Eccles
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NSW Department of Premier and Cabinet
Governor Macquarie Tower
Level 39, 1 Farrer Place
SYDNEY NSW 2000

Att: Ms Mandy Young

Dear Mr Eccles

Report on the Review of Oversight of Police Critical Incidents

Thank you for your letter of 20 December 2013 enclosing a copy of the Report on the Review of Oversight of Police Critical Incidents ("the Report").

In response to your invitation to provide advice on the recommendations contained in the Report, I set out below the responses of the Police Integrity Commission ("the Commission").

Recommendation 1

That the NSW Police Force makes the Critical Incident Guidelines publicly available and continues the approach of amending those guidelines as required and in consultation with relevant stakeholders.

- 1) The Commission supports this recommendation.

Recommendation 2

That the NSW Police Force amends the Critical Incident Guidelines to include, as part of the Region Commander's responsibilities to report to the NSW Police Executive on the outcomes of critical incident investigations, specific advice on why interim management action was or was not taken.

- 1) The Commission supports this recommendation.

Recommendation 3

3.1. That the NSW Police Force should, in the case of critical incidents involving death, prepare a Review of the Critical Incident Investigators Report which should be made publicly available as soon as is reasonably practicable after the Critical Incident Report has been completed.

3.2. The Review should include as much information as the Commissioner of Police considers necessary and appropriate to inform the public of the nature of the



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critical incident, the police response and the outcome of the Critical Incident Investigation including any response to Coronial findings and recommendations.

- 1) The Commission supports these recommendations but notes that the recommendations fall far short of what was proposed in the Commission's Calyx report and the Commission's written submissions to the McClelland review.

3.3. The Review should not include;

- any sensitive operational information;
- confidential police methodology;
- the identity of any witness or informant;
- information which is prohibited from disclosure under another law (including the Privacy and Personal Information Protection Act 2002, and the Telecommunications (Interception and Access) Act 1979 (Cth);
- information that could prejudice law enforcement or endanger the life, property, health or safety of any person;
- any information that was the subject of coronial or criminal non publication orders.

- 1) The Commission supports the above points with the exception of the third dot point.
- 2) The Commission does not support the omission from the Review of "the identity of any witness or informant". The Commission acknowledges that there may be incidents where the identity of an informant or witness will need to be suppressed but considers it unlikely that there would be any need or utility for the names of all witnesses or informants to be suppressed in a Review report. In cases involving death a coronial inquiry will precede the publication of a Review and the names of witnesses will be aired in that process. It is safe to assume that during the inquest the Coroner will comply with any request for orders to protect the identity of a witness or informant if necessary. The last dot point above seems to confirm this. Accordingly it is submitted that the recommendation for non-publication of the identity of any witness or informant be qualified by the addition of the words "which has been suppressed by the Coroner, or the Court in any criminal proceedings".

3.4. The Review should not be publicly released until;

- a. the completion of any criminal proceedings arising out of or relating to the critical incident, or
- b. the completion of any disciplinary proceedings arising out of or relating to the incident;

- 1) The Commission maintains its previous recommendation that, in the case of critical incidents involving death, the public should be entitled in all cases to a report from the NSW Police Force at the conclusion of the inquest. In those matters where criminal proceedings are brought, the resolution of the proceedings could take years, particularly if appeals are involved. Similarly appeal proceedings in relation to disciplinary action could be protracted. It is the Commission's view that the Critical Incident Report and Review should be completed following the inquest and, in the case of those officers who are the subject of prosecution action or disciplinary action, the report could note that such action was taking place at the time of the report's completion.

3.5. That any person who is the subject of adverse comment in the Review should be given the opportunity to object to publication of the Review in part or in whole before the Review is made publicly available.

- 1) The Commission supports this recommendation.



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Recommendation 4

4.1. That the Commissioner of Police, the State Coroner, the Police Integrity Commissioner, the Ombudsman and the General Manager of the WorkCover Authority constitute a Committee to ensure issues relevant to the investigation and oversight of police critical incidents are reviewed and resolved on a regular basis.

The Committee may also include representatives of other agencies and other appropriate persons either permanently or on an as needs basis.

