

REPORT OF PROCEEDINGS BEFORE

**COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND
THE POLICE INTEGRITY COMMISSION**

**FIFTEENTH GENERAL MEETING WITH THE NEW SOUTH WALES
OMBUDSMAN**

At Sydney on Thursday 21 May 2009

The Committee met at 2.00 p.m.

Mr Kerry Hickey (Chair)

Legislative Council

Ms S. P. Hale
The Hon. C. J. S. Lynn
The Hon. L. J. Voltz

Legislative Assembly

Mr P. R. Draper
Mr M. J. Kerr
Mr P. R. Pearce

BRUCE ALEXANDER BARBOUR, New South Wales Ombudsman, Level 24/580 George Street, Sydney,

CHRISTOPHER CHARLES WHEELER, Deputy Ombudsman, Level 24/580 George Street, Sydney,

STEVEN JOHN KINMOND, Deputy Ombudsman (Community Services Division) and Community and Disability Services Commissioner, Level 24/580 George Street, Sydney, and

GREGORY ROBERT ANDREWS, Assistant Ombudsman (Police), Level 24/580 George Street, Sydney, affirmed and examined:

ANNE PATRICIA BARWICK, Assistant Ombudsman (Children and Young People), Level 24/580 George Street, Sydney, sworn and examined:

CHAIR: I now formally open the proceedings of the Committee's fifteenth hearing with the New South Wales Ombudsman and statutory officers from his office. Mr Barbour, thank you and your team for appearing before the Committee on the Office of the Ombudsman and the Police Integrity Commission. Your appearance before the Committee is to provide information for the general meeting in relation to a wide range of matters concerning your office in accordance with the Committee's statutory functions.

Mr Barbour, the Committee has received a submission from you dated 30 April 2009, which is consistent with your responses to questions on notice taken from your annual report 2007-08. Do you want the submission to form part of your formal evidence?

Mr BARBOUR: Yes, thank you, Mr Chair.

CHAIR: Would you like to make an opening statement?

Mr BARBOUR: Yes, I would. I would like in my opening statement to deal briefly with a number of important issues, particularly the Office of the Ombudsman's current budgetary situation and the work we are undertaking in relation to our strategic planning and structure. Before discussing those issues I wish to apologise to the Committee that the Assistant Ombudsman, General Division, Ms Adofaci, was unable to attend today's hearings.

I will start with our current and future financial situation. There is no question that the community as a whole is experiencing unprecedented and difficult economic times. However, there are two pressures on my office's finances that were brought to bear well before the current financial crisis. These are the efficiency dividends and underfunded pay increases that my office has been required to meet. I would like to take this opportunity to make the Committee aware of the impact these measures are going to have on the work of my office.

Of course, all government organisations that are reliant on public funding should endeavour to be as efficient in their spending as possible. Over the past seven years the New South Wales Government has, in relation to agencies and departments, subjected them to efficiency dividends of around 1 per cent each year. We have estimated that the cumulative impact of these dividends between 2002 and 2012 on our office's budget will equate to a cut of approximately \$1.8 million. The impact of these sorts of measures is not felt just by my office, and is not unique to New South Wales. However, their impact on small offices is both considerable and undesirable.

A recent report by the Commonwealth Parliamentary Joint Committee of Public Accounts and Audit assessed the impact of efficiency dividends on small Federal agencies. The committee's broad conclusion was that the system of efficiency dividends "favours large agencies and agencies with a strong policy focus over smaller agencies". The committee went on to note:

Smaller agencies face particular challenges in relation to the efficiency dividend. One issue is that smaller agencies are often established to fulfil a specific function or purpose. That limits their capacity to reprioritise or trim discretionary activities. Also, such agencies are occasionally required to absorb new functions. The cost of one additional activity may appear small, but it could represent a large proportion of a small agency's total budget.

These comments sum up, in my view, my office's position very well. I would like to provide the Committee, at the conclusion of today's hearing, with a copy of the Commonwealth report. The efficiency dividends have not been the only pressure on my office's budget. Following negotiations with the Public Service Association, the Government agreed to a series of 4 per cent pay increases each year over three financial years, commencing 2008-09. Unfortunately, the Government has only provided funding to meet 2.5 per cent of those increases. This is not the first time pay increases have been approved but not fully funded by government.

I am raising this today to bring to the Committee's attention my concern about the impact of these measures on my office. As the Committee is well aware from its general meetings with us over the past years, our office has already undertaken extensive work to ensure that wherever possible we have reduced our costs whilst maintaining a quality service to the New South Wales community. The work that comes to my office shows no sign of reducing. If anything, it is likely to increase as financial pressures impact upon the level of service provided by government agencies and in turn this leads to an increase in complaints to my office. I am also fearful that as agencies grapple with their own reducing budgets, one of the areas of operation that may well be affected is the quality and capacity of their own complaint handling systems. If these systems are weakened or reduced in scope, the likely outcome is that considerably more work will be generated for my office.

In several areas of my operation, as you well know, we already have agreements in place which limit the number of matters that need to be notified to us. These agreements, particularly with New South Wales Police and various agencies within our child protection jurisdiction, mean that we do not directly oversight less serious matters. Our capacity to extend such agreements further is severely limited, and must be carefully measured to ensure that we continue to provide quality

oversight at a level which is expected by both the Parliament and the community. These financial pressures make our effective strategic planning for the future all the more important and necessary. At the end of last year we commenced a significant review of the office's strategic planning program, its internal structures, work processes and future direction.

Like any organisation, we need to regularly reassess the way we do our business in order to meet our challenges, plan for the future, and maintain our credibility and relevance. The first area we are looking at closely is the way we interact with our stakeholders. This will include the Parliamentary Committee, and I would welcome any comments from you about the way you and our office interact. We need to continue to ensure that we are working in the most efficient and effective way possible. To achieve this, we are reviewing our internal systems and processes to provide the best possible support for our work. We are also assessing whether our work itself needs to change or be tackled differently. During last year's general meeting I commented that the work of my office is constantly evolving, with a greater focus in recent years on proactive and project work. Being flexible, responsive and creative in our work, whilst ensuring that we also meet our statutory obligations, is critical for the future of our office.

