

REPORT ON PROCEEDINGS BEFORE

**COMMITTEE ON THE OMBUDSMAN, THE LAW
ENFORCEMENT CONDUCT COMMISSION AND THE
CRIME COMMISSION**

**2017 REVIEW OF THE ANNUAL REPORTS
OF OVERSIGHTED BODIES**

At Macquarie Room, Parliament House, Sydney on Friday, 12 May 2017

The Committee met at 10:30 am

PRESENT

Mr L. Evans (Chair)

Legislative Council

The Hon. L. Amato

The Hon. T. Khan

The Hon. A. Searle

Legislative Assembly

Mr S. Bromhead

Mr P. Lynch

Dr H. McDermott

The CHAIR: I now declare open the Committee on the Ombudsman, Law Enforcement Conduct Commission and the Crime Commission hearing for the 2017 Review of the Annual Reports of Oversight Bodies. I thank the witnesses for appearing before the Committee today.

FIONA RAFTER, Inspector, Office of Inspector of Custodial Services, affirmed and examined

The CHAIR: . Before we proceed, do you have any questions about the hearing process?

Ms RAFTER: No, Chair.

The CHAIR: Would you like to make a short opening statement?

Ms RAFTER: Yes I would. Thank you for the opportunity to appear before you today in relation to the 2015-16 annual report. I have in attendance with me today two staff from my office, Ms Kate Smithers and Ms Alexandra Mulder. I would like to advise the Committee that it has been a very busy year for the Office of the Inspector of Custodial Services. As you know, when I appeared before you last year I had only recently commenced in the position and my priority after commencing in the role in April 2016 was to make sure that all of the juvenile justice centres were inspected as required by the legislation. You might recall that when I last appeared before you there were five juvenile justice centres that had not yet been inspected. I am able to advise the Committee that the remaining juvenile justice centres were inspected by October 2016 and a report will be tabled in due course in relation to those inspections.

I particularly would like to acknowledge the assistance of the Queensland Department of Justice who allowed their Principal Inspector of Youth Detention to assist with the inspection of Frank Baxter, Acmena, Riverina and Cobham juvenile justice centres. Without their assistance and expertise it would have been difficult for our office to complete the juvenile justice inspections. Another priority for the office was to implement a monitoring framework to track progress on the implementation of recommendations made by the office. I am pleased to say that a monitoring framework has been developed now in consultation with Corrective Services NSW, Juvenile Justice and Justice Health and this means I will be in a position to report on the implementation in this year's annual report.

I should place on the record for the Committee that I am aware of an error in the 2015-16 annual report. The table on page 12 is a cumulative total of recommendations made over the 2014-15 and 2015-16 period, not the total of recommendations made either during the reporting period or the 2014-15 period.

One of my other priorities on commencing in the role was to visit all of the adult correctional and juvenile justice centres across New South Wales. I am able to inform the Committee that I have visited every centre now, except for Brewarrina, which I am scheduled to attend in early June.

It was as a result of these visits that I recommended to the Minister for Corrections and Juvenile Justice the creation of Aboriginal Official Visitor positions in each of the juvenile justice centres in addition to the existing Official Visitors. We now have Aboriginal Official Visitors appointed to each juvenile justice centre in New South Wales and this means more regular visits by Official Visitors to our juvenile justice centres. I have also met with a broad range of stakeholders, including our 65 Official Visitors—I think as of today there are a few less, that is how many I met with at last year's conference—who have assisted me greatly in understanding the challenges facing adult corrections and Juvenile Justice. These activities of meeting with stakeholders and attending the centres have assisted the office in developing a plan for the inspection of all centres by October 2018.

Implementation of the plan, however, will require extra resources in the office. In that regard I would like to express my appreciation to the Committee for its support last year in obtaining additional funding for the current financial period. I am pleased to report that \$300,000 of the \$659,000 underspend for the 2015-16 year was carried forward into the 2016-17 year. This has enabled me to create additional temporary positions in the office to undertake inspection works, develop the monitoring framework, and more recently, review the Official Visitors program. With the addition of our permanent research officer and the temporary positions I now have five permanent staff in the office and four additional temporary staff.

However, the immediate challenge is that all of our senior inspection and research officer positions who are responsible for undertaking inspection work are temporary staff, as the two permanent officers are currently absent from the office for at least another six months. I have therefore requested the creation of additional permanent positions to the establishment. Given the impending ratification of the Optional Protocol to

the Convention Against Torture in November 2017, I believe there will be an ongoing need for additional permanent resources in the office.

In my key observations for the 2015-16 year I raised the impact of rising prison numbers being the biggest challenge in the adult correctional system. The length of time in court cells and the increasing number of women being held on remand were two particular areas of concern. I would like to advise the Committee that an inspection has commenced that will see 11 24-hour court complexes and the Amber Laurel Correctional Centre inspected before the end of the financial year and the commencement of an inspection into women on remand, beginning with Grafton Correctional Centre in June 2017. There are still 25 adult correctional centres to inspect by October 2018 to meet the legislative requirements. Although we are working to a plan there is a risk that we will not meet our legislative obligations and I undertake to keep the Committee informed of my progress.

In addition to our inspection activities the office also coordinates the Official Visitors program of dedicated community visitors who visit adult, Juvenile Justice and 24-hour court cells on a regular basis. We are currently finalising an internal review of the program as we commence advertising for the next term of employment from October 2017. I anticipate recommending some legislative changes to the Minister as a result of the review. The term of appointment, maximum number of reappointments, diversity, confidentiality and reporting requirement are all under consideration as part of the review. Thank you.

Mr PAUL LYNCH: Picking up from your opening statement, why would it be difficult for you to complete the juvenile justice inspections without the assistance of Queensland?

Ms RAFTER: The assistance of Queensland was vital because we were also undertaking other inspections at the same time. During that period we were undertaking the inspections related to the management of radicalisation in prisons, as well as undertaking inspections on clothing and bedding, so we required additional assistance from outside of the office because we did not have sufficient staff within the office for coverage for three inspections at one time.

Mr PAUL LYNCH: You also mentioned women at Grafton. I have not turned my mind to it in any great detail, I have always identified Grafton as a male prison. How many women are likely to be held at Grafton at any one time?

Ms RAFTER: There is a particular wing in Grafton that holds women. The absolute bed numbers?

Mr PAUL LYNCH: A ballpark would be fine.

Ms RAFTER: A ballpark, probably less than 50. But I can give you the absolute detail. They are held in two separate areas. There is a specific women's area that is not a high security area. Then there is another small area where women who are classified into a high-security category are held as well.

Mr PAUL LYNCH: At one point in the last few years, women were held in Bathurst. Are women still held there?

Ms RAFTER: Yes, they are. There is a small unit at Bathurst—low numbers there as well—but the infrastructure for the women at Bathurst is quite modern.

Mr PAUL LYNCH: How many jails that might be identified as men-only jails also have accommodation for women?

Ms RAFTER: As part of the inspection, we have identified Grafton. We have also identified Wellington, because Wellington has a large male population but it also has a separate female wing and it holds quite a number of women there on remand and sentenced.

Dr HUGH McDERMOTT: How many suicides in juvenile custody facilities are you aware of since your appointment?

Ms RAFTER: I am not aware of any, but that is data that would be held by Juvenile Justice. I can undertake to check.

The Hon. TREVOR KHAN: Would you be advised if there was a suicide of a juvenile in custody?

Ms RAFTER: Not automatically, no, because that would go to the Coroner.

The Hon. TREVOR KHAN: I understand that it would go to the Coroner, but in a sense that answer is non-responsive. I am wondering why you would not be advised of a juvenile suicide.

Dr HUGH McDERMOTT: That is where I was going with that question.