- 1) The Commission is opposed to this recommendation and is generally opposed to the whole of recommendation 4.
- 2) There was only one case referred to in the Report where the work of the Coroner and the Ombudsman overlapped (Curti) and only one case where the role of the WorkCover Authority and the criminal investigation overlapped (Crewes). The legislative amendments recommended elsewhere in the Report which are supported by the Commission would, in the Commission's view, obviate the need for a committee.
- 3) The recommendations for the formation of a committee, the first items for discussion by the committee and the development of a "framework for cooperation" seem to proceed on an assumption that all the parties identified, including the Commissioner of Police, the WorkCover Authority and the oversight agencies, have common interests such that any issues between them can be resolved at a meeting of the committee. This assumption is incorrect. Because of their different statutory roles there are necessarily, and properly, conflicts of interest between, for example, the Commissioner of Police on the one hand and the oversight agencies on the other hand.
- 4) It is left unclear in the recommendation how issues between members of the committee are to be resolved. It is unclear whether it is proposed that the committee have power to resolve issues in such a way that a decision of the committee is binding on all the members of the committee.
- 5) The Commission as a statutory agency has the functions and powers conferred on it by the Police Integrity Commission Act. Under general principles of administrative law the Commission has a responsibility to make its own decisions about how its powers and functions should be exercised and cannot permit the exercising of its powers and functions to be fettered by third parties.
- 6) The Commission is, of course, agreeable to participating with other agencies in discussions of matters of common interest and such discussions already take place, without the need for any committee.

4.2. That consideration should be given to the first items for discussion of the Committee including;

- a. the impact of language used in reports,
- b. the appropriate role of Counsel Assisting,
- c. the potential impact of Baff v Commissioner of Police,
- d. refocusing on the objectives of the Wood Royal Commission,
- e. reviewing modern strategies aimed at accident prevention where relevant,
- and
- f. the development of a "Framework for Cooperation"

- 1) The Commission is generally opposed to this recommendation.



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- 2) The Commission makes the following brief comments about the individual items in recommendation 4.2.

4.2(a) – The Commission accepts that it has a responsibility to be judicious and measured in the language it uses in its reports. However, what language is used by the Commission in its reports is for the Commission alone to determine and is not a matter to be determined by a committee. If the Commission has found that misconduct by a police officer has occurred, that finding should be stated unambiguously and unequivocally in the Commission's report. The Commission has not received any complaint about any of the language used in any of the reports which were published last year.

4.2(b) – The role of Counsel Assisting, that is Counsel Assisting the Commission in an investigation by the Commission, is determined by the Commission in the light of relevant legal authorities (see for example Peter Hall *Investigating Corruption and Misconduct in Public Office* Chapter 12 Part 4 "The appointment and the role of Counsel Assisting" at paragraphs 12.150 to 12.220). The role of Counsel Assisting in an investigation conducted by the Commission is not a matter for discussion or determination by a committee.

4.2(c) – The impact of the court decision in *Baff v. Commissioner of Police* is a matter which is worthy of further discussion. Some discussion between agencies has already taken place and this discussion can continue, without the need for any committee to be formed.

4.2(d) – It is not clear what is meant by "refocusing on the objectives of the Wood Royal Commission". In some other parts of his Report, for example paragraphs 7.203 and 7.204 on pages 91 and 92 Mr McClelland seems to suggest that the NSW Police Force has been transformed since the time of the Wood Royal Commission and that the objectives of the Wood Royal Commission have been achieved.

4.2(e) – Accident prevention would clearly be a matter of concern for the Commissioner of Police and the WorkCover Authority. However, it is difficult to see how accident prevention could ever fall within the functions of the Police Integrity Commission, to prevent, detect and investigate misconduct by police officers.

4.2(f) – The Commission will make submissions about the "framework for cooperation" in its response to paragraph 4.3 of the recommendation below.

- 4.3 The "Framework for Cooperation" should establish the order of precedence of and overarching principles for cooperation in respect to the oversight of police critical incidents such that it clarifies:
- a. the role of each agency and the purpose of investigations undertaken by it,
 - b. the order of precedence between courts and oversight agencies to give precedence to;
 - i. the criminal process
 - ii. the Coronial process
 - iii. the Police Integrity Commission
 - iv. the Ombudsman
 - c. the order of precedence between investigatory agencies to give precedence to;
 - i. investigations by the New South Wales Police Force
 - ii. investigations by the WorkCover Authority of New South Wales
 - d. notification of events and commencement of investigations,



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- e. sharing of investigatory information and use of shared information,
- f. the obligation to avoid prejudicing Coronial or criminal proceedings,
- g. appropriate public comment,
- h. dispute resolution, and
- i. joint training.

