

NSW Police Response to the Second Ombudsman Submission to the Committee on the Office of the Ombudsman and the Police Integrity Commission concerning the Ten Year Review of the Police Oversight System

NSW Police has provided a response to the Committee's Questions on Notice which replies to many of the issues raised in the Ombudsman's Second Submission. However the following specific issues in that report warrant a further response by NSW Police.

No Case for Change (Page 4 paragraph 4)

In our submission, given the consensus that there have been significant and positive changes within NSW Police since the current corruption and complaints oversight arrangements were established, strong evidence should be required before substantial reforms are made to these arrangements. Rigorous oversight of NSW Police by the Ombudsman and the Police Integrity Commission has been integral to the improvements made. Without this oversight, it is unlikely that positive changes would have occurred to nothing like the extent they have, if at all. History has not reflected well on the capacity of NSW Police, without close oversight, to resist either corruption or deal effectively with complaints.

It is extremely disappointing to NSW Police to read those comments.

The Committee's attention is drawn to the following extract from the introduction to the *Police Regulation (Allegations of Misconduct) Bill 1978*.

Mr Wran

...the function of the Ombudsman in this expanded jurisdiction will be one of review. Complaints against police will continue to be investigated by police as at present. With some exceptions, complaints will generally be dealt with by the internal affairs branch.

The Ombudsman will be kept informed and will be empowered to direct that a complaint be investigated or to require that a complaint be further investigated if he is not satisfied with the result of an investigation.

...

The basic principles contained within the legislation are: complaints against members of the police force may be lodged with the Ombudsman, either directly or through a local court house or police station; investigations into complaints will be conducted by a reconstituted internal affairs bureau head of the police force; all investigations will be reviewed by the Ombudsman to ensure that they have been properly conducted

As is evidenced by that speech, the Ombudsman's Office had the same powers that are held today, some eighteen years prior to the Wood Royal Commission. Those powers did not stop corruption and in fact corruption flourished in spite of its oversight.

It is the view of NSW Police that oversight is not the key to reform. The key to reform is in the commitment of NSW Police from the senior executive to the new recruit, to embracing a culture that does not accept or endorse corrupt conduct and is willing to report on and deal with those officers that do not conform. Without that commitment oversight does not have any real effect, as is evidenced by the fact that the Wood Royal Commission occurred at all.

NSW Police is indebted to Justice Wood for his vision in recommending the creation of a standing Royal Commission and to the NSW Government for creating the Police Integrity Commission. This provided NSW Police with access to an agency that had coercive powers specifically tailored to the needs of NSW Police, which NSW Police could utilise for its own corruption investigation needs. However, NSW Police is confident the Police Integrity Commission would agree, that without the commitment of NSW Police, that agency may not be the success that it is today.

The Ombudsman fails to recognise the real achievements by the committed officers of NSW Police. The inference that police still cannot be trusted only serves to undermine the community's confidence in police officers and makes building

relationships with the community, a fundamental building aspect of modern policing, all the more difficult.

The NSW Police submission will now turn to specific comments made by the Ombudsman in his report.

No case for change (Page 4 paragraph 7)

Added to this is the evidence of senior police which suggests a lack of a basic understanding of complaints handling in NSW Police. For example, evidence that serious complaints are handled in the same manner as less serious matters is clearly not correct. Another example is the evidence of the Commander of the Professional Standards Command who did not know that the Ombudsman oversighted almost all serious complaints.

It is not that NSW Police does not understand the complaint handling system, but rather that NSW Police does not agree that matters defined as Category 1 or Category 2 complaints, under an administrative agreement between agencies external to NSW Police, should necessarily be the subject of an investigation, when the exercise of sound judgment would suggest that the matter is one that is remedial in nature and should be managed as a performance or competence issue.

The Ombudsman defines a ‘serious complaint’ by a process that NSW Police can no longer sustain. The assessment of matters based on literal complaint wording to the exclusion of all reasonable judgment by a manager, is not a definition of a ‘serious complaint’ for the purposes of NSW Police. The Ombudsman refuses to make any concessions in this area.

In relation to the term ‘serious complaints’, this is a sliding scale depending on the audience to which the Ombudsman is presenting. The NSW Police comments were in relation to those matters that involve serious corruption or serious misconduct matters with substance.

Where change is required – less serious complaints (Page 5 paragraphs 3-5)

The Ombudsman requests that the Committee recommends that new Commanders receive training in complaints management.

For the benefit of the Committee, this matter arises from an Ombudsman's investigation into turnaround times in complaint management. The term 'complaint management' should be transposed with the term 'complaint administration'. The Ombudsman is well aware of the NSW Police view that Commanders do not need training in complaints administration, but rather, Commanders need a complaints regime that provides a basic structure for complaints management with the primary focus being on exercising sound judgment that is both fair to the rights of the complainant to have the matter resolved and also recognises the right of the subject officer to have the matter dealt with quickly, fairly and in proportion to the conduct alleged.

The current regime which focuses on assessment and categorisation of complaints, followed up by audits and arguments about whether a matter is a complaint and what category it falls in to, is no longer sustainable. A fundamental shift is required from complaints administration based on checking boxes, to a focus on resolution, risk assessment, sound judgment, and sound management practices.

The Committee may like to note the comments of one Commander in response to the Ombudsman's investigation:

To complicate matters further, the Ombudsman directed that in matters of failed prosecutions where incompetence was the basis of the failure, the matter would be initiated as a Category 2 investigation and notified to the Ombudsman. However, when such action including a full copy of the file and s.150 report [was sent to the Ombudsman] we were advised not to waste their time on trivial matters...Again, the Executive Officer was engaged in this process for several hours needlessly

In another matter a Commander stated:

I don't know of a Commander in the state who is not frustrated by the level of minor complaints that we deal with, particularly the internal minor complaints. They usually revolve around HR issues more than anything else. We seem to be overly scrutinising those at the expense of the larger jobs. I have actually made the comment on a number of occasions that we actually put more attention into the minor matters than we actually do into some of our murder inquiries at times...Like I said, we haven't made it very simple to do the minor stuff.