Ms RAFTER: It would be something that I would be likely to be advised of in my regular meetings with Juvenile Justice, but there is not a requirement for an automatic notification.

The Hon. TREVOR KHAN: Right—we have one little pearl from our discussion with you!

Dr HUGH McDERMOTT: Are you aware of any suicides of adults in custody in adult prisons in New South Wales since your appointment?

Ms RAFTER: I believe that there have been but, again, there is not an automatic notification.

Dr HUGH McDERMOTT: I draw your attention to the Long Bay facility and suicides there, particularly with prisoners who have recently been transferred from other facilities. Are you not aware of any of those issues? Have you been notified of suicides at Long Bay?

Ms RAFTER: No.

The Hon. ADAM SEARLE: Returning to your inspections and the assistance you gained from Queensland, what was the nature of the Queensland assistance?

Ms RAFTER: The principal inspector of juvenile justice came down, attended the centres with our inspection team, assisted with interviewing staff and juvenile offenders and assisted in contributing to the report that is still in progress.

The Hon. ADAM SEARLE: How many people were provided to help?

Ms RAFTER: Just one.

The Hon. ADAM SEARLE: Is it usual for your office to obtain assistance from interstate to carry out inspections. Has it happened before?

Ms RAFTER: Yes, it has happened before and that particular principal inspector had assisted on the earlier Juvenile Justice report that was tabled by Dr Paget.

The Hon. ADAM SEARLE: I think your evidence was that the assistance was required due to the doubling-up of the number of investigations. Does that reflect a lack of resourcing for the office?

Ms RAFTER: That reflects a new model I have introduced in the office since I started, because before I commenced, there would be one inspection undertaken at a time and all of the resources in the office would concentrate their efforts on that inspection. As you might recall, before the Committee last year it was posed with a ministerial referral and an obligation to inspect the Juvenile Justice centres how that could occur and the model I have implemented is for the office to be able to run inspections simultaneously and draw on a number of resources, both internal and external—and yes, that has required additional internal resources as well as drawing on external resources.

The Hon. ADAM SEARLE: Do we return the favour and assist Queensland at any stage? What is the nature of the arrangement?

Ms RAFTER: In the past, a bit before I commenced, the two senior inspection and research officers in the New South Wales office had assisted Western Australia on an inspection, so it is something that does happen as part of the inspection network. I am aware that one of the Western Australian officers went to Queensland and assisted them for approximately six months, so it is something that does happen.

Mr PAUL LYNCH: Who paid the wages of the Queensland inspector when they were here doing New South Wales work?

Ms RAFTER: They were paid by Queensland.

Mr PAUL LYNCH: Does the preparation of reports and inspections require the exercise of any statutory powers?

Ms RAFTER: Sorry?

Mr PAUL LYNCH: Do the inspections by Queenslanders require the exercise of any statutory powers?

Ms RAFTER: When there is assistance granted they are always in the company of someone who is exercising the powers, because we have a model where we—

Mr PAUL LYNCH: Someone employed by your office is there while they—

Ms RAFTER: Yes. That is the model that we use, that we have two people present.

The Hon. TREVOR KHAN: If you have two people present, why do you have a person from Queensland doing it?

Ms RAFTER: They are with someone from the office.

The Hon. TREVOR KHAN: I know they are in physical proximity to that person, but you are bringing a person from Queensland because that is the person with expertise, are you not?

Ms RAFTER: Yes.

The Hon. TREVOR KHAN: Then you piggyback on someone from New South Wales, perhaps quite legitimately, to give some sort of statutory authority to the Queenslander doing that job. Is that the model that is applied?

Ms RAFTER: I am very conscious of where the powers rest in the legislation. We have a model where we always have two people go—we go in pairs—on the inspection, and that is a good, sound practice. It means that we can draw on the interstate person for their knowledge and expertise and they are exercising the powers under the legislation.

Mr PAUL LYNCH: What are the good, sound reasons to have two people doing it rather than one?

Ms RAFTER: The reason is that it means there are two people who have taken part in the conversations. One person can take notes and one person can interview. Then, after the inspection has taken place—

The Hon. TREVOR KHAN: I am sorry to interrupt, but am I right in saying that the person who is doing the interview is the Queenslander and the person taking the notes is the New South Wales person?

Ms RAFTER: No, not necessarily.

The Hon. TREVOR KHAN: I am being unduly cynical as to what is going on, am I?

Ms RAFTER: Yes.

Mr PAUL LYNCH: Something from which we all suffer in this place. It is not just the Hon. Trevor Khan!

Ms RAFTER: The other reason is that during those interviews it is a really good practice to make sure that both people prepare their notes, meet together and make sure they have an agreed position. It removes personal bias. It is a valid interviewing technique.

The Hon. LOU AMATO: Is having those unbiased opinions the reason it takes someone from another State or jurisdiction?

Ms RAFTER: It is very useful because they bring the knowledge of what is happening in their jurisdiction as well, yes.

The Hon. LOU AMATO: We do not have all that knowledge here in New South Wales.

Ms RAFTER: Yes, that is absolutely right.¹

The CHAIR: Could you provide the Committee with further information about the office's examination of the management of radicalised inmates?

Ms RAFTER: Yes, I am happy to advise the Committee of where that particular report is up to. We commenced the inspections into the management of radicalisation in June last year. Five centres were inspected as part of that review. We started with the MRRC, the Metropolitan Remand and Reception Centre, as we were trying to get an understanding of what happens as people enter into custody. We then also went in June to the High Risk Management Correctional Centre in Goulburn to inspect that centre, which is, as the Committee would no doubt be aware, where the majority of offenders who have been charged and convicted of terrorism-related offences in New South Wales are held.

¹ See also the Inspector's letter clarifying evidence as published on the [Committee's website](#) (Inquiry: 2017 Review of Annual Reports of Oversighted Agencies, Other Documents).

We went to the Mid North Coast Correctional Centre in July of last year and then in August we went to Lithgow Correctional Centre and then to Goulburn Correctional Centre. Both Goulburn and Lithgow hold a significant proportion of Muslim inmates at those centres and we were interested in seeing how the Muslim offenders were treated. That report is now in the procedural fairness stage with Corrective Services and I am hopeful that it will be tabled in the not too distant future.

Dr HUGH McDERMOTT: Is your focus on radicalisation only on prisoners of Muslim faith or have you looked at other areas of radicalisation?

Ms RAFTER: The report acknowledges that radicalisation is not just related to the Muslim community but it looks at the particular context in New South Wales.

The Hon. TREVOR KHAN: What does that mean?

The Hon. ADAM SEARLE: What is the particular context in New South Wales?

Ms RAFTER: In New South Wales the majority of people who are charged with or convicted of terrorist offences are Muslim.

The Hon. LOU AMATO: They are also held in a separate wing, are they not?

Ms RAFTER: That is the High Risk Management Correctional Centre.

The Hon. ADAM SEARLE: What potential radicalisation subjects are there in New South Wales other than those you just mentioned?

Ms RAFTER: There are potentially far right wing radicals and extremists.

The Hon. LOU AMATO: Are there any held in custody?

Ms RAFTER: I would have to get that data from Corrections.

The Hon. ADAM SEARLE: We would be interested to understand the breakdown of the types of radicalisation or radicalisation risks in the New South Wales prison system.

The Hon. TREVOR KHAN: I can imagine there is at least a theoretical potential for radicalisation by skinhead Nazi groups, for instance, but I suppose the question is whether there is any evidence that is occurring in our jails in New South Wales.

Dr HUGH McDERMOTT: It depends how you go about this, whether you are talking about all charges under terrorism legislation or whether you are just talking about Islamic groups, Tamil groups or far right groups. There is a whole mixture. The question is how many are in custody.

