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# Submission to the Ten Year Review of the Police Oversight System in NSW

**15 May 2006**

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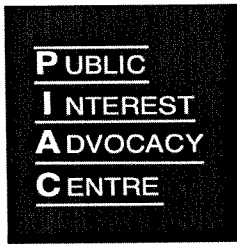
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## 1. Introduction

The Public Interest Advocacy Centre (PIAC) seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly-based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## 2. Experience relevant to this Inquiry

PIAC's submission is reliant upon the experiences of its Indigenous clients. PIAC has assisted numerous Indigenous clients to make complaints about police officers. PIAC's assistance has been given through its Indigenous Justice Project, which was established in 2001. The Project aims to provide assistance to Indigenous clients who have public interest civil law matters. It's focus since its inception has been on complaints about the police and corrections officers and discrimination against Indigenous people.

The Project has assisted many Indigenous clients to lodge complaints about police officers with the Ombudsman. This experience informs PIAC's submission.

## 3. Summary of submissions

In PIAC's view, the experience of its clients demonstrates that the current system of police oversight in NSW is in need of substantial legislative reform. PIAC's conclusion is that the legislative scheme for the making of complaints against police officers, which is set out in Part 8 of the *Police Act 1990* (NSW) (**the Act**), is fundamentally flawed as the current system is ostensibly one of self-regulation. PIAC notes below the numerous concerns that flow from this flaw in the design of the legislative framework.

However, PIAC is mindful that there is unlikely to be major redrafting of Part 8 and so make a number of recommendations for amendments to current practice and to the legislative scheme that would significantly enhance the effectiveness and efficiency of the system. These recommendations include:

- expanding the Ombudsman's powers to monitor investigations;
- ensuring that independent police officers, not associated with the station or local area command that is the subject of the investigation, undertake the investigation of complaints; and
- providing complainants with a detailed written report into the investigation of their complaints and outcome.

PIAC make its submissions in line with the Terms of Reference of the Committee's Inquiry.

## 4. Summary of Recommendations

**Recommendation 1:** That the current procedures for investigation of complaints against police by police be removed and replaced with a system that ensures investigation by an independent body.

**Recommendation 2:** That Part 8 of the *Police Act 1990* (NSW) should be amended to empower the Ombudsman to investigate complaints directly.

**Recommendation 3:** That section 156(1) of the *Police Act 1990* (NSW) be amended to remove the words, 'If of the opinion that it is in the public interest to do so'.

**Recommendation 4:** That section 146 of the *Police Act 1990* (NSW) be amended to require the NSW Police Commissioner to report to the Ombudsman on the progress of an investigation.

**Recommendation 5:** That section 127 of the *Police Act 1990* (NSW) be amended to include a paragraph in similar terms to sub-section 12(4A) of the *Ombudsman Act 1974* (NSW). This amendment would apply to complaints to all investigating bodies.

**Recommendation 6:** That the NSW Police Commissioner direct that sworn statements not be a requirement of an investigation of a police complaint.

**Recommendation 7:** That the NSW Police Commissioner require that all investigation officers demonstrate that they do not know and do not have a close relationship with the officer(s) who is the subject of the complaint.

**Recommendation 8:** That the *Police Act 1990* (NSW) be amended by the repeal of sub-section 150(b) and the amendment of sub-section 150(c) to read 'must provide the Ombudsman *and the complainant* with'.

## 5. The issues under review

### 5.1 The appropriateness of the respective roles and functions of the Police Integrity Commission and the Office of the Ombudsman

The current framework for the oversight of policing in NSW is self-regulation. In PIAC's view this is not an appropriate mechanism for a complaints system in relation to police officers as a consequence of the character of the activities and organisation being complained about.

Police officers have extensive powers that they are often empowered to use in a discretionary manner. The powers are used in a wide variety of circumstances and often in situations where police officers are alone with an individual. PIAC has no doubt that the overwhelming majority of officers use their powers responsibly. However, it is clear from the numerous formal government and similar inquiries into police activity that many police officers over the years have not done so. The powers by their nature and the circumstances in which they may be used are open to abuse. The impact of such an abuse of power can be extremely serious. It can lead to the denial of fundamental human rights and lead to injury to those whose rights have been breached. If such abuse of power occurs, an individual who is the victim of that abuse suffers, as does the NSW Police Service, as a lack of respect for police officers and the undermining of the community's confidence in policing practice will be an inevitable consequence.