- 1) The Commission is generally opposed to this recommendation.
- 2) Apart from (f), the Commission opposes all parts of recommendation 4.3 but will comment specifically on only some of them.
- 3) 4.3(b) to (c) – In the opening words of paragraph 4.3 it is said that the “framework for cooperation” should establish an order of precedence. However, in paragraphs (b) and (c) of the recommendation an order of precedence is dictated.

Any order of precedence and the roles of each agency should be established by legislation and not by the deliberations of a committee.

4.3(d) – The Commission is strongly opposed to the suggestion that the commencement of an investigation by it or any events occurring in the investigation be notified to others. It is often critical to the success of an investigation that it be kept confidential.

4.3(e) – The Commission is strongly opposed to the sharing of information which it has acquired in the course of an investigation. The sharing of information carries a risk of prejudicing the investigation.

4.3(i) – The Commission strongly opposes any suggestion that there should be joint training of personnel of the various agencies, for much the same reasons as it supports the continuation of the general prohibition on the employment by it of current or former NSW police officers.

- 4.4 That the NSW Police Force, the State Coroner, the Ombudsman, the Police Integrity Commission and the WorkCover Authority consider entering into new Memoranda of Understanding based on the principles of the Framework for Cooperation.

- 1) For the reasons stated above, the Commission does not consider a memorandum of understanding (MOU) between the NSW Police Force, the State Coroner, the Ombudsman, the Police Integrity Commission and the WorkCover Authority to be necessary or desirable.

- 4.5. That the NSW Police Force, the Ombudsman, and the Police Integrity Commission consider developing a training and relationship enhancement program consisting of:
 - a. Creating an induction and subsequent training modules in respect to each Agency's core functions, responsibilities and methods, and
 - b. Executive level secondments, or other appropriate arrangements, to achieve a better understanding of the functions, skills and investigative/oversight methods of each organisation.

- 1) The Commission opposes this recommendation.
- 2) The Commission does not consider that a training and relationship enhancement program with the Ombudsman and the NSW Police Force to be necessary. The Commission already has regular liaison and lines of communication with both agencies



and appreciates each agency's functions, responsibilities and methods. The Commission is particularly opposed to any secondment of staff between the Commission and the NSW Police Force.

Recommendation 5

That the Government give consideration to proposing legislative amendments to the Police Act 1990 to include a new Part that provides for the oversight of critical incident investigations by the Ombudsman, such that:

- 5.1. "critical incident" and "serious injury" are defined consistently with the use of those terms in the Critical Incident Guidelines.
 - 5.2. Critical incidents are investigated in accordance with the Critical Incident Guidelines issued by the Commissioner of Police.
 - 5.3. The NSW Police Force shall advise the Ombudsman of the occurrence of a critical incident, as soon as it is reasonably practicable to do so.
 - 5.4. The information provided by the NSW Police Force should include sufficient details of the incident and surrounding circumstances to enable the Ombudsman to decide whether to provide oversight of the investigation of the incident.
 - 5.5. The Ombudsman may provide oversight of the investigation of the critical incident if the Ombudsman considers that it is in the public interest to do so provided that such oversight;
 - is conducted in accordance with arrangements agreed between the Ombudsman and the Commissioner of Police,
 - does not include the power to supervise, control or direct the course of the police investigation, and
 - does not adversely impact upon the timely completion of the investigation.
 - 5.6. The Ombudsman may, after completion of the critical incident investigation report, publish a report on any oversight undertaken by his office and any such report may be responded to by the Commissioner of Police.
 - 5.7. The Ombudsman is not to "publish information whose publication may, in the opinion of the Commissioner of Police prejudice the investigation or prevention of crime, or otherwise be contrary to the public interest.
- 1) 5.1 to 5.7 – The Commission supports the inclusion of a new Part in the Police Act in which "critical incident" and "serious injury" are defined and the Ombudsman is given the power to oversight critical incident investigations. The obligations on police officers conducting the investigations and the powers available to the Ombudsman should be equal to the statutory obligations of police officers and the powers of the Ombudsman under Part 8A in respect of complaint investigations, including the power to monitor investigations.