Finally, senior staff in the office must continue to develop and be properly equipped to work effectively to lead the office. We are looking at ways of building a stronger leadership group, as well as ensuring that we have the most effective governance and accountability processes in place. This is a considerable amount of work, to be undertaken on top of an already very heavy workload. I am pleased to say, however, that staff in the office recognise the importance of these activities and they are participating in and contributing to them in a very positive way.

Lastly, I would like to mention a little about our work. Since our last meeting with the Committee in March last year we have dealt with almost 29,000 inquiries and more than 10,000 formal matters. We have issued a number of important reports to Parliament, including our 2007-08 annual report, our annual reports into the deaths of certain children and people with a disability, our annual report regarding the work of official community visitors, a report into access to government information in New South Wales, a review of certain functions provided to police by the Law Enforcement (Powers and Responsibilities) Act, a report into the use of Taser guns by New South Wales Police, a progress report into the support provided to people with an intellectual disability in the criminal justice system, and a review of the use of drug detection dogs by police in roadside operations.

We have also made publicly available a number of other reports regarding our work, including reviews of the situation of children under the age of 5 and between the ages of 10 and 14 in out-of-home care, a review of the support services available to those caring for Aboriginal children, and a review of complaint handling by family support services.

We have completed a large number of investigations, some of them very large in scale, making use of royal commission powers in many to require the production of documents and the attendance of witnesses at hearings. We have also provided a great deal of information to the Wood Special Commission of Inquiry into Child

Protection Services in New South Wales. The Government's response to the commission's recommendations has led to a change in our role, as well as providing us with a new function to audit the implementation of the interagency response to child sexual assault in Aboriginal communities. We have recently been given a number of new legislative responsibilities, including a yearly audit of the use by agencies of new covert search powers and a review role of the new criminal association legislation.

Lastly, it is with some sadness that I also wish to advise the Committee of the imminent retirement from the Office of the Ombudsman of Anne Barwick, who is our Assistant Ombudsman for Children and Young People. This will be her last meeting with the Committee. Anne has worked in the position of Assistant Ombudsman for 10 years. She has led with distinction the Ombudsman's child protection division from its inception, establishing the jurisdiction from scratch and managing our very important obligations and relationships with agencies. I would like to acknowledge here her significant contribution to the work of our office and in ensuring better child protection practices throughout New South Wales. Mr Chair and Committee members, I am most happy, as are my senior staff, to answer any questions you have.

CHAIR: Thank you for that statement. I now open the hearing to questions. As to the review of the Ombudsman's information security policy, the annual report discusses the security of your information systems. It says that the review identifies six main risks. One of these is "significantly inaccurate or incomplete information used in reports, correspondence or as the basis for findings, recommendations, or decisions." That is at page 28 of the annual report. From time to time people write to this Committee complaining that your office has made a decision based on inaccurate information, which has been provided by the agency that they are complaining about. Can you tell us how your office ensures the accuracy of information used in reaching a decision on a complaint?

Mr BARBOUR: There are a range of processes that we have had in place for a considerable period of time not only to manage security issues but also to manage risk. If I can just by way of history refer the Committee to the fact that for the purposes of our security accreditation Chris Wheeler, who coordinates our security processes within the organisation, identified these six factors that are nominated and listed in the annual report as being the key risks from a security perspective for the office. That is particularly the case because the office's reputation and credibility are paramount in terms of the way in which we engage with agencies, and that represents a very significant risk to us. In terms of actually ensuring the accuracy of information, a range of procedures are in place, and they are also noted on page 28 of the annual report under "Managing Risk". In each of the areas of our office we have a range of systems in place to ensure as best we can not only the accuracy of information but also the accuracy of the interpretation of the information if we are going to use it in correspondence or in reports. We also ensure that before we make any statements which are negative to an agency or where the views of an agency might be put in a manner that the agency might be concerned about we consult with the agency and provide them an opportunity to give us any further advice about the matter that they wish before we finalise anything. I am not sure whether there is anything much more to add. Chris, did you want to add anything?

Mr WHEELER: No.

CHAIR: Another risk to information security that the review identified was unauthorised disclosure. From the systems that you have in place to prevent unauthorised disclosure, are you satisfied that the leaking of the February 2009 report on the Roads and Traffic Authority's handling of the two Freedom of Information applications did not emanate from your office?

Mr BARBOUR: Yes, I am satisfied that it did not emanate from my office. One of the challenges in any large-scale investigation, of the kind that particular investigation was, is that you have a large number of people involved by way of giving evidence. Also, in that particular matter we had an additional challenge, which was that the complainant was a journalist. Trying to balance the competing tensions involved in a large-scale investigation and ensuring that the many witnesses that we are calling to give evidence are given sufficient information to allow them to properly give evidence, that the agency is fairly treated throughout the process, and that you are keeping your complainant in a manner appropriately informed mean that you have to balance a lot of issues that sometimes raise natural tensions. I am confident, however, we put in place for that matter very significant safeguards, and certainly the way in which the information was reported definitely, in my view, tended to suggest that the leaks came from outside our office.

The Hon. CHARLIE LYNN: Mr Barbour, paragraph 2 of your response is in regard to feedback from New South Wales government departments and authorities following a survey of their complaints handling systems. What has been the response from agencies to your work in this area? Was the Department of Fair Trading included in the survey that you did?

Mr BARBOUR: I cannot off the top of my head recall whether they were one of the responders to the survey. My recollection is that all State government agencies and all local councils were part of our survey, but not everybody responded. I am not sure whether all government agencies responded and whether Fair Trading responded. Greg was involved in coordinating that. I am not sure whether his recollection is better than mine.

Mr ANDREWS: I cannot remember off hand either.

Mr BARBOUR: We could certainly have a look at our records, if that is of interest to the Committee.