The Hon. ADAM SEARLE: How many are in prison? We are very interested, as you might see.

Ms RAFTER: The report will be tabled in the not too distant future.

The CHAIR: Recently there have been media reports about the amounts of phones that have been found in prisons. Do you have a comment on how they are getting in and how we could possibly stop them?

Ms RAFTER: I think that is a question that I would have to take on notice. I read a report the other day of phones coming in over a fence. As to the number of phones that have been found, I would have to ask Corrections for that data.

Dr HUGH McDERMOTT: Moving on to the mental health of inmates, as a member of Parliament I have received a number of complaints from families of inmates with mental health issues not receiving their medications while in custody. Have you come across similar complaints or issues?

Ms RAFTER: The Official Visitors Program takes the complaints. We do not take complaints directly to the office. I am aware that health still has the highest complaint numbers within the system. It is for that reason that we have on our forward timetable for inspections an inspection into health that will focus on mental health. I am planning to commence that inspection after the Juvenile Justice inspection has been finalised. Those are the sorts of issues that we will look at.

The CHAIR: Thank you for appearing before the Committee today. We may send you some additional questions in writing, the replies to which will form part of your evidence and be made public. Would you be happy to provide written replies to any further questions?

Ms RAFTER: Of course, Mr Chair.

(The witness withdrew)

(Short adjournment)

ELIZABETH TYDD, Information Commissioner, Information and Privacy Commission, sworn and examined

SAMARA DOBBINS, Director, Business Improvement, Information and Privacy Commission, sworn and examined

ROXANE MARCELLE-SHAW, Director, Investigation and Reporting, Information and Privacy Commission, affirmed and examined

The CHAIR: Thank you for appearing before the Committee today. Do you have any questions about the hearing process?

Ms TYDD: No.

The CHAIR: Do you wish to make an opening statement?

Ms TYDD: The opportunity to present to the Committee today on the exercise of the functions of the Information Commissioner and to assist members in the examination of the Information and Privacy Commission's annual report, prepared in accordance with governing legislation and any other statutory reports, is appreciated. I am both conscious and respectful of the important oversight role of the Committee, and with that in mind I have reviewed all the committee reports and transcripts over the past five years. It is pleasing to report on the acquittal of all undertakings from the chief executive officer, the former Information Commissioner, and myself as Information Commissioner since December 2013.

At the most recent Committee hearing in March 2016, I provided a report on the operation of the Government Information (Public Access) Act [GIPA] and undertook to consider the rich source of data now available through those successive reports. The 2015-16 report responds to many of those identified issues and provides a suite of examples of the outward regulatory focus we have been fortunate to implement over the past year. Within the Information and Privacy Commission NSW [IPC] we have moved beyond many challenges to ensure that our operational effectiveness has been largely established by internally robust foundations of strong procedures, systems, governance, prioritisation, and investment in capability. This approach has enabled us to project our work externally into a strategic regulatory approach that I foreshadowed in March 2016.

I will now deal with a couple of brief examples. Within the IPC we are focused on data integrity and transparent reporting. Our reputation for credible, reliable and consistent reporting has been recognised. It has been an honour to be invited to lead the contribution of State and Territory information commissioners and ombudsmen in developing a set of metrics to give effect to the commitments contained under Australia's Open Government Partnership National Action Plan. Those metrics are currently under pilot and will have the effect of enabling the examination of the operation of information access regimes in each of the jurisdictions against internationally established benchmarks.

We have also contributed to a greater understanding of the international level of the operation of information access regimes, and we have hosted delegations from China and Nepal. The feedback we received from both delegations is that our engagement has elevated their knowledge of models to promote information access. We have also hosted the State and Territory information commissioners' and ombudsmen's meeting in November last year. At that meeting the commissioners ratified a piece of work which was led by New South Wales and which was the development of a legislative compendium that looks at information access legislation to advance consideration of the operation of those statutes in various jurisdictions.

Another very significant piece of work that we have recently undertaken has been the commissioning of research undertaken independently by the University of New South Wales into open data enablers. It provides an examination of international regulatory, legislative, operational and cultural enablers. This pioneering and practical research is presented to the Committee today. I will provide that together with my opening statement, and it will be publicly available on our website from this afternoon. It will provide insights into future consideration of the aspirations of open data and open government in New South Wales and elsewhere. Our contribution to promoting integrity is clearly established through our standing up of the integrity agencies collaboration group and focusing on coordinated educational activities in that regard.

The publication of our regulatory framework and plan uphold our commitment to transparency to both agencies and citizens, and so too does our revised IPC service charter that reflects our commitment to values and service standards. We are now in a position to uphold those standards. For example, 91 percent of our reviews and complaints are finalised within 90 days, exceeding our public service standards. In implementing our regulatory plan, we have targeted many of the significant regulatory issues and risks that we identify in the sectors regulated by the IPC. We have used data to inform that plan, including the section 37 reports. One example contained in those reports is our work in relation to contract register reporting requirements. We have elevated performance in the university sector to about 20 per cent greater than compliance rates within 16 months of embarking upon that first initiative.

As a component of our commitment to understanding and identifying regulatory issues, including release rates that was foreshadowed in both the previous committee meetings and in the section 37 report, we embarked upon a series of direct engagements with agencies, including NSW Police and the Department of Education, to inform our regulatory practices to elevate their compliance. We have issued more than 20 publications, which is about a doubling in the last reporting period. They go to specific issues that have been informed by the data of the IPC for both citizens and agencies to elevate both levels of compliance and understanding and awareness of information access rights. Our case notes, bulletins and quarterly publications all provide additional educational resources to both the public and agencies.

The IPC is a small regulatory agency. We have jurisdiction over in excess of 200 significant agencies and all citizens of New South Wales. Our effectiveness in applying our limited resources has been largely achieved through the factors I mentioned earlier, but also by adopting a process of ensuring that our work is informed by proportionality and the judicious application of our regulatory intelligence holdings. Proficient people and processes are also instrumental in that regard.

The IPC is now achieving the commitment required of independent oversight agencies to effectively exercise statutory functions, but also to identify and to address underlying systemic issues and thereby elevate overall standards and compliance rates for the betterment of the community. Our regulatory influence is now well demonstrated, and our forward focus is heralded by both our Information and Privacy Commission NSW Annual Report and the report on the operation of the Government Information (Public Access) Act. Our strategic and operational plans demonstrate our commitment to shaping the future through transparency, effectiveness and strategic regulatory outcomes that balance, promote and respect information access and privacy rights.

The Hon. ADAM SEARLE: What is your overall impression of the culture of openness in relation to the Government Information (Public Access) Act by government agencies in New South Wales? In the time that you have held office, is it improving?

Ms TYDD: A number of measures would inform my response in that regard. I refer the Committee to proactive release rates, where proactively more information is being released. That goes to an issue of a culture of openness. There is still work to be done, as I heralded in my section 37 report. There are other factors that go to measures of openness, which include timeliness and responsiveness in relation to activation of the pull pathways; that is, applications made under the GIPA Act. As the Committee is aware, release rates have been decreasing over a number of years. However, in the last section 37 report, the decline has been arrested. It sits at about 68 per cent. However, that has to be considered in conjunction with the increase in proactive release, and also significant responses from certain agencies that information may not be held—it may not be within the agency.

Looking forward, in respect of progressing that culture of openness, there are opportunities. For example, greater guidance in the use of technology to assist applicants in making an application to stand the application on all fours, so that the advice and assistance that can be provided is targeted to ensure that the application is properly constructed at the time of receipt and that may also have an impact on levels of release and also informing what information may or may not be held by an agency. That issue can also be addressed by way of agency information guides and you will see in the section 37 report that that is a piece of work that we are undertaking so that we can promote access to information in relation to policies and service delivery and opportunities for citizens to engage with agencies through the use and better promotion of agency information guides.