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5.8. Any statement that is made in good faith by a police officer in response to questions about their involvement in a critical incident:

- a. is not, without the consent of the police officer who gave the statement, admissible in any civil or criminal proceedings against the police officer if the proceedings relate to the conduct in connection with which the statement was made, and
- b. may not be used as the basis of taking action under Section 181D or reviewable or non-reviewable action (within the meaning of Section 173) against the police officer.

1) The Commission agrees that statements given by an officer in the course of his/her duties should not be admissible against the officer in civil or criminal proceedings.

The Commission does not agree that statements made by a police officer about his/her involvement in a critical incident may not be used as the basis for taking managerial action against the officer (either under s 181D or s 173). Such statements should be treated like statements made after any incident involving police and should be available to the Commissioner of Police to use if misconduct is suspected or demonstrated. The Commissioner of Police is able to use statements made in response to questions in Part 8A investigations for such purposes. If the statement made by an officer involved in a critical incident could not be used against him/her then the Commissioner of Police could direct the officer to answer questions in a Part 8A investigation and such a statement could be used against the officer. It would be more practical to make the statement available in the first instance to avoid the undesirability of having to get another version from the officer.

If an officer is summoned to give evidence at the Police Integrity Commission and objects to giving evidence the evidence given cannot be used against the officer in civil or criminal proceedings but can be used against the officer for managerial purposes (s 173 or s 181D) irrespective of whether the evidence concerns a critical incident: PIC Act s 40(3). For the same reason that the Commission does not make a special case for evidence concerning a critical incident, there should be no exception made for the use the Commissioner of Police may make of statements given by officers involved in critical incidents.

5.9. The power of the Ombudsman to provide oversight of a critical incident investigation under these provisions is not in derogation of any other powers of the Ombudsman except that, if the Ombudsman chooses to exercise such other powers, the Ombudsman must refrain from further exercising powers under these provisions.

The Commission does not support this recommendation.

Recommendation 6

That subject to any legal advice on the matter, the NSW Police Force give consideration to further amending the Critical Incident Guidelines to specifically provide that, consistent with the relevant provisions of the Coroners Act, the Critical Incident Investigation Team shall provide such assistance as is required by the State/Deputy State Coroner, including any instruction to which an inconsistent instruction has been provided from another agency.

The Commission supports the obtaining of legal advice on this matter.

Recommendation 7

7.1 That the Government consider obtaining advice from the Crown Solicitor to whether a decision by the Commissioner of Police to suspend or defer an investigation under Part 8A of the Police Act 1990, in order to avoid prejudicing



a Coronial Inquest relating to a critical incident, has the effect of suspending the powers of the Ombudsman to monitor such an investigation.

The Commission supports the obtaining of legal advice on this matter.

- 7.2 That the Government give consideration to requesting the WorkCover Authority of NSW to amend the WorkCover "Compliance Policy and Prosecution Guidelines" to more clearly define circumstances where cooperation with other agencies is appropriate including by refraining from investigating a matter if that matter is being investigated by another law enforcement agency and continuation of the investigation by WorkCover may adversely impact on that other investigation.

The Commission supports this recommendation.

- 7.3. That the Government give consideration to proposing an amendment to section 21(2) of the Police Integrity Commission Act 1996, (relating to interference with other Court proceedings), to replace the word "may" with the word "must".

The Commission does not oppose this recommendation but does not think it is necessary. The Commission has demonstrated in the past its preparedness to delay its own investigations where there was a risk of interference with a criminal proceeding. This occurred in 2011 in Operation Winjana, an investigation into the NSW Crime Commission, where the commencement of public hearings was deferred in order to allow completion of the criminal trial of Mark William Standen, a former Director of the NSW Crime Commission.

- 7.4 That the Government give consideration to proposing an amendment to Section 10 of the Police Integrity Commission Act 1996 to include, as an additional exception to the prohibition of police officers being employed/seconded by the PIC, circumstances where the PIC is participating in a co-operative scheme with another Agency.

- 1) The Commission does not support this recommendation. The subject of whether present and former NSW police officers should be prohibited from being employed by, or seconded to, the Police Integrity Commission and, hence, the making by Mr McClelland of Recommendation 7.4, is clearly not within the terms of reference for Mr McClelland's Inquiry.

This subject matter is clearly not within paragraphs (a) or (b) of the terms of reference. Nor is it within any of the parts of paragraph (c), which are concerned with the allocation of responsibilities between different oversight agencies and whether there is any unnecessary duplication of roles or responsibilities between different oversight agencies. Paragraph (d) of the terms of reference is clearly consequential upon, and limited by, the earlier paragraphs of the terms of reference.