The Hon. CHARLIE LYNN: It is.

Mr BARBOUR: Not all government agencies responded. It was not a compulsory survey.

The Hon. CHARLIE LYNN: Are the results of that survey available publicly?

Mr BARBOUR: The results of the survey were provided to all of the people who participated in it. I think a copy of each of the reports in relation to that, which do not have identification of the agencies, are on our website. I will confirm that for you.

The Hon. CHARLIE LYNN: I would appreciate that.

Mr BARBOUR: Could I just mention for the Committee's interest, the significant outcome of that particular survey in my mind was that we saw a slippage in the quality of the complaints handling systems that were in place in both government and local government agencies and, indeed, results were less impressive than the results we had received the last time we did the survey quite some years earlier.

The Hon. CHARLIE LYNN: It would be interesting to review some of those. I refer this question to Mr Andrews in regard to the Pacific Islands Ombudsman issues. As part of that program, which I think is a very good program, do you have any form of exchange between the Pacific Islands and Australia where officers come here on long-term exchanges to look at the issues of governance?

Mr ANDREWS: There have been a number of exchanges but they have been done primarily through the Commonwealth Ombudsman's office up to date. There is one about to take place between the New Zealand Ombudsman's office and the Cook Islands and we expect that over the next few years our office may be involved as well. There has been a particular long-term exchange arrangement between the Commonwealth Ombudsman's office and the Ombudsman Commission in Papua New Guinea and there have been placements done for three- to six-month periods. In most of the consultation work we have done with agencies in the Pacific we have come to the firm belief that these exchanges are the best way to transfer ideas and training. So far all the evaluations we have done have shown that it is appreciated and it is making a significant impact.

The Hon. CHARLIE LYNN: It would be my belief that bringing people from Papua and New Guinea to Australia for long-term exchange would be far better value in the longer term than your officers going up there, for example.

Mr ANDREWS: I think it is probably valuable both ways.

The Hon. CHARLIE LYNN: Indeed.

Mr ANDREWS: One of the problems, as you would appreciate, is that we do not have all the answers and we are dealing with very different political and governmental environments. So I think it is useful for us. I certainly know from my own experience travelling to some Pacific nations it has helped me reflect on our practices by just being exposed to the challenges that other Ombudsman offices face. So I think there are certainly benefits both ways. It is not just the developed nations giving expert advice to the developing nations. I think we can learn from them as well.

The Hon. CHARLIE LYNN: It is a very good project.

Mr PETER DRAPER: I want to put on record my appreciation of Anne Barwick's work over the past 10 years. It is one of the most important sectors of our community and giving young people a better place to live is very important. I

appreciate what you have done and wish you every success in whatever you move on to do. Mr Barbour, in the annual report it is stated that the New South Wales Police Force does not define the sex industry as high risk under its secondary employment policy. Do you feel that there is sufficient risk mitigation on the part of the New South Wales Police Force both in terms of its secondary employment policy and also the broader issue of how police officers officially interact with workers in the sex industry?

Mr BARBOUR: That particular issue, of course, came to light in the handling of a specific complaint matter that we looked at. During the course of our oversight we identified that as being an issue of concern and we took it up with Police. You quite rightly refer to our comments in the report. I think that the secondary employment issue for police is a very significant issue and one well beyond simply the sex industry that needs to be looked at. There is no doubt that there are considerably more and more police involved in secondary employment. The current rostering programs and work programs foster and facilitate that. Indeed, one of the main objections to changes to the 12-hour, days on, days off type of roster is that it would limit the opportunity for police officers to engage in secondary employment, rather than actually being for its intended purpose, which was to allow police to rest before they go on duty. There are considerable risks in all forms of areas where police are in secondary employment, whether it be the security industry and security-type work right through to other employment. I think it is something that needs to be looked at. It is not something that we really have an opportunity to direct police in any way about. But certainly to the extent where any concerns around it come up in the context of complaints, we are very live to addressing them on each case.

Mr PETER DRAPER: Just on police, are you satisfied with the New South Wales Police Force's current progress in developing a use of force register?

Mr BARBOUR: Is the Committee aware of any further developments that I am not? Because if it is not, then I would say that we are still in a position where we do not think much is happening. Certainly following your EIS inquiry and recommendations, we have been contacted by Police to ensure that we are continuing our role in working with them in that project. I have absolutely no hesitation in doing that. We agree with the Committee's recommendations and we are happy to support a tripartite approach to that issue with the Police Integrity Commission and the New South Wales Police. But as far as I am aware there has not been a great deal of progress made.

Mr MALCOLM KERR: Just dealing with the matter of freedom of information and the open government information bill, has any further information or consultation taken place?

Mr BARBOUR: We received copies of an early draft of the bill, which I think was in line with the recommendations that we made in our report to Parliament. We provided a range of comments on the provisions of the open government bill and also on the information commissioner bill. We are currently in the process of drafting a formal submission to Premier and Cabinet in relation to the bills as tabled in Parliament. We do believe that there are some improvements that can be made. We have some concerns about some aspects of the legislation, but I have to say overall

I think that the response of the Government to the report has at last been a quick one. I am glad to see that there is some momentum on the issue. I think that the legislation as currently drafted in the bill provides an excellent platform for moving forward and it certainly would provide a far improved access regime than what we currently have.

Mr MALCOLM KERR: What sort of improvements would you like to see embodied in the bill?

Mr BARBOUR: A decision has been taken to set up an independent office. It is not clear to me what the public policy benefits are of that, quite frankly. We considered very carefully the notion of setting up a separate office or whether the role should be one that was conducted by the Ombudsman. I still lean towards it being a more appropriate fit with this office. Ironically, what will be set up will be a new body that will have all the same powers and be designed, or modelled if you like, on the Ombudsman office. So, it is a little unclear why one is suitable and one is not. There has been no pronouncement about why that recommendation has not been followed. Having said that, certainly an independent office can work, but I think that for an independent office that is being set up from scratch there are enormous hurdles for it being able to achieve the sort of inroads and the level of credibility that we already have in the landscape and that would attach to that particular responsibility.