NSW Police notes with interest that in 2003 the NSW Government legislated to introduce a new disciplinary scheme for the NSW Public Service. It was recognised that misconduct and performance issues should not be subject to the same procedures and consequently the Public Sector Employment and Management Act 2002 was amended and provided separate legislation and procedures for dealing with misconduct, unsatisfactory performance and serious criminal issues.

Narrowing the definition of complaints (Pages 5 - 6

The Ombudsman has provided a list of classes of complaint that apparently would no longer be the subject of oversight under the proposed model. The Ombudsman is misrepresenting the intent and scope of the NSW Police submission. NSW Police merely seeks to draw a distinction between performance or competence issues and misconduct issues in line with Public Sector Employment and Management Act.

All matters, including performance and competence issues would still be able to be viewed 'live' by oversight agencies, ensuring that there is transparency in the process.

It is this process of categorisation based on type or class of allegation that NSW Police seeks to resolve.

Each of the categories listed by the Ombudsman needs to be viewed as having different levels of seriousness contained within them. For example, the Ombudsman has included the category:

gross incompetence in investigations or prosecutions leading to the failure of criminal charges and significant costs orders being made against police

The term, 'gross incompetence' is subjective and given a broad definition by the Ombudsman. A reasonable interpretation would be that 'gross incompetence' is a matter that would warrant serious management action or dismissal. The status of these matters would not change.

However a relatively junior officer, who on one occasion forgets to summons a witness resulting in a matter being dismissed, but who otherwise has an exemplary work record and great potential, would be managed and not be the subject of an investigation under Part 8A.

Narrowing the definition of complaints (Page 6 paragraph 11)

In our submission, and given the sceptical view of the community about police investigating police, as demonstrated in surveys and evidence before the committee, such matters should be the subject of rigorous external oversight.

It is noted with interest that despite the existence of the PIC and the Ombudsman, submissions to the Committee remain sceptical.

A recent change of position (Page 7 paragraph 3)

Given the long history of cooperation and the open relationship between the Ombudsman and NSW Police, it is particularly disappointing that the first time these and other issues have been brought to the table is in the evidence from senior police officers before the Committee.

...

This lack of openness by NSW Police is further evidence as to why there would be little confidence in entrusting that agency to deal properly with complaints in the proposed circumstance of reduced oversight by external agencies.

The NSW Police submission was in response to an invitation by the Committee to make a submission to the review of the oversight of NSW Police. In the absence of the announcement of this hearing, there was no reason to raise this with the Ombudsman.

NSW Police aims to maintain a professional working relationship with both oversight agencies at all times. To have raised such an issue with the Ombudsman would have had no legitimate purpose and would have impacted on the working relationship between the agencies. The tone of the Ombudsman's second submission clearly demonstrates the effect that the NSW Police submission has had.

What the Ombudsman brings to oversight (Page 7 paragraph 10)

Another particular benefit of Ombudsman oversight is the contribution of a broader public perspective to NSW Police. We build on our relationships across the Ombudsman's Office and in the broader public sector, to inform and improve the practice of police officers.

If the Ombudsman had such an aim, the Ombudsman would have sought legislative change to Part 8A some considerable time ago, to improve complaint handling processes and remove unnecessary administrative burden and 'red tape'. The Ombudsman would have acknowledged the waste of human resources engaged in the process of complaint administration and looked to create an easier and more efficient system that could be understood and applied by any administrative officer with a minimal amount of training. This has not occurred.

In fact, on 5 July 2006 the Assistant Ombudsman (Police) wrote to NSW Police as follows:

I am concerned that considerable time is being spent by senior officers of both our organisations discussing whether particular matters are complaints, such that they must be registered on c@tsi, the current NSW Police complaints information system. Generally, these are matters that both agencies agree should be declined for investigation and hold little or no intelligence value. However as long as the

statutory requirement remains, NSW Police must register complaints, regardless of considerations such as whether they should be investigated.

*To seek to reduce the amount of time spent on these discussions by both our agencies, and to provide a clear mechanism to resolve these disputes, I have offered to review any matters where Commanders or officers of the PSC Complaints Management Support Unit disagree with the assessment by Ombudsman officers as to whether matters are or are not complaints. **This is on the condition that my view will be final and binding on both organisations for the purpose of determining whether matters should be registered on c@tsi.***

In providing my view, I will provide reasons and a decision as to whether the complaint should be, or need not be, investigated.

An agency that is apparently the lead agency in NSW in relation to matters of administration, should recognise the difficulties created by the legislative scheme and seek such change. However the Ombudsman takes the more costly and time consuming road and imposes yet another time-consuming process on an agency that is already ‘drowning’ in complaint administration process. Any reasonable member of the community would have a right to be concerned that a simple administrative task such as complaint assessment would be conducted by such a senior state government official.

Response to specific examples in police evidence (Page 10 paragraph 2)

...the Ombudsman has suggested an amendment to the Police Act that would relax the current strict requirement that any complaint against a police officer must be registered on the complaints information system...In brief, our suggested amendment would allow matters not to be registered if both the Ombudsman and NSW Police agree to this course.

Again the Ombudsman’s solution is to add further ‘red tape’ with another process step.

It should be noted that the Ombudsman's full suggestion, as communicated to NSW Police in recent discussions, is that where there is any disagreement, the Ombudsman's view will be final. This is not in line with a model that seeks to make Commanders accountable for complaints management within their Commands, or for NSW police to take full responsibility for their decisions. This will not be supported by NSW Police.

Evidence concerning 'the 500 matters' (Pages 10-11)

NSW Police has provided the Committee with a more comprehensive overview of what occurred in this matter, in response to the Committee's Questions on Notice.

Dealing with minor matters (Pages 12 paragraph 9)

Mr Carroll provided evidence in the following terms; "we are still dealing with minor management issues in exactly the same manner, process wise, as we are dealing with the serious end of the complaints situation" A similar statement was made by Mr Moroney concerning the investigation of less serious matters. However the procedures for handling serious complaints and LMIs are different.