In this context, the system of oversight of police conduct must also be able to robustly demonstrate its integrity and authority. In PIAC's view, the current system cannot meet this goal as it relies on police officers investigating police officers from within the same station or local area command. Set out below are examples of how self regulation leads to ineffective and accountable reviews.

While the complaints scheme set out in Part 8 of the Act provides for an element of independent oversight, it primarily allows police officers to review complaints about fellow police officers. The Ombudsman summarised the current practice in his answers to questions from this Committee at its Thirteenth General Meeting with the NSW Ombudsman as:

People can make a complaint to the Ombudsman, to the Police Integrity Commission or to police directly. Unless it is a matter that the Police Integrity Commission wants to deal with directly, the vast majority of complaints are dealt with by police in the first instance and oversighted by my office—we oversight about 99 per cent of all complaints. We do not do initial investigations, although if we chose to do a particular investigation at some stage during the course of the police investigation we can technically take over if we want. Our focus is on oversight of the systems and making sure those work effectively. There are various protocols in place for how those matters are dealt with. Unless the matters are particularly serious they are not done by Professional Standards Command; they are done in the local regions and are the responsibility of the Local Area Commanders and their particular complaint management teams.<sup>1</sup>

As is clear from this summary there is little independent review of police complaints. In effect the Ombudsman role is one of reviewing the reviewers. It is no surprise therefore that the Office of the Ombudsman confines itself to addressing systemic failures in the review system. Given the Ombudsman's lack of resources, which were raised by the Ombudsman at the Meeting<sup>2</sup>, it is difficult to imagine that the Ombudsman has the necessary capacity to undertake an exacting review of each complaint and the process involved in its review.

In PIAC's view the current system has limited potential to progress accountability in the NSW Police Service.

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<sup>1</sup> Committee on the Office of the Ombudsman and the Police Integrity Commission *Thirteenth General Meeting with the NSW Ombudsman Together with Transcript of Proceedings, Written Responses to Questions and Minutes* (2006) 59.

<sup>2</sup> *Ibid*, 86.

## Recommendation 1

That the current procedures for investigation of complaints against police by police be removed and replaced with a system that ensures investigation by an independent body.

## Recommendation 2

That, in the absence of complete reform of the police complaints system, Part 8 of the *Police Act 1990* (NSW) be amended to empower the Ombudsman to investigate complaints directly.

### 5.2 The extent of the powers available to the Ombudsman and the Police Integrity Commission to perform their functions

#### (a) *Limited scope for Ombudsman to investigate*

Any person has a right to make a complaint under section 126 of the Act and they may lodge a complaint, which must be in writing, with an investigating authority that includes the Ombudsman: section 127.

The Ombudsman does have a power to investigate a matter where 'it is in the public interest to do so': sub-section 156(1). PIAC is unaware of how often the Ombudsman exercises this power, but does not understand that it is routinely invoked. In PIAC's view this is unfortunate as the conduct of an investigation would benefit from the Ombudsman's experience of the investigating of complaints and a closer oversight by the Ombudsman of the investigations.

It is important to remember that this complaint process will not primarily involve criminal behaviour and, as a consequence, the standards are not the same as those applied in that context. The Ombudsman is experienced in the application of civil standards and the civil matters. Police officers are not. The complaint system would therefore benefit from giving the Ombudsman broader powers to intervene in investigations.

## Recommendation 3

That section 156(1) of the *Police Act 1990* (NSW) be amended to remove the words, 'if of the opinion that it is in the public interest to do so'.

#### (b) *Absence of duty to report to Ombudsman*

While the Ombudsman oversees the complaints system, the Ombudsman only has a passive role. In effect the Ombudsman is limited to reviewing the final report. Under section 146(1) of the Act, the Ombudsman 'may investigate the progress of an investigation if of the opinion that it is in the public interest to do so'.

Although section 146 of the Act also enables the Ombudsman to be present at interviews, it can only do so pursuant to agreements reached with the NSW Police Commissioner (**the Commissioner**): sub-section 146(3) of the Act. The Commissioner does not appear to have a legislative duty to report to the Ombudsman on the progress of the investigation. Indeed, the Commissioner has a discretion about whether or not to report to a complainant.

In PIAC's experience, complainants often have difficulty contacting investigating officers and even when they do, the investigating officers are not forthcoming with information. In PIAC's

submission, an obligation to report to the Ombudsman about the conduct of a complaint would enhance accountability of the process and to the complainant.