- 2) It did not occur to the Commission, at the time of preparing the written submissions which it lodged with Mr McClelland's Inquiry, that Mr McClelland would go beyond the terms of reference for his Inquiry and enter into a consideration of whether the existing statutory provisions about the employment by the Commission of current and former NSW police officers should be varied. Accordingly, no submissions were made by the Commission on this subject and Mr McClelland made his recommendation, without having received any submissions from the Commission.
- 3) It would appear from the summaries of the written submissions received by the Inquiry which are annexed to the Report of the Inquiry that no written submission was made by



anyone, including the Police Association and the Commissioner of Police, that the existing provisions about employment by the Commission of current and former NSW police officers should be varied.

- 4) The Commission makes the following brief comments about parts of Mr McClelland's report (paragraphs 7.184 to 7.202) which led up to the making Recommendation 7.4.

Paragraph 7.185 – The remarks made by the Commissioner for the Police Integrity Commission to the Parliamentary Committee about problems of "resourcing" referred to the level of the Commission's funding and not to the prohibition on the employment or seconding of NSW police officers.

Paragraph 7.188 – In his speech the Premier referred to the Commission and the Independent Commission Against Corruption ("ICAC") having substantially similar powers and functions. However, the powers and functions of the Commission are directed to NSW police officers (and, to a much lesser degree, to administrative officers and Crime Commission officers), whereas the powers and functions of the ICAC are directed to persons in the NSW public sector generally and there are important differences between the two categories of targets.

Paragraph 7.192 – The reasons for the concern felt by the Wood Royal Commission about a "home state" Police Force investigating allegations of corruption apply equally to a "home state" Police Force investigating allegations of misconduct other than corruption. The Wood Royal Commission acknowledged that there could be some arguments for permitting a police integrity commission in NSW to employ NSW police officers but concluded, after taking those arguments into account, that there should be a general prohibition on an integrity commission in NSW employing NSW police officers.

The investigators employed by the Commission are all former detectives from other jurisdictions (such as the Australian Federal Police and interstate police forces), who keep abreast of current developments in investigative techniques and procedures.

Paragraphs 7.195 and 7.196 – As acknowledged in Mr McClelland's report, the inquiry into the Police Integrity Commission Act by the Minister of Police, held as recently as 2011, had, unlike Mr McClelland's own inquiry, the benefit of having received submissions from the Commission on this subject.

Paragraph 7.197 – In his report Mr McClelland expresses the opinion that there has been a reversal of culture in the NSW Police Force. This opinion is based on a statistic that 37% of total complaints against police officers are now being made by other police officers. It is pleasing that more complaints against police officers are now being made by other police officers. However, it is not correct to assume that all complaints made by police officers against other police officers are meritorious. Furthermore, the misconduct findings made in the Commission's Calyx Report against the authors of the Critical Incident Investigation Report and the Review Report fly in the face of the submission by the NSW Police Association quoted in 7.197 that "NSW police officers demand a high level of professionalism from each other and trust the discipline system to maintain that professionalism".

Paragraph 7.198 – Mr McClelland, while acknowledging that it would be appropriate to have regard to the views of the Commission, made his recommendation and wrote his report, without seeking the views of the Commission. Most of the alleged disadvantages of the prohibition on employing NSW police officers listed in 7.198 do not exist or are not significant.



- 5) The Commission adheres strongly to the general position that current and former NSW police officers should not be employed by or seconded to the Commission.
- 6) As acknowledged by Mr McClelland in his report, the prohibition on the employment by the Commission of current or former NSW police officers is not absolute.

Under s 10(6) of the Police Integrity Commission Act s 10(5), which imposes the limitation, does not prevent arrangements being made by the Commission for police officers to be involved in task forces with which the Commission is involved or carrying out or participating in investigations for the Commission, on behalf of the Commission or under the direction of the Commission.

Under s 142 of the Police Integrity Commission Act the Commissioner can authorise a police officer to exercise functions under or for the purposes of the Police Integrity Commission Act. The Commissioner is required to notify the Inspector of the Police Integrity Commission of an authorisation under s 142 but the consent of the Inspector is not required for an exercise of the power of authorisation. Since the present Commissioner assumed office he has granted an authorisation under s 142.