- *Serious matters including criminal allegations or complaints alleging serious misconduct, must be notified to the Ombudsman and in some circumstances the Police Integrity Commission. These matters are to be dealt with in accordance with the requirements of Part 8A of the Police Act*
- *Management issues and customer service issues are not required to be notified to the Ombudsman or Police Integrity Commission...*

The Ombudsman has misunderstood the NSW Police comments. Whether a matter is assessed as a Category 1 or Category 2 complaint or an LMI is not the determinant of whether management issues are being dealt with through the same process. There are matters that are included as Category 2 notifiable complaints that are undoubtedly

performance or competence related. They are not misconduct, but are dealt with through the Part 8A process to the detriment of everyone concerned. .

NSW Police has already provided the Committee with examples on response to the Committee's Questions on Notice.

ICAC Matters (Pages 13 and 14)

NSW Police has already provided the Committee with numerous examples of the matters that the Ombudsman determined should be entered into the c@tsi system and the Ombudsman's assessment documents. It is noted that the Ombudsman confirms that there was little value in these complaints. However a police officer has spent approximately 80 hours (a conservative estimate) identifying issue categories, registration, scanning and completing all c@tsi data entry requirements to finalise the matters. This work is being completed in addition to the officer's normal duties. As stated by the Ombudsman there are a number of matters which NSW Police does not agree meet the criteria of Part 8A. Unfortunately, these matters will have to be discussed and debated at a more senior level, further diverting scarce resources for no measurable outcome.

Audits of local management and customer service issues – 2005 and 2006 (Page 15 paragraph 7)

Therefore the statement of Mr Carroll that he is significantly concerned with Ombudsman requirements following audits and the amount of resources required to deal with those requirements is difficult to understand.

The Ombudsman has provided two examples which are 'audits' ie 'desktop' and 'physical' audit.

However the Ombudsman has not provided the Committee with evidence of other audits that are conducted as 'investigations' under the Ombudsman Act. These matters are not 'investigations' but rather compliance and performance audits. The types of matters that are the subject of audit are turnaround times in complaint

handling; timeliness, complaints administration and any other issue that the Ombudsman decides.

For example the Ombudsman decided that Statements of Claim constitute complaints under Part 8A and commenced an ‘investigation’ into this matter. The purpose of the ‘investigation’ was the failure of NSW Police to comply with Part 8A of the Police Act with regards to assessing and registering Statements of Claim on the c@tsi system

The coordination of this project took over 12 months and comprises 5 volumes of material. All statements of claim had to be collated assessed and entered onto the c@tsi system during this process. NSW Police had concerns that since the intent of the plaintiff is not to complain to NSW Police and have the matter investigated, but rather to address the matter through the Court, there could be a risk to NSW Police investigators where an investigator approached witnesses in the plaintiff’s case.

The Crown Solicitor’s Office advised that Statements of Claim do not constitute complaints under Part 8A for the following reasons:

While a statement of claim will contain an expression of censure etc and the necessary allegations or indications, I do not think it is a complaint “made to an investigating authority” as required by s127(1). A statement of claim is in fact initiating process pleading a cause of action which is filed with a court for adjudication by the Court. A sealed copy of the process is served upon the defendant. In these circumstances, I do not think it can be said that a complaint has been, made to an investigating authority. That situation can be contrasted with the provision made in s.127 (2) (c) for a complaint to be made to the Commission if addressed to the Commissioner and “lodged at” a Local Court. Section 127(2) (c) provides for a special procedure utilising the local Court but is not, of course, referring to Local Court process filed in the Local Court.

The Ombudsman entered into legal argument over this advice and then required consideration of whether cl.20 of the Police Regulation would apply.

Briefly, the Crown Solicitor’s advised that:

Clause 20(1) (a) of the Regulation operates only if ‘an allegation is made to a police officer’ that another police officer has committed a criminal offence or other misconduct.

Accordingly, cl.20 (1)(a) could only operate in respect of a Statement of Claim if an allegation in that statement of claim can be said as “made to a police officer”. The words ‘made to a police officer’ suggest that the allegation must be directly communicated to the police officer and that merely “coming to the attention of a police officer’ will not be sufficient to give rise to an obligation under cl.20(1)(a).

Section 9B(2) of the Law Reform (Vicarious Liability Act (1983) prohibits the commencement of proceedings, at least initially, for a police tort claim against the officer concerned, but instead allows the claim to be commenced against the Crown

Section 5(1) of the Crown Proceedings Act 1998 requires that claims against the Crown be brought under the title “State of New South Wales” and s6 of that Act requires that in civil proceedings against the Crown, any document required to be served on the Crown is to be served on the crown Solicitor.

...

Clause 20(1)(b) of the regulation operates if a “police officer sincerely believes” that another police officer has committed a criminal offence or other misconduct.

I do not consider that a police officer could be capable of holding a sincere belief on the basis only of an allegation contained in a Statement of Claim, given that it is an initiating process seeking adjudication of as yet unproven assertions.

...

This was a lengthy and resource intensive project that could have been resolved without an investigation or the collation of voluminous material to provide to the Ombudsman under notice.

The Crown Solicitor's Office already brings concerns about possible misconduct issues arising through legal proceedings to the attention of NSW Police. It was therefore a simple matter of formalising that instruction in the formal instructing letter to the Crown Solicitor's Office for each Statement of Claim, to the effect that if any evidence of misconduct is identified during civil proceedings that information is to be forwarded to NSW Police for appropriate action.

All s160 audits and audits conducted as s16 investigations, are resource intensive and lengthy. The NSW Ombudsman Police Team is heavily and permanently resourced. In order to report on its performance, it must generate reports and recommendations. The level of work generated is a direct function of the staffing levels of that organisation.

The cumulative effect of the service requirements of the Ombudsman on NSW Police is significant and cannot be maintained to the levels currently being experienced. In the current climate of tight fiscal policy, this situation is unlikely to improve. The Ombudsman should not be conducting resource intensive 'investigations' into compliance issues, where the Ombudsman's solution is to impose further inefficient and unnecessary administrative processes. Audits should be conducted under s160 of the Police Act, not section 16 of the Ombudsman's Act, and the Ombudsman's own staff should access, collect and collate that information. The scope and purpose should be in accordance with s160 of the Police Act.