#### **Recommendation 4**

That section 146 of the *Police Act 1990* (NSW) be amended to require the NSW Police Commissioner to report to the Ombudsman on the progress of an investigation.

### **5.3 The accountability mechanisms built into the system**

The Act gives little guidance on how the complaint should be conducted. Under subsection 145(1)(a) police officers 'must carry out the investigation in a manner that, having regard to the circumstances of the case, is both effective and timely'.

PIAC has identified a number of systemic failures that have arisen in the handling of a number of its clients' complaints and lead to a failure in accountability. Mr A's case demonstrates many of these failures.

PIAC assisted Mr A, a homeless Aboriginal man, to make a complaint to the Ombudsman. He alleged that a police officer assaulted him and on another occasion while in custody at the police station the same officer, noticing fresh scars on his arm following a recent suicide attempt, demonstrated a more effective method to take his life, which was to cut up the length of his vein. This act was captured on CCTV footage.

The investigating officers asked Mr A to attend the police station where the incident occurred to give his statement. Mr A was apprehensive about returning to that station and, after some negotiation by PIAC, the interview took place on neutral premises.

During the course of the interview the complainant provided names and descriptions of various witnesses to the incidents. However, the investigating officer did not attempt to locate or interview any of the witnesses. Nor did the investigating officer take a statement from the police officer involved in the incidents. At one stage during the course of the investigation, the police officer that was on duty with the police officer named in the complaint (and who was a witness to the events) had charge of the investigation.

The outcome of the investigation was reported verbally to PIAC and neither the written report or the CCTV video surveillance footage was made available to Mr A.

Following the investigation there was no further contact from the Ombudsman to advise of any outcomes or follow-up.

In summary the general lack of accountability arises because:

- the Act requires a written complaint;
- investigating officers will not investigate complaints if they do not have a signed and sworn statement from the complainant;

- officers from the station where the officer complained of was based investigate the complaint, giving rise to at least a very real perception of bias, if not actual bias;
- complainants are required to attend at the station where the officer complained of was based to give their statement.
- investigating officers deal inappropriately with witnesses; and
- the investigating bodies fail to adequately report on the findings of the investigation to complainants.

A number of these issues are addressed in greater detail below.

### **(c) Written Complaint**

Section 127(1) of the Act requires complaints to be in writing. This acts as a deterrent for some people, such as those with poor literacy skills, to making a complaint. Most of PIAC's clients fall into this category. To ensure that all people have the right to complain, PIAC believes that the requirement of a written complaint should not be absolute and there should be discretion to accept a complaint that is not in writing. PIAC notes that the Ombudsman has such a power in relation to non-police complaints. Sub-section 12(4) of the *Ombudsman Act 1974* (NSW) states that complaints must be writing. Sub-section 12(4A) states:

(4A) However, the Ombudsman:

- may accept a complaint that is not in writing if the Ombudsman considers it appropriate to do so, and
- in that event, must reduce the complaint to writing as soon as practicable.

### **Recommendation 5**

That section 127 of the *Police Act 1990* (NSW) be amended to include a paragraph in similar terms to sub-section 12(4A) of the *Ombudsman Act 1974* (NSW). This amendment would apply to complaints to all investigating bodies.

### **(d) The requirement of statements**

It has been the experience of PIAC's clients that investigating officers have advised that they will not commence their investigation unless they receive a signed and sworn statement from the complainant. This requirement is not legislated and unfairly operates to shift the focus to the complainant. A sworn statement should not be a condition for investigating the complaint.

If there is a requirement to provide sworn statements, this should apply equally to both the complainant and the person about whom the complaint has been made. If the police require a sworn statement in the anticipation that a criminal prosecution may ensue, then this should be obtained after the conclusion of the investigation when the outcome has been made known to the complainant. Otherwise there is no reason why the complainant should not bypass the complaint process and seek to press criminal charges against the person named in the complaint. However, PIAC's preferred position is that rather than requiring a sworn statement investigators obtain this information in a less formal manner.

### **Recommendation 6**

That the NSW Police Commissioner direct that sworn statements not be a requirement of an investigation of a police complaint.



**(e) Officers from the station where the officer complained of was based investigate the complaint**

In a number of matters in which PIAC has assisted clients, there has been a close connection between the officer investigating the complaint and the police officer who is complained about. This was most starkly illustrated in the investigation into the investigation of Ms B's complaint.