The Commission considers that the existing provisions of the Police Integrity Commission Act confer all the flexibility that is required and that the recommendation for legislative change made by Mr McClelland is not required.

- 7) The question of whether the general prohibition on the employment by the Commission of NSW police officers should continue was considered by the Minister of Police in the review of the Police Integrity Commission Act which was published as recently as November 2011. This review had the benefit of having received submissions from all interested parties. After carefully considering the issue at pages 15 to 17 of the report the review concluded:-

Outcome 6: the prohibition on the employment by the PIC of serving or former NSW police officers should be maintained.

Immediately before the statement of this outcome it was stated in the report:- "... the PIC currently is in the best position of any agency to judge the integrity of potential employees – and its ongoing support for drawing police officers from outside NSW deserves greater weight than the views of the organisations which the PIC is required to oversee"

Recommendation 8

That the Government give consideration to requesting the Police Integrity Commission and the Independent Commission against Corruption to confer with a view to examining the feasibility of those Agencies entering into a Memorandum of Understanding to facilitate the sharing of staff, resources, expertise and capabilities.

- 1) The Commission does not support this recommendation. Cooperation between the Commission and the ICAC of the kind recommended by Mr McClelland already exists and the recommendation made in the Report is unnecessary.

Section 18 of the Police Integrity Commission Act provides that in exercising its investigative functions the Commission may work in cooperation with other investigative agencies, including the ICAC.

Section 131 of the Police Integrity Commission Act provides that the Commissioner for the Police Integrity Commission and the Commissioner for the Independent Commission Against Corruption may enter into arrangements between the two Commissions.



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Pursuant to these statutory provisions an MOU dated 21 October 2008 was entered into and this MOU is still in force. A copy of the MOU can be provided if required. It is proposed that a fresh MOU, which would probably not differ in any substantial way from the current MOU, be entered into between the Commissioner for the Police Integrity Commission and the new Commissioner for the Independent Commission Against Corruption in the near future.

The current MOU provides inter alia for joint investigations by the ICAC and the Commission (clause 6), for liaison between the Commission and the ICAC at a number of levels (clause 9) and for the provision of information and property from one Commission to the other. Under clause 10.3 each Commission may, upon request and subject to availability, provide personnel or technical equipment or expertise to the other Commission for the purposes of an investigation being conducted by the other Commission.

On a number of occasions cooperation between the two Commissions in accordance with the MOU has occurred.

- 2) Although the recommendation actually made in the Report is the fairly limited one already referred to, there are passages in the parts of the Report leading to the making of the recommendation (paragraphs 7.203 to 7.219) which suggest that Mr McClelland is proposing, at least in the long term, a "merger" between the Commission and the ICAC or, more accurately, that the Commission should be abolished and that the ICAC should assume responsibility for the external oversight of the NSW Police Force. For example, in paragraph 7.216 Mr McClelland refers to "the merger of the PIC and the ICAC", while accepting a number of complex issues would have to be considered. In paragraph 7.219 Mr McClelland describes the recommendation he makes "as an initial step", presumably an initial step to a "merger". In the summary of recommendation 8 on page xiv of the Report Mr McClelland describes recommendation 8 as relating to "the longer term efficiency and effectiveness of the PIC".

The Commission notes that in media articles about Mr McClelland's report the Report has been interpreted by journalists as advocating a merger of the Commission with the ICAC.

- 3) The proposal for a "merger" of the Commission with the ICAC is clearly not within the terms of reference for Mr McClelland's inquiry. It is clearly not within paragraph (a) or paragraph (b) of the terms of reference. It is not within paragraph (c) of the terms of reference, which is limited to the allocation of responsibilities between agencies having oversight of critical incidents and whether there is any unnecessary duplication of roles or responsibilities among those agencies. The ICAC is not an agency presently having any oversight of critical incidents and played no part whatever in any investigation relating to the death of Adam Salter or the death of Robert Lauderio Curti, which are the two incidents expressly referred to in the terms of reference for the Inquiry. The proposal made by Mr McClelland is not within paragraph (d) of the terms of reference which is consequential upon, and limited by, the previous paragraphs. Even the recommendation that the Commission and the ICAC confer for the purpose recommended goes beyond any of the terms of reference for the Inquiry.
- 4) It did not occur to this Commission, at the time of preparing the written submissions which it lodged with Mr McClelland's Inquiry, that Mr McClelland would go beyond his terms of reference and enter into an inquiry into the future of the Commission and, consequently, the submissions which the Commission lodged did not address this issue.