Ombudsman assessment of new complaints (Page 16)

The Ombudsman presents statistics apparently to confirm that there is general agreement between NSW Police and the Ombudsman about the assessment of complaints.

The Committee is referred to the letter from the Assistant Ombudsman (Police) referred to previously and attached to this submission (Appendix F), which does not support this contention.

It should also be noted that while NSW Police Commanders attempt to comply with the Ombudsman's strict literal interpretation of Part 8A, they do not necessarily agree that these matters should be recorded against officer's complaint histories where they are clearly remedial issues or vexatious complaints. Commanders also spend significant time grappling with intricacies of the assessment process.

Role of Ombudsman in serious complaints (Page 16 paragraph 9)

Overwhelmingly, the Ombudsman is the oversight agency for complaints and investigations concerning matters such as conspiracies or cover-up, drug offences, bribery or extortion allegations, perjury allegations and allegations concerning fabrication or suppression of evidence. These are matters that should be known by the Commander of the Professional Standards Command. A primary reason for this is that many of the Professional Standards Command's investigations are the subject of Ombudsman oversight.

The Ombudsman qualifies the above examples with the use of the term 'allegations'. It is true that serious 'allegations' are oversights by the Ombudsman. The NSW Police response to the Committee's Questions on Notice provides some examples. The PIC has no interest in complaints that are anonymous and provide little detail; are lacking in substance; or are unlikely to lead to a meaningful outcome. The PIC treats these matters as intelligence.

The PIC approaches oversight from an operational perspective and works with NSW Police to determine those matters that have valuable leads or some prospect of success. The Professional Standards Command and the Police Integrity Commission meet on a weekly basis for a briefing session. The PIC is provided with updates on all PSC operations and information is exchanged. The Ombudsman is not a party to those meetings. Where a matter appears to have some prospect of success, the PIC will consider whether it will take over the matter and use coercive powers, not available to NSW Police investigators.

The mere fact that the PIC does not send copious amounts of correspondence about perceived flaws in process does not mean that the matter is not ‘oversighted’ by that agency.

It is wrong of the Ombudsman to suggest that the PIC has in some way delegated its jurisdiction in relation to corruption and serious misconduct to an administrative body. This is not the understanding of NSW Police. However given that NSW Police supports a one agency model that handles all corruption and serious misconduct issues, perhaps the Committee could explore this matter further and be satisfied as to the Ombudsman’s role in corruption investigation, as this may further support the NSW Police submission that there is a duplication of roles between the Ombudsman and the PIC. It would be of great assistance to NSW Police to have a definitive statement regarding the respective powers, functions and responsibilities of both oversight agencies and what this means in practical terms for NSW Police.

NSW Police written submission (Page 17 paragraph 4)

At page 8 of the submission there is a reference to Part 8A of the Police Act being an ‘industrial process’. However Part 8A of the Police Act is headed “Complaints about the conduct of police officers” and outlines procedures for dealing with complaints. It is Part 9 of the Police Act headed “Management of Conduct within NSW Police” that provides for industrial processes for police officers including the application of the Industrial Relations Act.

This is an interesting point. However, if this argument is accepted, then Part 8A investigations would not form the basis of every management action and dismissal proceeding taken by NSW Police. Complaint histories would not be used in considering police promotions and the Ombudsman would not interpret the term ‘action to be taken’ under s150 of the Police Act to refer to ‘management action’.

If the Ombudsman’s view is to be taken to be correct, then perhaps the Ombudsman may like to explain to the Committee why NSW Police sworn employees are not included in the Public Sector Employment and Management Act and managed in

accordance with the Public Employment Office Guidelines; a process which applies to unsworn NSW Police employees.

It is quite clear that the findings of a Part 8A investigation, result in management action against a sworn employee of NSW police and there is no other process for handling misconduct of sworn police employees.

(Pages 17 paragraph 7 and page 18 paragraphs 1-2)

The Ombudsman has provided submissions and detailed material to the Committee concerning the c@tsi system and our involvement in it. The submission at page 9 that “the Ombudsman ceased to be primary user of the c@tsi system on the basis that it was a conflict of interest for it to rely on a police system to oversight police complaints” is frankly a misrepresentation of the ombudsman’s decision concerning c@tsi.

The Ombudsman’s correspondence dated 27 July 2005 is attached (Appendix G). It states as follows:

Ombudsman Independence

In determining to further reduce the Ombudsman’s participation in c@tsi, I have also had cause to closely reconsider the benefits and disadvantages of a complaints database residing in NSW police, for the use of both NSW Police and my office.

Given the history of this matter, I am now firmly convinced that a significant risk to the independence and the effectiveness of my office would arise from the integration of our core business system for police complaints.

As you know, under the Police Act I am obliged to keep under scrutiny the systems established within NSW police for dealing with complaints. At this stage the c@tsi system does not support the data capture required by my office to fulfil these obligations.

...

In addition, on a practical level, it is problematic for my office to keep under scrutiny the development and implementation of c@tsi by NSW police and at the same time to participate in the project as a user and beneficiary of the system.

NSW Police responded on 8 September 2005:

I acknowledge and accept both your right and responsibility as the NSW Ombudsman to identify and resolve any conflict of interest that may impinge upon your statutory role and any adverse public perceptions of the impartiality of that role. I therefore accept your decision that it is no longer possible for your office to rely principally on a NSW Police system to perform statutory oversight functions and will regard this as your final position on the issue.

The key issue for NSW Police is the refusal of the Ombudsman to access the c@tsi system for the purposes of viewing and printing off investigation reports. This is the only matter which NSW Police requires oversight agencies to agree to.

At page 61 of his evidence to the Committee Mr Cohen stated:

In terms of 150 reports, I have offered to the Assistant Commissioner of Professional Standards to look at options to receive smaller of these reports electronically. But I do not think it is fair, given what we were promised through c@tsi, to then take on the responsibility of having to print out the voluminous reports in some matters that need to be gone through page by page, given the serious nature of the allegations that are raised in them.