Mr MALCOLM KERR: In your opening statement you mentioned financial constraints, particularly the increase in salaries that have not been offset with any additional revenue from the Government. How serious is that problem for you in being able to perform your duties?

Mr BARBOUR: It is extremely serious. We regard it, in the context of our planning and our strategic work at the moment, as really the burning platform for the office in the sense that there is always a higher and greater expectation on us to perform in a particular way. We cannot continue to do that on a shrinking budget. You will have noticed that I did not specifically say that I was after increases in my budget. What I was pointing out was that what government was taking away, arguably openly, but really by stealth, is causing a very significant impact. If you want me to measure that in people terms, we have estimated that the dollar amount will mean 20 fewer investigators by the year 2012. That is more than 10 per cent fewer investigators to do the work, which is increasing. As you know, and certainly this is the direction I have felt from the Committee over the past few years, you are very supportive of our increased proactive and project work because it achieves such positive outcomes.

The challenge for us is that that very work actually requires greater resources. Some of the projects that we have underway or have just completed—including the review of FOI, our review of JGOS, the Aboriginal foster carer project and so forth—require travel to all parts of New South Wales. We have meetings with in excess of 400 people during the course of these reviews, sometimes in 25 or 30 different locations. There is an enormous amount of material and information, and we are dealing with multi-agency responses to very difficult public issues. So, to be able to continue to do that work and for me to make decisions to allocate resources to that, I

have to make sure that we are able to balance that important role also with our core and statutory responsibilities that we need to meet as well. Now, the opportunity to do that effectively and to the standard that we have set is really going to be eroded and compromised if we are to continue to lose the level of money that we are.

Mr MALCOLM KERR: You mentioned proactive projects and you used the blanket term "and so forth". Could you particularise the other projects that might spring to mind or perhaps give the Committee a written response? It would be important to know what is being threatened.

Mr BARBOUR: I cannot point to a particular thing that is being threatened, but really what I am saying is that the opportunity for us to be able to do that work is going to be limited. So, when we sit down to work out what we can afford to do in our budget, as we are currently doing for next year, we are going to have to make choices. So, instead of maybe doing two significant projects, we might be able to only do one. We might have to limit the number of people we have involved in those, which would limit the scope and the benefits that would flow and the positive outcomes that would flow. So, we are going to need to look at that. I do not want to get to a position where we have to decline more matters, but that is something we have also considered as being a possibility. So, there is no particular thing I can point to, but certainly what we have to do in relation to our budget is more carefully scrutinise our work plans and probably make decisions that we are not going to be able to do some things that we would like to do.

Mr PAUL PEARCE: Just on the freedom of information issue, particularly in relation to—

Mr BARBOUR: Sorry, could I add to that last question because my deputy Chris Wheeler has just mentioned one thing that we have in fact made a decision about, which I can specifically provide you with an answer on, and that is our mystery shopper program. We will not be doing a mystery shopper program in the coming year because we do not have the resources to do it. That to me is very disappointing because it is a longstanding project and one we have always received positive feedback from.

Mr MALCOLM KERR: You might remind us of the mystery shopper program. It did not have anything to do with retail outlets?

Mr BARBOUR: No, no. The mystery shopper project is one that has been on foot for a long time. We target different sectors of the public sector or broader government agencies each year. The one that is reported on that we did in 2007-08 was in relation to 30 local councils. We targeted 18 regional and 12 metropolitan councils. My staff assume a mystery identity, which is an identity of a local resident, and ask questions, attend councils, and receive information; we mail letters, we contact council by email and we develop a profile about customer service and provision of information to provide feedback to the agency from a mystery shopper perspective of how well that agency actually is responding to inquiries from the community. We have done it in a whole raft of different areas over the years and it has always been well received. I have to say, unusually the agencies that are the

subject of this project often are very grateful because it does provide them with really first-rate insight into how their front-line services are operating.

Mr PAUL PEARCE: I hope the staff member involved is being paid penalty rates to do it, if it is local government! To return to the earlier discussion about freedom of information, in your report you give a brief discussion on the issue of freedom of information [FOI] applicable to Houses of Parliament and, particularly, the issue of privilege. You cite the United Kingdom freedom of information Act, which, in the light of recent developments, maybe is not quite as effective as we all might have thought. The issue of parliamentary privilege is difficult to deal with. In one way the issue of expenses et cetera can be addressed, but there is a raft of other things that members of Parliament deal with, particularly lower House members, about which it would be dubious to be generally publicly acceptable by way of FOI. In the absence of any statutory scheme defining parliamentary privilege in New South Wales, how would you see this operating to ensure that there was not a step over the line in our relationship with our constituency and following up our constituents' issues?

Mr BARBOUR: We certainly put this in really to generate discussion and to have those with an interest in this issue direct their attention to whether or not Parliament should be included. I do not think there is a right or wrong answer to the question you are asking. I think really it is a question of degree and a question of principle. Like all parts of any access-to-information legislation, there will be areas where it is permissible to gain information and there will be areas where it is not permissible. I would see no reason why, if there were a general consensus that Parliament will be included, there may well be consideration given to particular aspects of the work of Parliament that would be excluded for good reason. But we suggested that in relation to any consideration of this, it probably wait until the first review of any new legislation that came in because in that five-year period there could be very genuine consideration given to the sorts of issues that you are raising. Certainly, we did not think and we did not take a position to the effect that members of Parliament ought to be covered specifically—clearly Ministers are—and we are unaware, apart from the examples that we provided, of that happening in any of the jurisdictions within Australia, obviously. So, it is a new issue for Australia, but as a matter of principle we saw no reason why Parliament ought be excluded per se.