- 5) The proposal that the Commission should be "merged" with the ICAC, that is that the Commission should be abolished and that the ICAC should assume responsibility for the oversight of the Police Force, obviously concerns the ICAC, as well as the Commission. However it is apparent from Mr McClelland's report that no submissions were sought or received from the ICAC. It should not be assumed that the ICAC would favour a merger of the Commission with the ICAC. It is well known that Mr David Ipp, the recently retired Commissioner of the ICAC, was strongly opposed to the ICAC being given responsibility for the oversight of police.
- 6) It is apparent from a comparison of the submissions by the Police Association, which are summarised at pages 105 to 120 of the Report, and pages 91 to 95 of the Report, that Mr McClelland, in the absence of any submissions from any other party, adopted parts of the submissions which, without regard to the Inquiry's terms of reference, had been made to him by the Police Association.
- 7) It is noteworthy that in the submissions on behalf of the Commissioner of Police, which are summarised at pages 99 to 104 of the Report, no submission was made about the future of the Commission.
- 8) The Commission makes the following brief comments about parts of the Report at pages 91 to 95 of the Report, which are numbered somewhat confusingly, as paragraphs 7.203 to 7.219.

Paragraph 7.205 to 7.209 – Mr McClelland appears to be suggesting that the Commission has been using its resources to investigate matters which fall below a threshold of "serious officer misconduct" and are merely matters of incompetence or poor performance by police officers.

This suggestion is completely unfounded. In fact, the Commission has rarely, if ever, investigated a matter in which there has not been an allegation which, if established, would amount to serious misconduct by the police officer concerned and not merely incompetence or poor performance.

The Commission has not itself conducted any investigation of a critical incident. The Commission investigated the NSW Police Force investigation into the death of Adam Salter (the Commission's Operation Calyx) and reviewed the evidence concerning the death of Roberto Laudisio Curti (the Commission's Operation Anafi). In both these operations the allegations of misconduct which the Commission investigated and many of which the Commission upheld were surely "serious misconduct" by any standard and not merely incompetence or poor performance. Both investigations resulted in the referral by the Commission of numerous briefs to the ODP for consideration of criminal charges.

Paragraph 7.203, 7.204 and 7.206 – Mr McClelland speaks approvingly of what he says are the present high standards and competence and professionalism of the Professional Standards Command ("PSC") of the Police Force. He expresses the opinion that the Police Force, including the PSC, is quite different from the Police Force as it existed at the time of the Wood Royal Commission. Mr McClelland says in his report that he has formed these opinions after spending hours with the leadership of the PSC.

However, the investigation by the Police Force into the death of Adam Salter, which was investigated by the Commission in its Operation Calyx, is a quite recent example of a seriously deficient critical incident investigation by a high ranking officer of the NSW Police Force and an uncritical endorsement of that seriously deficient investigation by a high ranking officer of the PSC.



Furthermore the Commission is aware of recent instances in which officers of the PSC improperly alerted other police officers that they were being investigated for alleged misconduct, by either the PSC or the Commission.

Paragraph 7.211 to 7.215 – Mr McClelland refers in his report to the recent establishment in Victoria of the Independent Broad-based Anti-Corruption Commission ("IBAC") and suggests the NSW Government might further explore the "reforms" in Victoria.

The Commission notes that the creation of IBAC has been attended by ongoing opposition and delay (see for example a report of December 2012 by the Victorian Ombudsman to the Victorian Parliament on problems with the proposed integrity system). IBAC has been in existence for less than a year so can hardly be viewed as a proven model for the consolidation of anti-corruption functions into one agency.

- 9) In the review by the Minister of Police of the Police Integrity Commission Act in 2011 consideration was specifically given to whether the policy objectives of the Police Integrity Commission Act remained valid and whether the functions being performed by the Commission should continue to be performed by a stand-alone body or would be better performed as part of a specialist division of the ICAC. The review had the advantage of receiving submissions on these questions from a number of parties, including the Commission and the NSW Police Association. The first two outcomes stated in the report of the review dated November 2011 were:-

- " 1. the Government considers that the policy objectives of the PIC Act remain valid
- 2. the Government considers that for the foreseeable future those policy objectives are best performed by maintaining the ICAC and the PIC as separate bodies."