It is the view of NSW Police that the Committee should view very seriously such a comment by the Assistant Ombudsman. The Ombudsmans's Office uses c@tsi for conducting audits and apparently 'intelligence gathering', but refuses to agree to push a button on a computer system to print the investigation reports. To reduce the administrative burden on Commands, the Professional Standards Command now prints the s150 reports from the c@tsi system and delivers hardcopy reports to the Office of the Ombudsman. There is no material included in the hardcopy reports that is not scanned onto the c@tsi system, and that the Ombudsman cannot view and

print. This is quite simply unacceptable and cannot be justified on the basis of a comment that it is 'not fair'.

The Ombudsman was not merely consulted in relation to the development of the c@tsi system, but rather was a foundation partner of a shared complaints information system, built for its express purposes, along with NSW Police and the Police Integrity Commission. Each oversight agency had a dedicated c@tsi Business Manager position established for the duration of the c@tsi project, to manage each agencies business requirements. The Ombudsman has only recently redesignated that position.

The system was developed, among other things, to deliver s150 reports to the Ombudsman electronically to create a 'paperless office'. Ombudsman officers were to view the material in its electronic form to remove the administrative burden of providing hard copy reports and the cost to Government of photocopy paper. The fact that the Ombudsman's Office has later found that it prefers to work from hard copy reports is not an issue for NSW Police, or a failing of the c@tsi system, but an internal business decision for the Ombudsman.

NSW Police would greatly appreciate the assistance of the Committee in resolving this issue of electronic delivery via the c@tsi system to oversight agencies, with a view to removing unnecessary and time-consuming administrative burdens on NSW Police.

NSW Police written submission (Page 18 – paragraph 6)

As page 12 of the submission the following statement is made "The Ombudsman also has decided that if a matter is assessed as meeting the criteria of a complaint (ie could lead to any form of management action then, unless the matter is declined at the outset under the legislation, any inquiries made, no matter how minimal will constitute an 'investigation'...This includes the preparation of formal investigation reports.

This statement is inaccurate in a number of respects.

NSW Police has provided examples in the submission to the Committee's Questions on Notice (attached).

NSW Police written submission (Page 19 paragraph 4)

At pages 14 and 15 of the submission it is suggested that the Police Integrity Commission oversees the management of complaints by NSW Police. With respect, this is entirely incorrect and contrary to the advice of both the Ombudsman and the Police Integrity Commission.

The NSW Police submission actually stated:

The current processes adopted by the PIC to oversight police conduct is a more mature oversight model that works effectively. The PIC oversees how NSW police manages its complaints on an ongoing basis. It notifies NSW Police of all complaints it receives and ensures that they are placed on the complaints information system in a timely manner. It may choose to take over a matter to investigate otherwise NSW Police will investigate it with or without direct oversight. The PIC will inform NSW Police if it requires a final report on a matter otherwise it simply views the matter on the c@tsi system and decides whether to intervene, comment, criticise or accept an outcome as valid.

This statement is correct. The Committee may like to consider confirming this statement with the Police Integrity Commission.

No case for change (Page 4 paragraph 5)

As a general comment, however, that submission puts forward a number of examples to demonstrate a need for change. A close examination of those examples shows that, in a number of instances, incomplete or wrong information has been provided to the Committee. If NSW Police cannot provide full and correct information to the Committee for so important an inquiry, this weighs heavily against making recommendations to reduce current oversight arrangements.

In response to this statement, the examples provided at the hearing on 24 August 2006 were included in an opening address that had a time limit imposed of five minutes. The examples had to be significantly summarised in order to communicate a message and it must be expected that some detail will be lost as a result of that process.

The Ombudsman has no such excuse. However it is noted that the Ombudsman's submission is noticeably lacking in specific details that would not support the Ombudsman's view. In order to avoid further debate about these issues, NSW Police has provided edited copies of most documentation from the investigation files in order that the Committee may form its own view as to whether these matters were deficient investigations, as the Ombudsman contends and whether the Ombudsman plays a role in the over-management and delay in relation to complaint handling by NSW Police. Documents that have not been provided are COPS events, administrative records such as Standards Operating Procedures or risk assessments and other source data that require extensive editing and would make little or no sense in that format.

Appendix A – Example 1

Internal police complaint concerning access to confidential police information by officers on long-term sick report

The Ombudsman has missed the point in relation to this matter. The officers were on long term sick leave and the accesses had been identified through an internal audit process. The appropriate and quickest resolution method would have been to ask the officers to explain the accesses, before forming an opinion as to whether formal procedures were required.

Unfortunately NSW Police has to assess each management issue at its highest and that is the issue that is recorded against the officer's ie illegal computer access. This remains recorded for the rest of the officer's career and makes complaint histories unreliable without a full qualitative assessment.

The Ombudsman raises the issue that the officers did not record the accesses in their police notebooks. The CMT appropriately recorded this failure. It was a managerial matter and breach of policy that did not require the Ombudsman's involvement. It

should be noted that one of the officers was a Probationary Constable with limited experience within the organisation.

Unfortunately, as can be seen by this example, there is little flexibility afforded to NSW Police managers in the internal management of personnel.

If the Commander had adopted a common sense approach and dealt with this matter managerially rather than through formal investigation, the Ombudsman would eventually identify the matter through audit and the Commander's performance would be criticised by the Ombudsman to both the Commissioner and the Minister. Commanders try to avoid this occurring.

The legal fact is that these matters are not complaints under Part 8A. Police officers have an obligation under cl.20 of the Police Regulation to report misconduct. It states that:

If an allegation is made to a police officer that another police officer has engaged in conduct which, in the opinion of the officer to whom the allegation is made, constitutes a criminal offence or other misconduct, or a police officer sincerely believes that another police officer has engaged in any conduct of that kind, the officer is required to report the conduct or alleged conduct by the other officer to a senior police officer (being a police officer who is more senior in rank to the officer making the report)

Police officers therefore make written reports to ensure that they have complied with their cl.20 obligations and cannot be found to have breached that obligation.