Mr PAUL PEARCE: I agree that it is going to be subject to debate. Given the current climate, I am a little nervous that there will be a stampede or a drive to do something that could significantly disadvantage or put at risk the parliamentary role vis-a-vis our constituents. As you would be aware, there is a very grey area when we are dealing with correspondence from constituents, which we then forward onto various departments, as to whether or not that correspondence remains privileged for the purpose of any subsequent litigation.

Mr BARBOUR: I must say it certainly would not have been in my mind that that sort of correspondence would have been able to be sought under the Act. Really what we were getting at was far more the administrative functions of Parliament and the way both Houses of Parliament operate—similar information to what they put in the voluntary annual reporting mechanisms they have at the moment.

Mr PAUL PEARCE: So, changing the method from voluntary to mandatory?

Mr BARBOUR: Exactly, and drilling down to the sort of level that you are talking about was certainly not something that we had contemplated. We were looking at the initial step of it being a far more generic process of the administrative practices of the Houses of Parliament.

Ms SYLVIA HALE: How do you check upon the accuracy of an agency's response to your office in response to a complaint about the work of that agency?

Mr BARBOUR: It would very much depend, I think, on the nature of the complaint and the type of information. Some information we would know from our own checking would be accurate or inaccurate. Some information where it is opinion based or based on some sort of consideration of particular facts may or may not vary, depending on where it is coming from. Have you a particular issue in mind?

Ms SYLVIA HALE: Yes I have. Without going to the specifics of it, an agency assured your office and the complainant that it would be issuing an apology within two weeks. The person who made the complaint had not received the apology, and rang your office about five months later only to be told that in fact the agency had written to your office falsely claiming that the complainant was happy with the response and that the matter had been resolved. The question this person is interested in is: When you receive a response from that agency is there any mechanism for checking with the complainant whether the response you received from the agency is actually as the agency maintains?

Mr BARBOUR: In most cases I would think that sort of issue would not arise because in most cases if the agency was providing this advice it would normally copy us with the actual letter it has sent or the correspondence it had sent to the individual, the complainant. So, we would normally have a copy of the letter. Now, unless they have falsely claimed they had mailed it or something, we would accept that at face value. We would accept it at face value from the agency. Where there has been some sort of resolution reached between the parties, we always endeavour to indicate to the complainant if something does not transpire that has been agreed to, or if there are concerns, to let us know so that we can take that back up with the agency. But it would be impossible for us to check literally every statement that comes from an agency. We have to accept in large part at face value that what they are telling us is accurate.

Mr ANDREWS: We should add also that if we find out that that has happened, we take it very seriously.

Ms SYLVIA HALE: There was a complaint to the police about the failure to wear identification tags and about obscuring those tags with fluorescent vests and then threatening arrest of the person who was taking a photograph of an officer not wearing an identity tag. The police rejected that complaint. The complainant wrote back asking for details about which subsection of the Police Act that complaint had been dismissed under, and the grounds for it. No reply was forthcoming, so a letter was sent to the Ombudsman's office. Then, adding to the source of the complaint, for two months there has been no satisfactory response from the Ombudsman's office or any indication that the matter is being pursued.

Mr BARBOUR: It is very difficult for me to comment on a matter without looking at it.

Ms SYLVIA HALE: Do you have a time frame, other than an automatic response, in which you would expect to get a response, say, within a month?

Mr BARBOUR: We have time lines that we try to adhere to, and so do the police. We monitor the police efforts in relation to that. If there is a particular concern about us failing to respond to something within an appropriate time frame, I would be very happy to look at it. Sometimes people's expectations and what we are able to deliver do not necessarily match. What you have described may well be one of those cases. In relation to any concerns that any Committee member or any member of Parliament has, we regularly deal with letters from members of Parliament about the concerns of their constituents. I am more than happy to address them individually.

Ms SYLVIA HALE: You do not have your own technical staff or funding to obtain independent expert opinion on a fee-for-service basis when you undertake an investigation. Does the office have any input into the selection of experts required to provide technical reports? Or is that left to the department or the Minister who is the subject of the investigation?

Mr BARBOUR: Firstly, we can retain expert assistance if we need to, if a case warrants it. It would be fairly rare and it would be a particularly complex or specialist type of issue that we would consider doing it for, but we have done that in the past. When we get a response from agencies and ask them to provide information to us, our expectation is that that information will be accurate and will be of a standard that meets that agency's needs and expectations on that particular issue.

Ms SYLVIA HALE: As a result of the Minister or department or agency appointing an expert, would you make any inquiries as to potential conflicts of interest? Would you pursue that?

Mr BARBOUR: It would depend entirely on the circumstances. I am not sure what you are asking. We would not ordinarily inquire into the particular qualifications of an expert that is advising an agency unless, in the course of our inquiries, we believe that expert was giving inaccurate advice or had in some way provided inappropriate advice to us on behalf of the agency. It would not be as a matter of course that we would have any contact with those people. It would only be in the context of a particular investigation or inquiry, where we were working with them.

Ms SYLVIA HALE: Do you keep statistics as to complainant satisfaction with the Ombudsman's responses?

Mr BARBOUR: We do regular surveys of complainant satisfaction. We tend to do them every three to four years, sometimes we do spot surveys through our inquiries area. We publish the response rates and put them in our annual report when we do those surveys.

Ms SYLVIA HALE: But they are surveys rather than detailed statistics of satisfaction?

Mr BARBOUR: The surveys are about satisfaction. They go through in detail and ask a series of questions about not only whether they are satisfied with the outcome but also the processes, whether they were treated appropriately, whether things are explained appropriately to them.

Ms SYLVIA HALE: Is that spot-checking rather than an assessment?

Mr BARBOUR: We could not possibly do it in all cases. We deal with 35,000 people a year.

Ms SYLVIA HALE: What percentage of cases would you do?

Mr BARBOUR: We do different samples, depending on when we do it. I do not know what the last sample was, I could look back for you if you would like that information. It would be in the hundreds, but then you cannot compel people to respond, so you are dependent upon the response rate. But they would be done in a professional way and they would be done of a sample that was considered to be statistically appropriate.