- 10) The terms of reference for Mr McClelland's inquiry directed the Inquiry to take into account the findings of the Commission's report in Operation Calyx and the report of the Ombudsman on the monitoring by the Ombudsman of the police investigation into the death of Roberto Laudisio Curti. The Commission infers that the Government decided to hold the Inquiry at least partly because of the Commission's report in Operation Calyx.

It would be truly ironic if an inquiry resulting in part from an investigation by the Commission in which the Commission exposed serious deficiencies in a critical incident investigation by police, is made the occasion for recommending the abolition of the Commission.

- 11) It is appropriate to refer to the role played by the Commission in regard to the death of Roberto Laudisio Curti. Following a recommendation made by the Coroner, the Commission instituted its own investigation. The Commission decided that, having regard to the voluminous evidence taken during the inquest, it was unnecessary for the Commission itself to conduct hearings. However, the Commission prepared and submitted to the Director of Public Prosecutions a multi volume brief, in which the Commission assembled the evidence which had been given at the inquest and the evidence which had been collected by the police for the purposes of the police critical incident investigation, summarised and analysed that evidence and made recommendations to the Director of Public Prosecutions that consideration be given to the prosecution of a number of police officers on various charges. The Director of Public Prosecutions accepted the majority of the recommendations made by the Commission and a number of charges against police officers have been laid.



- 12) The Commission has already referred to the opinion expressed by Mr McClelland in the Report that the Police Force including the PSC is now quite different from the Police Force as it existed at the time of the Wood Royal Commission. On the basis of this opinion Mr McClelland appears to question if there is any continuing need for the Police Integrity Commission.

In this connection it is appropriate to refer to remarks made by the Hon James Wood QC in an address he delivered on 28 November 2013 at the Australian Public Sector Anti-Corruption Conference (APSACC), which had been opened the previous day by the Premier.

In his address Mr Wood departed from his prepared text to make the following remarks which do not appear in the published version of his prepared address but which were recorded. After referring to the establishment of the Police Integrity Commission Mr Wood said:

" ... Now if I may say, there has always been some pressure to bring the PIC within ICAC. I have the greatest regard for ICAC and I don't by any means demean it by what I am about to say but I am of the view that any move to meld PIC into ICAC must never occur. It would destroy its focus, it would destroy its intelligence and expertise in dealing with police. It would expose it to a risk of bad security, leaks of security and so on. ICAC has a different role to play and if policing was rolled into there it would simply be swamped by all the other work which ICAC does very well ... "

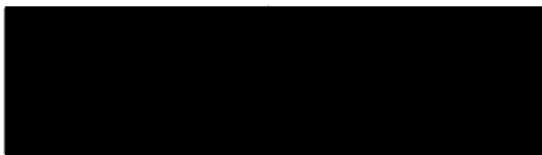
Recommendation 9

That the Government convene a meeting between the NSW Police Force, the Coroner, the Police Integrity Commission, the Ombudsman and the Police Association of New South Wales with a view to those organisations conferring regarding developing a mutually agreed media protocol in respect to critical incidents to ensure that any public comments made do not pre-empt investigative findings. Consideration should be given to including in that protocol:

- 9.1 identification of who should be authorised to make statements to media at critical incidents on behalf of the respective organisations, either individually or collectively.
- 9.2 Guidance regarding the content of the media statement including:
 - a. acknowledgement of the tragedy,
 - b. reassurance of the community as to public safety,
 - c. expressing concern about the welfare: of any person who suffers injury and, in the event of death, the welfare of the family of the deceased,
 - d. expressing concern as to the welfare of any police involved,
 - e. in the event of death – stressing that the matter will be 'the subject of the Coroner's inquest,
 - f. stating that there will be a thorough police investigation and, in the case of death that police investigators will forward a brief of evidence to the Coroner to assist with the inquest,
 - g. stating that the police investigation will be the subject of active oversight by the New South Wales Police Professional Standards Command who may also report to the Coroner,
 - h. stating that the investigation may also be independently overseen by the Police Integrity Commission,
 - i. advising that neither the police investigation nor the oversight, will prejudge the outcome of the Coroner's inquest.

- 1) The Commission does not consider this to be necessary if the recommendations for the legislative change in the Report which are supported by the Commission are implemented by Government. The Commission reiterates the recommendations it made in the Calyx Report regarding the police handling of media statements.

Yours sincerely



The Hon Bruce James QC
Commissioner



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