It is the advice of the Crown Solicitor's Office that:

...to merely report conduct or alleged conduct would not ordinarily be understood to be the same as making a complaint about the conduct or alleged conduct.

A police officer and a senior police officer appear to have no obligation under cl.20 of the Regulation to report the broader category of conduct which, pursuant to s122 of the act may be the subject of a complaint under Part 8A of the Act.

Given that it is an express requirement under s127(1) of the Act, that a complaint for the purposes of Part 8A be made in writing, it is notable that a police officer or a senior officer is not expressly required to report in writing an allegation pursuant to cl.20 of the Regulation.

I also note that cl.20 of the Regulation is located under the heading “Division 4 Misconduct and unsatisfactory performance” rather than the heading of the next division “Division 5 Complaints information System” (being a reference to part 8A complaints).

The distinctions drawn between cl.20 of the Regulation and part 8A of the Act indicate that cl.20 is not intended to be read in the context of part 8A and that any report pursuant to cl.20 will not bring into operation the requirements of Part 8A of the Act.

The Ombudsman does not share this view.

The process that the Ombudsman requires is inflexible and subjects officers to investigation where, in the above circumstances, an initial inquiry with the officer would have been the fairer option. Of course if the officers could not justify the access then there would be a basis on which the matter could be formalised. This is in line with the approach adopted by other government agencies under the Public Sector Employment and Management Act.

The Ombudsman still maintains the view that there should be a written record of interview. The officers had not agreed to be interviewed and were only prepared to discuss the matter ‘informally’. In fact those informal discussions clarified why the accesses had been made and required no formal process to follow. Despite the Part 8A process, this matter was resolved with a minimum of impact and the Command appropriately identified improvements to internal mechanisms to prevent a reoccurrence in the future.

It is noted that under the Public Sector Employment and Management Act, public sector employees only have allegations recorded on their personnel records in the event that a disciplinary finding is made against the officer.

Appendix B – Example 2

Off-duty police officer confronting compliance officers

The Ombudsman has not provided all details that provide the background to this matter. This was not a complaint to the Ombudsman and the assistance of that agency was not sought by the complainant.

The attached documentation shows the steps taken by the Commander to obtain information from the government agency after the complaint was received. The agency was less than helpful, given the serious nature of the allegations made and the fact that the allegations were made by a Solicitor apparently on behalf of government investigators.

It is not the case that the complainant in this matter was a vulnerable person or someone who could feel threatened by the level of formality required. These were experienced government officials who were experienced in both the field of law and investigations. A combination that one would expect would lead to a clear finding in the matter and given the serious nature of the allegations unreserved assistance to police investigators.

As can be seen by the attached documentation this was not the case.

The initial letter in relation to this matter was serious. However, the initial inquiries did not support the level of seriousness in the correspondence. In such circumstances the Commander was entitled, on the balance of probabilities to conclude that the event did not occur as alleged. In the absence of any evidence from the complainant, this matter had little prospect of progressing.

The agency was advised of the outcome of the matter and that no adverse finding would be made. The agency has not disputed this finding, despite being contacted again following the Ombudsman's deficiency letter.

The Committee is invited to read the attached documentation and form its own view as to whether this matter warranted the continuation of this matter by the Ombudsman given the failure of the compliance officers to assist NSW Police and given the steps taken to receive that assistance.

Appendix C – Example 3

Police treatment of a person attempting self-harm

The complaint was made to NSW Police, not to the Ombudsman.

The issue with this matter is that the complainant's resentment of NSW Police and the sad circumstances of her illness were well documented in the complainant's letter. The investigator contacted the Ambulance Officers, which was the obvious line of inquiry. The Ambulance Officers rebutted the allegation. The correspondence to the subject officers and to the complainant (provided to the Ombudsman) provided reasons as to why the complaint was found to have no substance. It was, on the balance of probabilities, a safe conclusion to draw.

The Ombudsman then had 'concerns'. The Ombudsman sought to examine matters that were not complained of ie whether the complainant was detained. The complainant clearly stated that she had been transported to the hospital because she had attempted self-harm.

s141 of the Police Act allows a matter to be declined on the basis that it is frivolous, vexatious or not made in good faith. This section has no practical application where some initial inquiries cannot be conducted to make an initial determination as to whether a complaint has some substance, warranting a formal investigation. The Ombudsman does not permit such inquiries and requires this assessment to be made on the basis of the contents of the complaint.

A common sense approach to this section would allow NSW Police to decline a matter after an initial and limited fact finding exercise, depending on the circumstances of the matter, to determine whether there may be some substance to what is being alleged that would warrant a formal investigation. It is noted that the Public Sector Employment and Management Act allows such preliminary inquiries. In fact, the Ombudsman also conducts preliminary inquiries to determine whether that office will conduct an investigation. NSW Police is not permitted this administrative flexibility.

As can be seen by the attached examples, a NSW Police complaint matter cannot be declined, except at the assessment stage. A matter can also not be down-graded and removed from the investigation process. It has to be treated formally right to the very end, despite submissions by the Ombudsman to the contrary.

The Ombudsman has stated that there is a legislative requirement to seek advice from complainants as to whether they are satisfied with the action to be taken. This is worthy of more detailed discussion in the context of this complaint and in relation to the broader implications of this provision.

s150 of the Police Act requires NSW Police to follow this process:

As soon as practicable after the investigation of a complaint has been concluded and a report of the investigation finalised, the Commissioner:

- (a) if practicable, must consult with the complainant before making a decision concerning any action to be taken as a result of the complaint, and*
- (b) must provide the complainant with 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*
- (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.

The Ombudsman interprets this section to mean that the Ombudsman will be provided with the investigation report, every supporting document or other evidence and a statement as to whether the complainant is satisfied which is recorded in the investigation report by the investigator.

This then raises the question of what is the purpose of the complainant satisfaction requirement. If it is to measure satisfaction with how NSW Police has handled the complaint, then the fact that the section does not require complainant satisfaction to be measured on declined matters, only those that NSW Police chooses to investigate, is not logical. It is the declined matters that complainants are most likely to be dissatisfied with.