The Hon. ADAM SEARLE: Are there any particular agencies that are, in your experience, more recalcitrant than others in respect of their willingness to be open?

Ms TYDD: In respect of openness, you would see from the section 37 report that we have examined the agencies that have lower release rates. In previous evidence to the Committee I have identified factors,

including the type of information that is held, but in the most recent report we have conducted an examination of two agencies that are responsible for a large amount of the GIPA applications made in New South Wales, and those two agencies are NSW Police with 41 per cent of applications and Roads and Maritime Services.

The Hon. TREVOR KHAN: That comes as no surprise.

The Hon. ADAM SEARLE: Is Transport for NSW a particularly difficult agency?

Ms TYDD: Transport for NSW is an agency we have direct engagement with because it is a big agency. Are they disproportionately represented? I could not provide that advice now, but they do not represent the number of applications that derive from the top three agencies. In fact, transport is not one of the top three agencies from which we receive applications. Transport for NSW is also identified in the section 37 report, particularly in relation to its proactive release of information and the data that it has released to better inform users of transport services.

The Hon. ADAM SEARLE: Are there any particular difficulties being experienced with Transport for NSW and its GIPA unit that you can inform us of?

Ms TYDD: I am certainly aware of questions to the House that were made in that regard and I can indicate that the Information and Privacy Commission undertakes a range of regulatory activities for all of the agencies in New South Wales.

The Hon. ADAM SEARLE: Has the head of the GIPA unit at Transport for NSW been stood down?

Ms TYDD: That knowledge is not available to me. In respect of standing down, that appears to frame a question in relation to someone being removed from office; I have no knowledge of that.

The Hon. ADAM SEARLE: Are you aware of any investigation into the conduct of the GIPA unit at Transport for NSW?

Ms TYDD: I am seized of an investigation that relates to Transport for NSW. However, my capacity to answer questions in relation to that investigation have to be tempered by the additional statutory obligations that I have, and they arise from legislative instruments other than the Government Information (Public Access) Act and the Government Information (Information Commissioner) Act. Accordingly, I cannot provide further details given the obligations that I must uphold.

The Hon. ADAM SEARLE: You say your office is "seized of", does that mean you know, or are aware of, or are conducting—

Ms TYDD: The Commission has a number of reviews, investigations and complaints that are currently being undertaken, and Transport for NSW is included in that group.

The Hon. ADAM SEARLE: Moving on now to another topic, Sydney Motorway Corporation is a corporation that appears to be owned by two shareholders, both of which are New South Wales Government Ministers. One is the Treasurer, the other is the Roads and Maritime Services Minister. It is not a state owned corporation, it is not any kind of public body. It seems to be a private corporation, and it claims to be beyond the reach of the Government Information (Public Access) Act. Are you aware of any difficulties around that, and what do you think about the appropriateness of that kind of corporate arrangement if it does defeat the Government Information (Public Access) Act, given it is currently building perhaps the biggest piece of public infrastructure in the State with the WestConnex projects?

The Hon. TREVOR KHAN: Point of order: The question, apart from being a double bunger, invites this witness to express an opinion, which I suspect is beyond her remit.

The Hon. ADAM SEARLE: I will rephrase the question. Are you aware of any difficulties that people have experienced getting information out of the Sydney Motorway Corporation because the corporation claims it is not subject to the GIPA?

Ms TYDD: I would have regard to information that is within the public domain and also any information that comes to the IPC. I can speak to the operation of the Government Information (Public Access) Act which lends itself to five sectors. In those sectors, which the Committee is very familiar, there is a capture within the jurisdiction. In my previous evidence to the Committee, I have also referenced section 121 which goes to the contracting out of services by agencies and the IPC, in response to that issue, has issued further guidance for contractors and agencies to ensure that there is a firm understanding—a much clearer understanding—of rights and obligations, particularly those of a contracted service deliverer to provide information to the entity. Section 121 may have application in this case.

The CHAIR: I have a scenario from a constituent who put in GIPA applications to his local council. He was refused because he was unable to pay. He put in 375 GIPA applications and he was unable to pay the fee.

The Hon. TREVOR KHAN: If there were 375 of them, I am not surprised.

The CHAIR: In that circumstance, is there a waiving of the fee or somewhere where he can appeal?

Ms TYDD: There are a number of provisions under the Act that deal with fees and charges. There is a waiving of fees that can be done at any time by an agency. There is also a reduction in fees when it is established or determined to be in the public interest to meet a public interest test. That matter has been considered recently—not your matter, Chair, I apologise, but that concept, those issues—by the NSW Civil and Administrative Tribunal, and in response to some of that enhanced legislative judicial determination, we have reviewed and republished guidelines that would assist in that regard. They were out for consultation for several months and have now been finalised and are available. They can be provided for the Committee, if that would assist the Committee.

The CHAIR: In this circumstance, he was refused any application. That is my biggest concern. He was refused one GIPA because he said he could not pay for the lot of them. Is that a breaking of the GIPA law?

Ms TYDD: The provisions for applications are set out at section 41 of the Government Information (Public Access) Act, and they require the application to be in writing and accompanied by a fee. That is not the case if it was an internal review and it is not the case if it was a case for external review by the Information Commissioner, but under the Act they are required to be accompanied by a fee, hence the provision that the fee can be waived at any time by the agency, or an application can be made to waive or reduce the fee on the grounds of hardship or public benefit.

Mr STEPHEN BROMHEAD: The annual report stated the change in categorisation of the GIPA, so it went from 19 up to 68. Could you explain that?

Ms TYDD: You are speaking in relation to advices, if I understand you correctly?

Mr STEPHEN BROMHEAD: Yes.

Ms TYDD: Advices within the Information and Privacy Commission and all of our statutory functions have been subject to a review of procedures to ensure the integrity of our data. For example, enquiries may not readily translate into meaningful significant work that requires an application of the IPC's resources. We have recently undertaken a review of our categorisation processes to ensure that we are counting properly and ensuring that we can predict our resource requirements going forward. Advices are one example of that, whereby some advices have not been properly categorised and they may have been categorised either as a corporate piece of work or an enquiry, so in the recategorisation they have translated properly into advices. Likewise, we are very conscious not to overcount enquiries, for example, as complaints when they may be something that is resolved at first instance over the telephone or with reference to publicly available material.

Mr STEPHEN BROMHEAD: Have you identified any recurring themes or trends in relation to those advices?

Ms TYDD: There is a significant amount of work now being undertaken in relation to open government at a national level and, likewise, in relation to any statutory work that would involve consideration of legislation that would involve the Information Commissioner's perspective, and that may be reflective of those requirements. There is also a significant amount of work being undertaken in relation to open data in New South Wales. Open data as a subset, if you like, of open government is something on which we certainly have a role that relates to section 17, the role of the Information Commissioner, in promoting and informing and advising in that regard.

The CHAIR: Thank you very much for appearing before us today. We may send you some additional questions in writing. Your replies will be part of the evidence and will be made public. Would you be happy to provide written replies to any further questions?

Ms TYDD: Thank you, Chair. Yes.

(The witnesses withdrew)

PETER SELBY HASTINGS, Commissioner, NSW Crime Commission, affirmed and examined

The CHAIR: Would you like to make a short opening statement before we begin?

Mr HASTINGS: No, thank you.

The CHAIR: Does the committee have any questions?

Mr PAUL LYNCH: I might start with the obvious ones. Commissioner, I am sure you are aware there has been a report recently tabled by the Ombudsman entitled "Operation Prospect: A report on developments".

Mr HASTINGS: Yes.

Mr PAUL LYNCH: I was wondering if you might have any comments in relation to that.