Ms SYLVIA HALE: If a complainant is dissatisfied with the Ombudsman's response, what avenues are open to a complainant to pursue it further?

Mr BARBOUR: We have an internal review process, which I personally am involved with. If anyone writes to us and says that they are unhappy with the decision and seek a review of it, we follow a very detailed process. We contact the person to find out exactly what they are concerned about. If it is an issue around their not really understanding why we have made a decision, or re-explaining it, or reframing the information, we try to do that with them informally over the telephone.

If it is clear that they want us to actually formally review things, and they think we have got it wrong, another officer—not the officer who handled the matter before—usually someone senior, does a formal review and provides recommendations to me. I end up looking at those files myself and I sign off on those. That is the review process. Beyond that, the only other form of external review would be if it were a legal issue, to take the matter to court or, alternatively, to address the concerns to the Committee.

Ms SYLVIA HALE: In your annual report, do you comment on complainant dissatisfaction with responses at all?

Mr BARBOUR: We refer regularly to our compliments and our complaints. On page 13 of the annual report there is a table that lists the number of complaints and the issues that they were for, and also the outcome of the reviews conducted. It is extremely important to provide that information. I am also pleased to say that the number of compliments that we get compared to complaints is about 10:1.

Ms SYLVIA HALE: From your answers to questions on notice, it would appear—and I hope I am not misjudging the issue—that the New South Wales Police Force is somewhat uncooperative in its responses to complaints. Is that a fair characterisation?

Mr BARBOUR: What exactly are you referring to in our response that leads you to that conclusion?

Ms SYLVIA HALE: It states:

In January 2009 the police were significantly reading down our powers to require information for the review. Has the Police Force responded to the Office's proposals to facilitate the provision of information about the uses of Part 6A emergency powers.

You said that they were reading down your powers to require information for review, and were proposing the provision of a range of necessary information. You said that you have a signed agreement, which was received on 16 April. Is it your experience that there is certain recalcitrance on the part of government departments? Or is this more characteristic of police?

Mr BARBOUR: No, I think the reason why it is perhaps associated more frequently with police is because it usually will arise in the context of our review functions, and those review functions normally relate to additional or new powers that have been given to police. I believe that, quite wisely, Parliament has from time to time, when police have been given new powers, particularly powers that are more intrusive to civil liberties than normally present, given us a role to observe the operation of those and to report back to Parliament.

From time to time in the initial stages of those reviews, there is, for want of a better expression, a bit of a dance that happens. We want to get access to information that we believe is necessary for our review. Sometimes police will take a very literal or formal view about what we are entitled to obtain for the purposes of the review. In most situations, that is able to be resolved relatively well. Occasionally, it takes longer than it should. My view is that it is a silly dance, in the sense that we are both working ostensibly for the same team.

The idea is that police are supposed to exercise their powers appropriately and we are meant to ensure that they do. At the end of the day, normally if we are not able through senior officers to get an appropriate outcome, I will raise it directly with the commissioner. He looks at it and quite often that changes the dance and we get a bit of a breakthrough.

The Hon. LYNDIA VOLTZ: Who funds the Government Partnership Fund grant, which is administered by the Commonwealth?

Mr ANDREWS: AusAID.

The Hon. LYNDIA VOLTZ: So it is funded by the Commonwealth Government?

Mr ANDREWS: Yes.

Mr BARBOUR: Unfortunately that is one of our limitations. I share Mr Lynn's view about the importance of this work and our office's role and contribution to it. However, because it is Commonwealth funding and it is not really one of our statutory obligations I have to ensure that, as much as possible, our involvement in it is covered by funding we are able to get through the Commonwealth Ombudsman's Office from AusAID. If we are unfunded to do this I cannot justify our being involved.

The Hon. LYNDIA VOLTZ: At what point is the current AusAID application?

Mr BARBOUR: It has been the subject of a favourable indication from AusAID. The chairman of the Pacific Ombudsman Alliance, the Commonwealth Ombudsman, John McMillan, has advised us that he will be forwarding correspondence shortly. We understand they are supportive of a further five-year program.

The Hon. LYNDIA VOLTZ: I do not underestimate the importance of this program, but I think it was very brave to go to Fiji. I notice that they are not on the list. Do not get me wrong, I think it is vitally important in places like Papua New Guinea.

Mr BARBOUR: We have not been to Fiji.

The Hon. LYNDIA VOLTZ: What about in 2005?

Mr BARBOUR: Yes. But not since the formation of the POA.

The Hon. LYNDIA VOLTZ: Is there an ombudsman there at the moment?

Mr BARBOUR: No, or not one that we deal with anyway.

Mr MALCOLM KERR: You mentioned police being given additional powers. Have you received any response to the recommendations in your review of certain functions conferred on the police under the Law Enforcement (Powers and Responsibilities) Act 2002?

Mr BARBOUR: Since it has been tabled we have not received anything further. That document and the provisional report were provided to the police for comment and many of the comments they made informed our final investigation in relation to the document. As you know, it dealt with three major issues. The most significant in terms of public interest was probably the search powers and provisions. We have made a large number of recommendations and there is a time line for reporting set out in the report.

Mr PAUL PEARCE: You have made a number of points in your response to the question about the use of Taser weapons by the New South Wales Police Force, particularly in respect of improved recordkeeping and there being no direct action. Have you heard anything further from the police on that issue?

Mr BARBOUR: Unfortunately we are at odds with the NSW Police Force, the association and the Government in our view on Tasers and their ongoing use. We have not opposed the use of Tasers per se. In fact, to the contrary, we indicated that while they were being used by specialist police units there was nothing to suggest they were being misused or inappropriately used and that they seem to provide an appropriate resource. However, after doing a lot of research and looking at other jurisdictions, our concern was that there was a safety issue in relation to their use that has not been properly researched and considered. We also believe that there is anecdotal evidence from their wider use by police in other jurisdictions that they are misused.