This is further complicated by the fact that the Ombudsman determines every document created by NSW Police to be a potential 'complaint' where there is no intent by the author to complain. So when a Management Team finds an anomaly during audit, this becomes a police complaint. The investigators report will not record complainant satisfaction because there is no 'complainant'. This applies to many IPC matters.

Further, complainant satisfaction is recorded by the investigator. It is not independently sought and evaluated. The Ombudsman has raised issue with this fact in relation to s122(2) matters as discussed in the NSW Police response to the Committee's Questions on Notice, but raises no similar issue in relation to these more serious complaints.

The more reasonable interpretation of the section, in NSW Police 's view, is that the intent of the section is not to measure complainant satisfaction, but rather to provide a

mechanism by which the Ombudsman can be alerted to matters that should be the subject of more thorough review (currently 20% of matters). Then, if the Ombudsman is sufficiently concerned, the Ombudsman can use the powers under s151 of the Police Act to request the supporting documentation. The section states as follows:

*For the purpose of determining whether a complaint has been properly dealt with, the Commissioner must, **at the request of the Ombudsman**, provide the Ombudsman with the following:*

- (a) an explanation of the policies, procedures and practices of NSW Police relevant to the conduct complained of, and*
 - (b) **such documentary and other information (including records of interviews) as the Ombudsman requests with respect to any inquiries made by the Commissioner or other police officers into the complaint, and***
 - (c) to the extent to which the Commissioner is able to do so, any explanation, comment or information sought by the Ombudsman in connection with the complaint.*
- (2) *The Ombudsman may withdraw the request if the Commissioner objects to providing what has been requested and the Ombudsman is satisfied that the grounds of the objection are well-founded.*
- (3) *Instead of making such a request, the Ombudsman may, in accordance with arrangements agreed between the Ombudsman and the Commissioner, seek information from other police officers.*

As it currently stands, the Ombudsman reviews 99% of matters dealt with by NSW Police and requires NSW Police to provide every single document in relation to the investigation. This interpretation would appear to negate the need for s151 of the Police Act and is incompatible when viewed together with s150.

It is the NSW Police view that s150 of the Police Act is not a section inserted for the purpose of collecting statistics on complainant satisfaction. Statistics are collected to inform decisions makers about many things, including how to improve service

delivery. This is not achieved by an investigator asking a complainant whether they are satisfied with the investigation that he has undertaken. There is no independence in this process. It also does not measure why a complainant is dissatisfied, which of course should be the aim of the exercise. For example a complainant may be dissatisfied with the time the matter took to complete but not the outcome; or the way the investigator spoke to him or her; or with the action to be taken against the officer; or that the complaint has not been sustained; or that a matter was declined and not investigated at all; and any number of other reasons. This can only be achieved by a properly constructed survey, properly tailored to collect data which the agency decides should be measured.

If this view is accepted then the purpose must be intended as a mechanism to alert the Ombudsman that a matter may require more thorough review and request documents under s151 to serve that end.

NSW Police would greatly appreciate the Committee's views on the relevance of this section, as the section is not well suited to measuring complainant satisfaction and the Ombudsman does not adopt a strategic or focused approach to review of complaints, making the section redundant.

Appendix D – Example 4

Alleged police harassment of husband and wife

The complainants were legally represented and did not seek the assistance of the Ombudsman. The letter was a precursor to legal action. The letter stated:

On my instructions the actions of the police described above are unlawful. As a result of the actions my clients have suffered a great deal of stress and embarrassment.

Prior to issuing proceedings I am instructed to give NSW Police an opportunity to justify the behaviour of the Department in [deleted] towards my clients.

In the meantime I am instructed to ask that the police desist in their harassment of my clients.

s141 allows NSW Police to decline matters where there is an *alternate means of redress*. However NSW Police investigated the actions of police.

The complainants were drug suppliers and were under operational criminal investigation. Despite the circumstances of this matter, on being advised of the findings of the investigation, the Ombudsman requested extensive documentation, to determine whether the current police operations were lawful.

It would appear that the fact the complainants were arrested and charged, eventually negated the Ombudsman having to review the COPS material. The reason for this is not explained by the Ombudsman and whether a person is charged or not, would appear to have little relevance. The Ombudsman has quite neatly evaded any explanation as to the probative value of the COPS events and Intel reports. The Ombudsman was provided with a list of the event numbers and intelligence reports in response to the deficiency letter, but this document did not provide any material in relation to the searches. It is therefore difficult to determine what the aim of the Ombudsman was in seeking to review the COPS data.

This was presented to the Committee as an example of how criminals who are under investigation use the complaint process to hamper police and how police officers become the subject of complaint simply by performing the duty that the community expects. It is also an example of how the Ombudsman attempts to become involved in reviewing police operational decisions while criminal investigations are on foot, where the complainant has not requested the Ombudsman's involvement and communications are directly between NSW Police and the complainant's legal representative.

Operational policing becomes increasingly difficult when officers are being investigated as a result of a complaint by the person that they are actually currently investigating. This is compounded when the Ombudsman does not accept the information provided and must delve deeper and deeper into matters.

It appears from the Ombudsman's submission that the decision to finalise the matter was based on the fact that the complainants were arrested, a fact which has no

relevance to the issues the Ombudsman was seeking to explore. The Ombudsman also relied on the fact that the complainant could not identify the police officers who were supposedly harassing her, a fact which was known to the Ombudsman before the deficiency letter was sent.

Appendix E – Case Study 1

Officer attending school without permission

This example was included in the NSW Police written submission at the last minute and based on a verbal briefing. NSW Police has spoken directly to the Assistant Ombudsman (Police) about this matter. While some of the detail may not be accurate, the message remains the same. The Committee is asked to form its own view on the evidence presented in the edited documents attached to this submission.