Mr HASTINGS: I have noted what the Ombudsman has said in his additional report in general terms. By way of an update, as the Commission indicated in its published response to the original report, we undertook to embark upon an independent assessment of the conduct of Crime Commission officers in the context of apologies. We identified one incident in particular in which we took the view that the conduct of a senior Crime Commission official was unacceptable and inexcusable, and we have issued an apology to the person who was subject to that conduct.

We had decided that there were no other incidents that we could identify in the material provided in the original report which warranted an apology by the Commission and we are not intending to make any further apologies. However, I note that the additional report from the Ombudsman raises some further matters and I will be asking the lawyers at the Commission to again assess the material in light of the matters being raised by the Ombudsman.

Mr PAUL LYNCH: Any indication of a time line of that?

Mr HASTINGS: It is not a voluminous document so I am hoping we can do it more expeditiously than we did in analysing the 880 pages of the original report.

Mr PAUL LYNCH: The other broader problem or broader issue is the relationship between Crime Commission and Ombudsman. Do you see there is a long-term problem with that relationship now arising from these reports and these commentaries?

Mr HASTINGS: I do not think so. I am quite concerned not to get engaged in a war of words over this, that is why I am responding in very general terms rather than being drawn into what might be perceived to be a slanging match. I do not want to aggravate any tension that may exist. But the reality is that the Commission has very little to do with the Ombudsman. This was quite an exceptional inquiry.

The Hon. TREVOR KHAN: I think we all agree with that, on so many levels.

Mr HASTINGS: I am sorry, that was a somewhat loaded statement. What I meant was it was out of the norm in its general formal structure. Our general supervision by the Police Integrity Commission is now to be overtaken by the Law Enforcement Conduct Commission and, as far as I am concerned, my relationship with them is a more important working factor than dealing with the Ombudsman. The Ombudsman still does have a role and will continue to have a role in relation to observing our compliance with telephone intercept and surveillance device legislation, but that, in totality of the scrutiny to which we are subject, is quite small.

The Hon. ADAM SEARLE: The Ombudsman said that your response released in March of this year was done without any prior formal notification to the Ombudsman's office. Would you care to comment on whether that was the case or not?

Mr HASTINGS: I suppose in broad terms it was. It is a matter of record, I think, that prior to the issue of the report, I had communicated with the Ombudsman advising that I was contemplating obtaining an injunction because of what I perceived to be—and most others did—a lack of procedural fairness. I endeavoured to follow the Premier's memorandum in relation to litigation between public agencies; we met, I suggested that we should invoke the assistance of the Attorney General or the Solicitor-General as an independent assessor or arbitrator of the processes which had been adopted, and that was declined on the basis that it would take too long. Thereafter I had indicated—

The Hon. TREVOR KHAN: I think we would agree with that too.

Mr HASTINGS: Subsequently I made the decision not to litigate because I was concerned that under the Ombudsman Act on one view I would need to allege bad faith, and I thought it was unseemly for the head of one agency to be making allegations of that character against the head of another. So I decided that we would not litigate. But it had always been understood, as far as I knew, that there would be at some point or other a response from the Commission.

The Hon. ADAM SEARLE: The Ombudsman described your response as containing unfounded and inflammatory claims, and now we have got the further report from the Ombudsman to which you are going to respond. What is the process by which there is closure in the difficulty in the relationship at least around this quite significant issue?

The Hon. TREVOR KHAN: Probably by you stop poking the bear I think is the answer.

The Hon. ADAM SEARLE: These are matters of public record. That is a pretty strong statement by the Ombudsman's office about a response issued by your office.

Mr HASTINGS: Yes, and I probably did use robust terms in the response document. But within the norms of the criminal justice system in New South Wales, and it is quite usual vernacular to use in a semi-legal scenario such as this.

The Hon. ADAM SEARLE: But quite remarkable for two public authorities, particularly a law enforcement agency and the Ombudsman, to be using this sort of language about each other.

Mr HASTINGS: Well, the whole thing was remarkable in the sense that one agency was entrusted about making adverse findings against another, and that is quite an unusual scenario. One of the difficulties, I suppose, was—

The Hon. ADAM SEARLE: I guess what I am getting at is your response has said very strong things about the Ombudsman's conduct of this matter. The Ombudsman has now got a further report where, even just on a casual reading, there is still very strong and robust language used about the Crime Commission and you are going to respond further. How do we bring this to a conclusion and have a sense of closure because, on the face of it, there seems to be a very significant rupture between two important public bodies about a very serious and long-running issue?

Mr HASTINGS: The fundamental fact is that the facts happened 17 or 18 years ago, and is history as far as I am concerned. The processes that were criticised have long gone, and are no longer current. We are participating in recommended reviews that were contained in the original report, with other affected agencies in a working group. We have continued to assist the Ombudsman by providing whatever evidence is being sought for inclusion in briefs. To that extent a working relationship continues. It does not seem to be difficult to me, if we reach a point where we agree to disagree.

One of the options I have considered is simply to apologise, because I can get some proformas printed, and sign them and send them off. That would probably be the end of it but I do not see that as particularly responsible conduct. If the end result is that we disagree, then so be it, in view of the history of it all and its lack of connection with what happens now.

The Hon. ADAM SEARLE: Presumably, your response was informed by serious concerns your office or you have about the way in which the Ombudsman went about fulfilling its duties in relation to the Operation Prospect. Is that still the case?

Mr HASTINGS: Yes. I have to say that I was extraordinarily pleasantly surprised at the reaction to my response. Quite unsolicited calls were made to me by lawyers and even by the people themselves, expressing their total agreement and gratitude that someone at last had spoken up about the processes that were adopted.

The Hon. TREVOR KHAN: That is hardly surprising. There were clearly, in a sense, two camps—were there not? There was a camp that had an entirely different view to the other camp in terms of the whole process. Half of them were going to agree with you; the other half were not.

Mr HASTINGS: My point is that both camps were ringing me and saying, "Well done; we agree."

The Hon. ADAM SEARLE: That could be because the Ombudsman was critical of all of them.

Mr HASTINGS: I think it was just a frustration about the process. It was nothing to do with the outcome, in factual terms.

The Hon. ADAM SEARLE: This is what I am getting at. You have expressed serious concerns about the way in which that process was undertaken. In one sense it is over—the report is done—but what can be learnt from it and how can it be avoided in the future?

The Hon. TREVOR KHAN: Do not do it that way again.

The Hon. ADAM SEARLE: Yes.

Mr HASTINGS: I appreciate the fact that an enormous amount of work went into the production of the report. On the other hand, an enormous amount of work was contributed by the Commission. I cannot calculate the amount of time we spent digging out the records that were required. As I said earlier, I made the point at some stage to the Ombudsman that I did not require a formal notice; I only had to be told by email what was required and we would get the staff to find it. At one point we allowed an analyst from the Ombudsman to have direct access to our system without a security clearance—contrary to what some people were advising me—to facilitate every opportunity that they needed to get the documents. We did put an enormous amount of work into assisting them.

Mr STEPHEN BROMHEAD: I would like to talk about some operational matters. In the annual report you spoke about more arrests and charges generated by the Joint Counter Terrorism Team. Has there been an increase in terrorism charges? Does the Commission have a greater focus on counterterrorism now? If it does, does it affect other areas of the Commission's jurisdiction?

Mr HASTINGS: We have made a point of using resources to assist the Joint Counter Terrorism Team. We think we have a distinct role in which we can assist terrorism investigations of a domestic character. The background to this is that the Joint Counter Terrorism Team is a multi-agency organisation comprised of Federal agencies and state agencies. The Australian Criminal Intelligence Commission [ACIC] participates and has the capacity to hold hearings. We also think that we can assist—and have been assisting—by using our power to conduct coercive hearings. Ours are more directed to the domestic Curtis Cheng type of activities. We were quite active in that case. The arrangement is that the ACIC will use its powers in relation to the more Federal aspects of terrorism.