Ms B alleged that police officers had verbally harassed her outside her home. During the course of investigating her complaint, the investigating officer repeatedly referred to the police officer named in the complaint by his nickname, 'Dean-o'.

In addition he made inappropriate and adverse comments about the complainant's character, which was irrelevant to the complaint and indicated to the complainant his bias against her.

The connections often arise because officers from the same station are investigating the complaint. In such circumstances, at the very least the perception of bias is real. However, PIAC believes bias is a common feature of these investigations. As is demonstrated in Ms B's case, bias is often real and has an impact on the conduct of the complaint.

Another example of bias is investigating officers taking statements from witnesses they prefer. For example in our clients' experiences investigating officers have preferred to interview other police officers than witnesses suggested by the complainant.

In PIAC's submission the most effective method of ensuring the absence of bias, is to have independent investigators. This ideally should be the Ombudsman, but at the very least, the NSW Police Commissioner could make the complaints process more effective by directing that all investigation officers demonstrate that they does not know and does not have a close relationship with the officer complained of.

## **Recommendation 7**

That the NSW Police Commissioner require that all investigation officers demonstrate that they do not know and do not have a close relationship with the officer(s) who is the subject of the complaint.

**(f) Absence of duty to report to complainant**

A major limitation of the complaints process is the level of reporting of the investigation when it is completed. Reporting to the complainant is limited to 'advice as to action to be taken': sub-section 150(b). The Ombudsman does however receive a copy of the finalised report into the investigation: sub-section 150(c).

There is no reason why a person who makes a complaint into behaviour that they feel is unfair or unlawful should not be provided with a copy of the report into the investigation of their complaint. The integrity of the complaint mechanism is put in question be this failure.

This lack of accountability appears even more odd in light of the statutory reporting duty placed upon the Office of the Ombudsman when it investigates a complaint. Sub-section 157(3) of the Act compels the Ombudsman to give a copy of a report of an investigation to a complainant.

Mr C's complaint is an example of the difficulty complainants face in obtaining the reports into the investigation of their complaints.

PIAC represented Mr C, a young Aboriginal man, who was involved in a series of incidents with police officers involving allegations of false imprisonment and assault. The matter was classified as a Category One due to the seriousness of the allegations.

The complaint was investigated but a copy of the written report was not provided to complainant. The Ombudsman, who had sat in on a number of the interviews, did not contact the complainant to advise of the findings or follow-ups. When the Office of the Ombudsman was asked to provide a copy of the final written report, it advised that its policy was not to supply copies of reports and suggested PIAC raise the issue directly with the police. The police also refused to provide a copy of the report.

The complainant then made an application pursuant to the *Freedom of Information Act 1989* (NSW) at his own expense to obtain a copy of the report. The NSW Police Service provided some but not all the requested documents. The complainant then sought an internal review at further expense to obtain a complete copy of the documents.

It has been ten months since the complaint sought a review of the initial FOI decision and he has still not received an adequate response.

## **Recommendation 8**

That the *Police Act 1990* (NSW) be amended by the repeal of sub-section 150(b) and the amendment of sub-section 150(c) to read 'must provide the Ombudsman *and the complainant* with'.

### **5.4 The efficiency and effectiveness of the current police oversight system and the scope for further efficiencies and effectiveness**

In summary, PIAC submits that the current police oversight system could be significantly more effective if it was truly independent from the NSW Police Service rather than a system of self-regulation.

As demonstrated in the examples above, the current system presents a number of disincentives to complainants who wish to make a complaint. In addition the experiences of PIAC's clients is that the process of making the complaints has not been satisfactory and on occasions has exacerbated the initial dissatisfaction with the treatment by the Police Service.

PIAC represented Mr D, a young Aboriginal man alleging ongoing police harassment, false imprisonment and an assault, which required medical treatment.

Mr D was initially asked to attend at the station to provide a recorded statement. The complainant felt apprehensive about attending at the station as the officers he had complained about worked at the station. The complainant was permitted to submit a previously prepared written statement.

A number of witnesses to the incident had been named in the complainant's statement. PIAC was contacted by a distressed witness after the investigating officer and his partner arrived unannounced at her home on the weekend to interview her in relation to the incident. He had not contacted her beforehand to make an appointment. The investigating officer had also made a number of comments that suggested that he had looked up her police file prior to the visit.

The outcome of the investigation was reported verbally to complainant but no written report was provided. Even though the Office of the Ombudsman had earlier indicated that it would be overseeing this investigation, there was no further contact from the Ombudsman to advise of any outcomes.