We were also concerned that even among the specialist units there were different operating procedures and practices and we were concerned to ensure there was consistency of practice before any further rollout. The police have agreed largely with the sentiment of our recommendations and what underpins them, with the exception of the rolling-out issue, but they have not been moved to change their procedures much. What is of interest to me is that the Victorian Police Commissioner has specifically ruled out the further expansion and use of Tasers until the very steps we have identified have been undertaken. There have also been 12 Taser-related deaths since the release of our report, including one in the Northern Territory.

Mr PAUL PEARCE: That is the reason for my question. I note that you mentioned the police were going to examine the use of force register project. Has there been any further feedback?

Mr BARBOUR: We do not have any feedback about that project. As you know, it is not something they have seen as popular or necessary. I think there will be further developments because of the Committee's recommendations in relation to the EIS. We will continue to work with them on that. Clearly, if there is going to be a use of force register then the wider use of Tasers will figure prominently.

Ms SYLVIA HALE: I read with concern your response to the question about the official prison visitors and whether or not you could make any contact with them. I assume the commissioner is still not facilitating contact.

Mr BARBOUR: He facilitates contact, but through his officers, which I find unacceptable as a matter of principle. I am yet to be provided with any reason that it is inappropriate to ask the official visitors if they have a problem with us contacting them. If they do not then we will. I believe this is a further example of an unnecessarily rigid approach to issues within the Department of Corrective Services. It is further suggestive of a position that limits cooperation and coordination amongst those who have a role to ensure that the system operates appropriately.

Ms SYLVIA HALE: As you are no doubt aware, the Government proposes to privatise Parklea Correctional Centre, and Junee Correctional Centre is already privatised. Do you have ready access to people who have complaints about the operations of Junee?

Mr BARBOUR: We have jurisdiction over Junee and we visit regularly. We deal with it as we would any other correctional centre and we deal with those issues

with the management of Junee. In terms of any additional privatisation, we would plan to deal with the prisons in exactly the way we deal with the department.

Ms SYLVIA HALE: Presumably any management contract should make provision for your involvement.

Mr BARBOUR: It is all covered by statute.

CHAIR: I am sure that Mr Woodham would be very sympathetic to the Ombudsman.

Ms SYLVIA HALE: I am sure he would. The other disturbing feature of your answers to questions on notice relates to the overcrowding of Department of Juvenile Justice facilities. I assume you have made appropriate representations to the department. Indeed, you say you have been impressed at the efforts being made by the department to manage this difficult situation. However, you also say that more robust action is needed to address both the short-term and long-term projections for the number of young people in custody. You presumably address those concerns to the relevant Minister.

Mr BARBOUR: We do. This issue in particular is extremely troubling. It is a classic situation where policy decisions are made and laws implemented, the consequences of which are not properly thought through. The tightening up of the bail laws has meant that there are far more young people being detained who previously would not have been. I do not know whether that was the intent of tightening up those laws and the focus on law and order issues. There is a growing and very disturbing overcrowding situation within Juvenile Justice which is not of its own making and which it must try to manage to the best of its ability, and it is doing so. The department has received some additional funding to help with overcrowding, but, frankly, that does not deal with the issue. The real issue is why so many young people are going into detention centres. That is what needs to be addressed and considered by government.

We are looking at that issue and a number of other issues in a complementary way around the concept of young people at risk. It is one of the projects that I do not want to be impacted by our budgetary constraints because it is very important and it will be something that the office will focus on in the next 12 to 18 months. I would like to look at how young people intersect with government and the bureaucracy when they are at risk, when they have family problems, when they come from domestic violence backgrounds and when they have been abused and subjected to inappropriate treatment. I want to examine where they intersect with the Department of Community Services, courts and the police, how the police deal with them and ultimately what happens to them when they end up in a Juvenile Justice facility. That is a very large task for an office such as ours, but I am increasingly concerned about the fact that there is no single agency that seems to be championing the concerns of young people and how they deal with these very difficult circumstances.

Ms SYLVIA HALE: Are you continuing to monitor the situation at Emu Plains Correctional Centre? You would be aware of newspaper reports of children being locked in cells for 20 hours.

Mr BARBOUR: I am not only aware, but I also inspected the premises. I took the opportunity to invite the Minister to accompany me. We had a number of discussions during our time at the centre. This is a classic scenario. I see the problem for Juvenile Justice in terms of how it manages the situation. The facilities it has available at the moment through an agreement with the Department of Corrective Services are not consistent with best practice for young detainees. There are two detainees in each locked unit without water or bathroom facilities. There are also shared shower block facilities. That situation presents risks not only to the safety of the young people housed there but also because of shared bathing and toilet facilities.

Because of the problems associated with managing the issues that flow from that there is inadequate staffing to allow the young detainees to spend sufficient time outside their cells. To its credit, the Department of Juvenile Justice has tried in a very difficult environment to introduce a range of measures to make that process better for the detainees. However, it is still not desirable. There is inadequate space and no facilities to ensure that they get really good exercise and those sorts of things. Plans are currently afoot to improve those facilities if they are able to maintain them for a longer term.

Ms SYLVIA HALE: You talked about the Department of Juvenile Justice implementing a range of measures to improve conditions. What are they?

Mr BARBOUR: They have improved the existing facilities to a standard that provides reasonably good opportunities to undertake recreational activities. They have astroturfed some areas and provided basketball and other games facilities. There is also some communal television, interactive video game areas and shaded areas. As you can imagine, during summer it is a very warm environment. To the extent that the physical facilities allow, they are trying to make them as good as possible.

Ms SYLVIA HALE: But if juveniles are in cells for 20 hours at a stretch, their opportunity to make use of those external facilities would be limited.

Mr BARBOUR: It would be exceptional for any of them to be locked up for 20 hours. I understand that there is an effort to ensure that they are not locked up for anywhere near that length of time. We are monitoring that situation. In my view the situation there is not as bad as it is in other facilities where there are mattresses on the floor and rooms that are not designed to house two people are housing two or three young people, which creates additional risks. Some of the other facilities that are currently overcrowded are presenting greater risks and challenges. There was a significant sexual assault in one centre that is under investigation. Undoubtedly, overcrowding is presenting enormous challenges for the Department of Juvenile Justice.