I think it is a significant role. We have some high-quality analysts who also work in the team. It seems to me to be quite appropriate for the Commission to be giving priority to such important criminal offences. I am not sure whether that answers your question. The number of offences is not something over which we have any control. The arrangement is that we will assist whenever circumstances are identified in which our coercive powers can be exploited. That is something which is out of our control. We certainly give priority to doing that if and when circumstances are brought to our attention.

The Hon. ADAM SEARLE: In the past this Committee—at least some of us—have asked you some questions about a People Matter Employee Survey of your organisation.

Mr HASTINGS: I thought it was only you.

The Hon. TREVOR KHAN: It was. What was the context of that?

The Hon. ADAM SEARLE: I was going to ask whether there has been a subsequent survey and what has it disclosed about how your organisation is travelling?

Mr HASTINGS: There has been a subsequent survey, late last year, after I appeared here. The results for the Commission were lower than the 2014 survey, which was lower than the 2012 survey—to a point where it is a matter of concern. The particular matters of concern were public-sector wide, according to the covering report by the Public Service Commissioner, in that in large part they stem from deficiencies in change management. We have subsequently set up a committee, under the chair of our Director of Legal Services, comprised of staff members from each division within the office.

They have gone about identifying what the staff perceive to be the problems in the way that we handle change. In large part it is a matter of communication. What we have tried very hard to do is to improve our level of communication with staff to ensure that they are kept up to date and given a right to be consulted when we are in the process of introducing change. I would like to think that circumstances have improved. At the time of this survey there was a concurrence of a number of factors which caused the staff to be unsettled. One was the introduction of the Government Sector Employment Act which, at that time, was causing concern.

The Hon. ADAM SEARLE: I will come to that in a moment.

Mr HASTINGS: Another was the fact that we had moved to an electronic document record management system, which was a major change from handling folders of paper, into electronic systems.

Another was difficulties with our IT system, which have been overcome, because we have been funded for a whole new IT system. There was talk of relocation because Property NSW had decided to sell the building and there was uncertainty as to where we would be located.

I was endeavouring to change the strategic direction of the commission but was not making much progress in my discussions with the NSW Police Force. All of these things had caused unrest and uncertainty. One of the positives out of the survey was the high level of response from our people. We had a response rate of something like 80 per cent to the survey, which compares to some others which are about 20 per cent or in that range. I think that is a reflection of the commitment of our people and their concern about any possible disruption to what they otherwise regard as a very successful agency.

The Hon. ADAM SEARLE: You said that you had been endeavouring to change the direction of the organisation but that you had met with difficulties from the NSW Police.

The Hon. TREVOR KHAN: Before this question is asked—I am certainly not suggesting that it is an inappropriate question—is it appropriate that it be asked in a public forum?

The Hon. ADAM SEARLE: None of this should be confidential. The report is public, I think. I am not going into anything that has been dealt with in any kind of confidential setting.

The Hon. TREVOR KHAN: All right.

The Hon. ADAM SEARLE: Obviously, if the commissioner feels concerned about answering any of the questions he can flag that. I guess I am focusing on what you regard as the strategic direction of your organisation and implementing the changes that you see as necessary. Correct me if I am wrong, but I think you were flagging that that was being impeded by another agency. I wanted to understand how that was impeding your changing the direction of your own organisation.

Mr HASTINGS: "Impeding" is probably not the right term. The reality is—as I think I described when I was here last year—that I have taken the view that because of the changes to the Act as far back as 2012, the focus of the commission needed to be on circumstances in which it could use its coercive powers. That had flowed into a change of operational emphasis because it was difficult to use the powers in relation to a current drug importation or something of that character. I think I indicated that, influenced by what I had observed from the Queensland Crime and Corruption Commission, the role of being a service provider to the Police was an appropriate one for the commission, in that the commission could use its coercive powers whenever the Police powers of investigation had run into a brick wall.

The Hon. ADAM SEARLE: It could be subcontracted to help them.

Mr HASTINGS: Yes, providing the tests for the issue of a reference were appropriate, which involved a broadening of the type of matters on which we could assist the New South Wales Police. It was simply a case that I had started with some fruitful discussions with Deputy Commissioner Kaldas when he was in charge of the State Crime Command and he then left before we could reach finality and it is only quite recently that a permanent change has been made to allocate responsibility for the State Crime Command which will enable those discussions to continue.

The Hon. ADAM SEARLE: So it was more just due to the Police's own internal reorganisation, rather than any kind of difficulty between the two agencies?

Mr HASTINGS: Quite so, there has been no resistance to it. Certainly Nick Kaldas embraced the notion that I was putting forward to him and in the few words that I have had with the new Deputy Commissioner there has been a similar enthusiastic response.

The Hon. ADAM SEARLE: Attraction and retention of staff, particularly your analysts, have you had any difficulties with that since our last oversight meeting?

Mr HASTINGS: No, not really.

The Hon. ADAM SEARLE: So you are confident that that is not an issue that in any way impacts upon your organisation's operation?

Mr HASTINGS: Yes, I am.

The Hon. ADAM SEARLE: You mentioned the Government Sector Employment [GSE] Act and I think you had previously identified the advent of that on your organisation as an issue of some concern to the staff. Are you able to tell us whether the implementation of that legislation in your agency has led to any practical difficulties or is it just merely working through the organisational change aspects?

Mr HASTINGS: The position was that when I was here last time there was an air of uncertainty about the impact that the Act would have, particularly in the transition of executives into the GSE Act structures. As I indicated then, I was giving myself legal advice by going back myself and looking at the Acts, regulations, by-laws and all the other documentation that was attached to it and I formed the view that the concerns which had previously been expressed were probably unwarranted. I then formulated, as required, a senior executive implementation plan on the basis of what I saw to be the fundamental premise of the Act, of there to be no financial disadvantage for executives who are moved from the old Act into the new Act. That was approved by the Public Service Commissioner and implemented by February this year, as required. The end result is that those senior executives who were caught by the Act have been moved into it, with the assistance of some SOORT determinations, at their same salaries. At the same time we have taken the opportunity to refine our hierarchical structure to improve the management flows. In the end I think it has worked out reasonably well.

The Hon. TREVOR KHAN: That protects your current staff. What is the impact, in terms of attracting replacements with the turnover that inevitably happens in any organisation?

Mr HASTINGS: There are two aspects of that. One is, what I have described so far really only dealt with the executives and the remainder of the staff still need to be brought more squarely within the terms of the Act. One of the difficulties is that the staff have had an ad hoc system of wage fixing. I had given them an assurance that I would endeavour to put it into a graded scale system which is more traditional in the public sector. The problem about that is that it will have an additional cost to the Commission which we simply do not have the funds for. So at the moment that is a long-term project which is not likely to happen soonish. The other side is that, at the moment because of the efficiency dividend reductions on our budget, the issue is not recruiting staff but culling staff. We simply cannot afford to maintain the same staff level under the continual efficiency dividends to which we are being subjected and if there is what we describe as natural attrition in the near future, then we will need to use that as a way of reducing our numbers without having to make people redundant or otherwise oblige them to leave.

The Hon. ADAM SEARLE: That will be most regrettable.

Mr HASTINGS: It will indeed. The other side of this is that the work that we now undertake has become much more resource intensive. I gave a bit of a speech last time I was here about the impact of organised criminals not using their phones in the way which enabled them to be intercepted in the past. They still use their phones but they use Blackberries and other encrypted apps, which means that they cannot be recorded or intercepted. That means that there is a very challenging task to extract data from the telephone intercept system which is very resource intensive. At the same time, organised criminal groups have become more sophisticated. We are now detecting quite polished networks dealing with money laundering and drug importations which are more difficult than ever to infiltrate and identify. Again, that is another imposition on our resources which makes staff levels very difficult and maintaining our effectiveness very difficult when our budget is being continually eroded by efficiency dividends.