This example concerned the circumstances where the sister of a young police officer had been threatened with assault by a girl at school. The girl had rang her father but could not contact him on his mobile phone, so she rang her brother, a Probationary Constable, and told him what had happened and that she was terrified. He requested permission to leave work to handle a personal matter involving his sister. The officer attended his sister's school. It was a school that he had himself attended until 1998 and knew the teachers and headmaster well. He spoke to a former teacher and asked her what the problem was with his sister. The teacher told him it was *'just two girls having a fight and to take her home'*. The teacher went to find the sister and the Probationary Constable asked if he could come with her as he was in a hurry. The teacher told him he could not talk to [the other girl] on his own. He asked if he could sit with and speak to both students outside the class. The teacher was present. He said to the other girl *'What's it all about. Why are you threatening my sister. You have to be friends.'* The Probationary Constable said *'something along the lines of "If you hurt my sister I won't be dealing with it. My friends or mates will'*. The teacher said that the girl *'stood up to him'*. He left the school with his sister.

On his return to work the Probationary Constable spoke to his supervisor and told him what he had done. He had concerns that in hindsight it might be considered inappropriate that he attended the school in his police uniform. He told his supervisor

that he had words with the teachers at the school who did not appreciate his attendance and interfering in what was a school matter. His supervisor advised him that it was inappropriate and that he refrain from involving himself in similar matters in the future. He was also advised to leave those types of matters to his parents. He was very concerned and extremely contrite about the matter. The Duty Officer found him to be a bright, intelligent officer and that he had learnt his lesson. The Duty Officer formed the view that if the officer had received the call when he was off duty, he would have attended the school in civilian attire and that it was a matter of coincidence that he attended the school in his uniform. The officer confirmed that there was no other option as there was no one to pick his sister up. He said that he should have worn a jacket over the top. He acknowledged that he could have approached it differently, but that he was worried about his sister and concerned for her welfare.

The Principal in his letter stated that the officer *'still remains a respected ex-student, although it is a little strained over this. I hope that he learns by this mistake and can continue to do well in the Police Force'* and further states:

NB [name of officer deleted] completed his HSC at this school in 1998. He is a well-respected ex-student of the school. Since 1998 he has visited the school on a number of occasions to visit staff members and feels comfortable and welcome in doing so. However, he appears to have confused this personal relationship with his professional responsibilities. Current students are unaware of his past links with the school and on this occasion only saw him as a Police Officer.

. . . information deleted at Committee's direction . . .

The file for this matter records the following:

Formal statements from:

- Principal
- Deputy Principal

- School receptionist
- Student
- Student's mother

Records of Interview:

- Probationary Constable
- Probationary Constables sister
- Duty Officer
- 3 police officers who the Probationary Constable spoke to

The mother of the student and the young girls were subjected to formal interviews over a matter that already subjected them to statements during the school investigation. The mother of the student, who had the most cause for concern stated:

I am surprised that this has gone this far. I do think [deleted] has done the wrong thing but do not want to see him get into any serious trouble over this

The matter resulted in advice and guidance, which had already been given to the Probationary Constable, by his supervisor, prior to the complaint being received. The comments of the Commander on the file were that the Probationary Constable was relatively new to NSW Police and that he had excellent prospects for the future. The complaint could have been resolved on the day of receipt to the satisfaction of everyone concerned, including the parents of the student. It was purely remedial in nature and is certainly not a matter that should have been formally investigated. Informal discussion with the teachers would have been much less intrusive and would have led to the same result. The teachers did not require any serious action against the officer, just that he be advised to follow school protocols in the future. A more informal approach would have placed significantly less pressure on such a young and inexperienced officer and the civilians who were required to give formal statements.

NSW Police is confident that the community would be extremely concerned that operational police are diverted from frontline police duties, taking statements from

school children and their parents, over a matter where the officer has already told his supervisor what occurred, accepted that he had acted inappropriately, shown contrition and the complainants were reasonable and understanding people who wished the matter to be resolved in a mature and sensible way. The Ombudsman's comments that this was '*clearly a matter that presented significant risk to NSW Police and the officer concerned*' are difficult to accept.

Perhaps this further and more detailed information about the matter will better inform the Committee regarding the concerns that NSW Police holds about the current criteria that requires an investigation of a matter that meets the broad definition of Part 8A and the way in which the Ombudsman encourages the over-management of complaints.

Perhaps it may be also be appropriate to forward this matter to Justice Wood for his opinion as to whether this is how he envisaged these types of matters being dealt with by full evidence based investigation.

Appendix F – Case Study 2

Officer with Outlaw Motor Cycle Gang sibling

The Ombudsman advised the Committee that stated that NSW Police advice was that this example was “made up”.

NSW Police actually advised the Ombudsman that the example was provided as a ‘what if’. The hypothetical could just as easily apply to any allegation of improper association or conflict of interest.

It is noted that the Ombudsman has not disputed that this scenario is correct in the application of Part 8A. The NSW Police hypothesis is correct

The example provided by the Ombudsman has no similarity to the hypothetical example provided by NSW Police.

Appendix G – Case Study 3

Complaint with no substance

NSW Police maintains that this matter is not a complaint against police and should be treated accordingly.

The Ombudsman states that the Ombudsman did not request that the matter be recorded against a subject officer's name. This is simply because no officer was named in the complaint.

It is disappointing to NSW Police that the lead agency in NSW, in relation to matters of administration, so strongly resists any suggestions by NSW Police for improvements to its own operations and internal processes. The Committee may like to note that the Ombudsman has consistently refused to allow NSW Police to introduce a complaint form. NSW Police complaint handlers often receive complaints in narrative form, some of which can extend to over a hundred pages, which may include only minor issues or may be difficult to understand. Complaint handlers have to read and analyse every page to try and distil issues on the basis of the literal wording. This is a very time consuming and often confusing process. Given the Ombudsman's view, NSW Police sought legislative change to allow the introduction of a complaint form. Since the Committee hearing the Ombudsman has informally agreed to allow NSW to introduce such a form. NSW Police is no longer seeking this legislative amendment.

Finally, NSW Police would greatly appreciate the Committee's assistance in resolving the issue of electronic transfer of s150 reports to the Ombudsman and the Committee's view on the distinction between the roles of the PIC and the Ombudsman in relation to matters involving corruption and serious misconduct and other issues referred to throughout this report.

****Appendices not attached at the direction of the Committee****