Ms SYLVIA HALE: In your experience, how long would children be subjected to these conditions and presumably deprived of any opportunity to undertake educational activities or anything resembling a normal existence?

Mr BARBOUR: The plan was to limit the time that young people were housed at Emu Plains Correctional Centre because there were no education and program facilities provided. We are monitoring that to ensure that if there are any longer stays that they are being appropriately managed. The plan was that most of the young people would be there for only a short stay or on remand until court dates and so forth. However, our concern is—and it appears to be happening—that they are being kept there longer, and we are monitoring that.

Mr PAUL PEARCE: How does this sit with our obligations under the Convention on the Rights of the Child?

Mr BARBOUR: There are various obligations of that kind. However, there are also significant concerns about appropriate and humane treatment. My greater worry is that the Department of Corrective Services will end up taking over the Department of Juvenile Justice and the situation might become worse. It worries me that the detaining of young people in these facilities will be viewed purely on a cost basis rather than on what is appropriate for their age and circumstances. To reduce recidivism, for them to avoid an adult institution in the future and to have a chance back in the community, we must ensure that Juvenile Justice facilities provide appropriate educational activities, programs, more interaction with staff and a higher staff-to-detainee ratio. They are all things I suspect will be under threat if the only consideration is the dollar at the end of the day.

Ms SYLVIA HALE: I stand to be corrected, but I think your office reported on the number of young people who had been searched by police but not in the presence of a responsible adult.

Mr BARBOUR: Yes.

Ms SYLVIA HALE: Has there been any response from the police to your report?

Mr BARBOUR: That report was only recently tabled in Parliament and we have not yet received a formal response. Certainly, one of our concerns in reviewing the search powers was that in relation to young people there did not appear to be adherence to a support person being available.

Ms SYLVIA HALE: I understand that, for example, at rock music festivals it is now possible for police to check the fingerprints of minors. It is highly unlikely that an adult would be present at a rock music festival or whatever, but the police now have this facility.

Mr BARBOUR: They have mobile machines for fingerprinting, but I am not aware of any power that allows police to take young people's fingerprints.

Mr ANDREWS: The new devices can be used to check the identity of people to whom police are about to issue a criminal infringement notice. However, they cannot issue such notices to people under the age of 18.

Ms SYLVIA HALE: So there is no excuse for attempting to check the fingerprints—

Mr ANDREWS: No, the person concerned would have to be arrested for some offence before the police could do that.

Ms SYLVIA HALE: Therefore the Minister's response that if you have not done anything wrong you have nothing to worry about is inappropriate.

Mr ANDREWS: If a police officer suspects someone has committed an offence for which they can issue an on-the-spot criminal infringement notice, he or she has the power to be assured of the identity of the person, and to do that they can use a mobile fingerprinting device. They could say to someone who claims to be under 18 years of age, "You look older and I want to check." However, that would be unusual. They would certainly not be able to do it willy-nilly with children.

Ms SYLVIA HALE: In your report on the use of sniffer dogs you suggest that police would only be permitted to search a person, in response to a sniffer dog indicating a positive response, if there was a reasonable belief that that person had committed an offence and had drugs or whatever on them. But has the issue of a sniffer dog's responses being sufficiently inaccurate to not form the basis of a reasonable belief as to a person's conduct been pursued at all, to your knowledge, in any jurisdiction?

Mr BARBOUR: We believe that the use of sniffer dogs for their intended purpose, which was to stop dealing and stop large-scale transactions in relation to drugs, was pretty ineffectual. A very high percentage of dog indications, after searching, led to no drugs being found at all and that, in our view, brought into question their usefulness, given the stated purpose of the dogs. However, Government policy and the police position has been to continue to use them in the manner they have been used.

Ms SYLVIA HALE: Do you receive many complaints about the use of sniffer dogs?

Mr ANDREWS: Not a great deal but they still do occur, and we are still very much alive to that issue. It is still an ongoing educational campaign that the police themselves are doing to make sure their officers are alive to the fact that just because a sniffer dog gives an indication, they still have to have something more before they really have the power to search.

Ms SYLVIA HALE: Reverting to Juvenile Justice, I notice in your answers to questions on notice you said that Juvenile Justice suspended transfers of certain categories of detainees aged over 18 to adult facilities in August 2008 pending a review of its procedures, in response to a court case—this appears on page 18. You say there are new draft transfer procedures and you have commented upon them. What is happening now? Has it become operational or are you waiting on those procedures to come into force?

Mr BARBOUR: My understanding is that we are still, through our liaison meetings, working with them on those new procedures, but I am happy to provide an updated position on that to the Committee, if you would like.

Ms SYLVIA HALE: In view of the huge pressures from overcrowding there is no evidence that Juvenile Justice has reverted to transferring—

Mr BARBOUR: That certainly is not happening, as far as I am aware. There are new procedures in place and that was the subject of legal challenge.

CHAIR: But overcrowding is not just isolated to Juvenile Justice; overcrowding is across a lot of the Correctional Services centres throughout the state. Do you delve into that area as well?

Mr BARBOUR: It depends who you talk to, because there are a number of Corrections facilities that certainly have facilities that are unoccupied and largely they are unoccupied because there are inadequate resources to monitor them.

CHAIR: Such as Cessnock?

Mr BARBOUR: Exactly, and there are other centres where there is overcrowding and we have concerns about people being put in rooms that were designed for one occupant and decisions being made to put two people in them.

CHAIR: Such as Wellington?

Mr BARBOUR: There is a disparity, depending on where you go and what you look at.

CHAIR: Thank you for your attendance today. If there are any further questions, they will be put on notice, and I ask they be returned to the Committee secretariat.

(The witnesses withdrew)

(The Committee adjourned at 3.20 p.m.)