The CHAIR: Thank you, Commissioner, for appearing before the Committee today. We may send you some additional questions in writing. Your replies will be part of your evidence and be made public. Would you be happy to provide a written reply to any further questions?

Mr HASTINGS: Of course.

The CHAIR: Thank you for joining us today.

(The witness withdrew)

(Luncheon adjournment)

JOHN MCMILLAN, Acting NSW Ombudsman, NSW Ombudsman, affirmed and examined

CHRIS WHEELER, Deputy Ombudsman (Public Administration), NSW Ombudsman, affirmed and examined

DANIEL LESTER, Deputy Ombudsman (Aboriginal Programs), NSW Ombudsman, sworn and examined

MICHAEL GLEESON, Acting Deputy Ombudsman (Police), NSW Ombudsman, affirmed and examined

The CHAIR: Good afternoon, before we proceed do you have any questions about the hearing process?

Professor McMILLAN: No.

The CHAIR: Would you like to make a short opening statement?

Professor McMILLAN: Yes, I will. Thank you for the opportunity to speak with the Committee today. I will cover three topics in my opening statement: the work of the Ombudsman's office over the past year; the transfer of the Ombudsman's police complaints jurisdiction to the Law Enforcement Conduct Commission [LECC]; and, the finalisation of the Operation Prospect investigation.

Firstly, the work and achievements of the office over the past year. The scale and impact of Ombudsman work is reflected in our interaction with the community.

In 2015-16 we received over 40,000 new matters, including: 15,000 relating to State and local government services; 3,000 about police; 1,700 about community services; and, 1,400 reportable conduct notifications. We had 300 training workshops in which 6,000 people participated across the State. We inspected the records of 400 controlled operations by law enforcement bodies. We celebrated the twentieth anniversary of the Official Community Visitors scheme, which supervises visits to more than 1,200 services that cater for children and people with a disability.

Our work is reflected in the reports we release. We released our second report on the New South Wales Government's approach to handling asbestos. The report commended the Government for implementing more effective regulation of asbestos use, particularly in the building industry and waste disposal. The report pointed to three continuing dangers: lack of regulation of home renovation of houses with fibro sheeting; lack of awareness of asbestos risks in remote Aboriginal communities; and, ineffective monitoring of James Hardie asbestos disposal sites. We released a report on fostering economic development for Aboriginal people in New South Wales. The report emphasised the need to tackle key barriers to workplace participation and business development. This report was referred to in the recent report of the Parliament on economic development in Aboriginal communities.

Since March last year we completed six legislative review reports on new policing powers for combating criminal organisations. Four of the reports have been tabled by the Minister. They dealt with firearms prohibition search orders, the declaration of restricted premises, the declaration of criminal organisations, and the use of the consorting law. For example, the report on the consorting law found that it had been used inappropriately against vulnerable groups such as the homeless, young people, people with no criminal record, and - in some regional areas - Aboriginal people.

Similar to our reports are our submissions. We have made submissions this year on a large range of important topics: the Public Interest Disclosures Act, the abuse of elderly people, the child protection system, establishment of a national integrity commission, and five submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse.

Our guidance material is a particularly effective way of developing robust administrative systems across the government and non-government service sectors. We released new and revised guidance material on investigating and reporting allegations of disability and child abuse. We launched a new video and tip sheet on person-centred complaint handling for disability service providers. We published the third edition of our "Good conduct and administrative practice guideline - Guidelines for state and local government - an internationally recognised publication.

We worked on other important projects in collaboration with other agencies. One is a new complaints portal on all government websites as part of our whole-of-government approach to complaint handling - a no-wrong-door practice. We finalised a joint protocol to reduce the contact of young people with a disability in supported accommodation with the criminal justice system. We are about to publish another joint protocol for dealing with child abuse allegations. We hosted a forum entitled "Addressing the abuse, neglect and exploitation

of people with a disability", attended by over 500 participants. We hosted four complaint handler practitioner forums attended by between 50 to 100 people at each forum.

I will now say a few words about oversight of police complaint handling. We had expected that the Law Enforcement Conduct Commission would commence on 1 January this year. That is yet to occur and no firm date has been announced, though Committee members will be aware that a Chief Commissioner has been appointed. In the meantime, the Ombudsman's office has continued to discharge our police oversight work, but with reduced staff. Many staff left on redundancy and other arrangements in anticipation of this function ceasing. We are currently working with a skeleton staff of nine people reduced from about 32 people. We continue to receive and assess complaints from the public and notifications from police. Committee members may be aware of a story published today in the *Guardian* online, which stated that the Ombudsman has not conducted a review of a police decision since last year.

The Hon. TREVOR KHAN: That was the article you sent me, Mr Searle?

The Hon. ADAM SEARLE: I sent it to all members of the Committee.

Professor McMILLAN: That article has been corrected online. It was a misunderstanding of information we had provided to the journalist.

The Hon. ADAM SEARLE: It has not been corrected. I just pulled it up and it is in the same form. I am looking at this very part.

Professor McMILLAN: Hopefully it will be corrected by the end of this session. The accurate picture is that we are not accepting applications for a review of a decision we have made. That is an internal review process. We are not accepting applications for review of police handling of complaints that are managed in the first instance by police without our oversight. Those are complaints about poor customer service or minor unprofessional conduct. Otherwise, all our functions are still being performed including receiving, examining and referring complaints to the police and maintaining oversight of police investigation of serious misconduct issues. The delay in the commencement of the LECC is clearly a matter of concern to us but a matter over which we have no control and limited knowledge.

Finally, Operation Prospect. The pleasing news is that a six volume 22 chapter report was tabled last December. Operation Prospect was a complex and at times controversial investigation, the largest single investigation by an Ombudsman in Australia. In launching the report I said it was my strong belief that when an Ombudsman's office is given a difficult task it will tackle it properly, professionally and with maximum transparency. I believe the Operation Prospect report met that standard.

The controversy has subsided but not entirely gone away. For that reason I decided to prepare a further report to the Parliament, tabled this week, on developments of the past five months. Those developments include responding to queries, preparing matters for referral to the Director of Public Prosecutions, participating in ongoing Supreme Court litigation that is challenging the validity of the report, and responding to criticisms—mostly telegraphed through the media—that we did not investigate relevant issues, went outside our terms of reference, victimised whistleblowers and misapplied the statutory test of unlawful conduct. The report tabled this week deals with all those matters.

One issue dealt with at length in the report is the criticism of the report made by the New South Wales Crime Commission. As Committee members will know, a central issue in this controversy has always been whether the commission—a government agency entrusted with forbidding coercive powers—properly supervised and used those powers during the Mascot investigations into police corruption in 1999 to 2002. The reason this was still an issue in 2012, and is still an issue in 2017, is that the commission has actively resisted external investigation of its conduct.

The Government asked the Ombudsman's office—an independent body with no involvement in the actions, no stake in the outcomes, no agenda—to conduct the investigation. In my view the commission's response to the Ombudsman's investigation has been unacceptable in so many ways.

It was unacceptable that on two occasions I should read in the media of the commission's scathing criticisms of our investigation, on one occasion before and on another occasion shortly after being formally informed of the commission's views.

It is unacceptable that the commission should publicly claim that our procedural fairness processes were a "grotesque injustice", when the commission chose to make five submissions totalling only 29 pages, partly repetitive, to a provisional statement of findings of nearly 1,200 pages in length.

It is unacceptable that the commission claims it can ignore this report on the basis that the commission was told in 2012 that it would not be allowed to cross-examine witnesses in the inquiry.

It is unacceptable that the most recent commission strategy was to attack me personally for bad faith, inherent bias, a lack of skills necessary for this inquiry task and for writing a report that in the commission's words is "bizarre, ridiculous, patently erroneous, inherently misconceived and completely without merit". Members of this Committee will be aware that I came to this task from outside the jurisdiction with no prior contact with any of the events, any of the agencies or any of the people.

But what is most unacceptable is that the commission flatly and categorically refuses to apologise to any of 17 people listed in the Operation Prospect report without explaining individually why any of them is undeserving of an apology. So much of this controversy has been played out in the public arena at a macro level on a sensational platform and involving major players in New South Wales law enforcement. But the sober reality is that there were a large number of anonymous individuals, minor players, who felt damaged and aggrieved by what had occurred. Three of them have written to the Ombudsman's office this week. "Thank you so much for having a go", one said, "It means a lot to me and no doubt others." Another offered, "Congratulations on your report to Parliament in relation to the unprecedented and inflammatory attack upon yourself and your staff. I fully understand your difficult task in investigating Mascot." And a third, "Good luck in presenting this to the Parliament without interference and prejudice."

As my recent report says, the responsibility of organisations to apologise when people are wronged has become a central principle of remedial justice. The acceptance of that principle over the past 20 years across Australia by public and private sector organisations has been a hallmark of institutional civility and accountability. The New South Wales Crime Commission stands alone and aloof from that trend. I invite the Committee to take a continuing interest in that point.

The final matter I should mention is that, as Committee members know, I held this position on an acting basis.

That will soon draw to a close. The Government is advertising the position of Ombudsman this weekend. Thank you for the opportunity to share these thoughts with you. My colleagues and I welcome any questions you choose to ask.

Mr PAUL LYNCH: In turning to the Law Enforcement Conduct Commission and oversight of police behaviour, have you been given any indication at all as to why five months later the Law Enforcement Conduct Commission [LECC] still has not come into effect?

Professor McMILLAN: No, we have not been. I must say, we have had frequent talks, both with government and with the Commission, to arrange the handover and three Ombudsman staff have now joined the staff of the Commission, and I have met a couple of times with the Chief Commissioner. But we are unaware of the precise reason why there is a delay in the commencement of the Commission.

Mr PAUL LYNCH: Sorry, granted that the substantive parts of the LECC Act have not been proclaimed yet, how can three people be employed by an organisation that does not exist?

Professor McMILLAN: I am not quite sure. The Act has been passed and the staff are over there. Let me say, there has been intense discussion about what the legal basis for the employment is. I know there are people behind me who have been involved in those discussions. I assume it has been done correctly. But they are not exercising the functions, and that is why we continue to execute the police complaint function. Michael, do you have more precise knowledge of the section of the Act?

Mr GLEESON: I think under the Act certain provisions to establish the LECC agency have been enacted. That is my understanding of the situation.

Mr PAUL LYNCH: I will have some pleasure in pursuing that in another place. Three of the staff have gone from the Ombudsman to LECC.

Professor McMILLAN: Correct.

Mr PAUL LYNCH: Your staff have been reduced from 32 down to nine in the police oversight section. Presumably that means there are a whole lot of things that the Ombudsman used to do that he cannot do now, you cannot lose that proportion of staff and continue to do exactly the same things you used to do. What are the sorts of things that are not being done now?

Professor McMILLAN: The sorts of things we used to do, for example, according to good Ombudsman practice, if somebody was disappointed with the way that we handled their complaint we would do

an internal review. We do not do that. The police, as you would be aware, have the responsibility in the first instance of investigating all matters. If somebody complained to us about a police handling of what they would regard as a customer service matter or professional matter, we would investigate it. We do not at the moment because we just do not have the capacity and are uncertain whether we could complete any investigation while we have jurisdiction.

We did have an active role in undertaking legislative reviews, and as I say, six reports in the last year. Of course, it is up to the Parliament to refer a matter for legislative review. Clearly, we are not doing it, and one issue is whether that function is reinstated. There are nine staff working very solidly and we still have regular contact with police outside the complaint handling jurisdiction in relation to our Aboriginal oversight areas, our child investigation reports and our development of the joint protocol for handling sexual abuse allegations against children. We are still actively discharging those functions.

Mr PAUL LYNCH: The other organisation that has a role in police behaviour is the Police Integrity Commission [PIC]. I would assume that the same phenomenon as has affected you is affecting them, that they would be losing staff and not being able to fulfil their traditional functions. Do you know about that?

Professor McMILLAN: No, I have no direct knowledge. You may be aware that the people operating under the umbrella of LECC are currently located in the PIC premises, but I have no direct knowledge of what investigations PIC may still be doing.

Mr PAUL LYNCH: The only other question I was going to ask, I might have misunderstood you in your opening address, am I to take it that there are some reports or reviews that you have given to the Minister that have not been tabled?

Professor McMILLAN: Yes, there are still two to be tabled. One is a report on name and place of duty, and another is a report on the counterterrorism powers. This report raised the issue of the degree of access that the Ombudsman would have to police records in order to satisfy itself and prepare a report for the Parliament, of it being an appropriate use (on a records basis) of those powers. Those are the two reports yet to be tabled, and we have no direct knowledge of when that may occur.

Mr PAUL LYNCH: This is my last question: Where is the litigation up to in relation to Operation Prospect?

Professor McMILLAN: It is currently before the Court of Appeal—that is the short answer—on a constitutional issue. To put that in context, the litigation commenced in December last year and sought an interlocutory order to restrain the Ombudsman from tabling a report that contained any references to Mr Kaldas. The interlocutory injunction was sought in advance of a more substantive hearing on whether there were legal flaws in the report. The court refused the interlocutory injunction, so the proceedings continue. The Ombudsman Act provides that proceedings cannot be commenced against the Ombudsman except with the leave of the court on the ground of bad faith. We drew attention to that in the proceedings and said there were no pleadings of bad faith. That has now been - on the application of Mr Kaldas - referred to the Court of Appeal on the constitutional issue or issue as to whether that provision still has operative force following the decision of the High Court a few years ago in the Kirk case, which held that the constitutional inhibition to Federal privative clauses had a flow-down effect to State privative clauses. The boundaries of that principle are far from certain. It has been listed for hearing in the Court of Appeal on 8 and 9 June.

Dr HUGH McDERMOTT: I have questions regarding the Child Death Review Team.

The Hon. ADAM SEARLE: I will return to Operation Prospect.

The Hon. TREVOR KHAN: What a surprise that is!

The Hon. ADAM SEARLE: I know everyone will be very surprised. Ombudsman, please update the Committee about where your office's referrals to the Office of the Director of Public Prosecutions [DPP] are up to, as far as you know.

Professor McMILLAN: We expect the referrals to be completed by the end of May. I have not announced the number of referrals in any of the reports because it becomes a little too easy for people to connect different parts of that report and identify names, but it is already clear that there are multiple referrals from my use of the plural. But yes, we have been gathering the material for a brief of evidence and we expect that all those briefs will go to the DPP by the end of May.

The Hon. ADAM SEARLE: In your most recent report, at 3.4 you talk about the issue of whistleblowers and Operation Prospect. I think it is a matter of record that at least one former senior police officer feels that—

Professor McMILLAN: Yes, correct.

The Hon. ADAM SEARLE: —part of the investigation into Operation Prospect was also the collateral investigation referred to your office by the Police Commissioner, which was about how certain information got into the public domain.

Professor McMILLAN: We took over, yes, the Police Commissioner's complaint on the issue.

The Hon. ADAM SEARLE: That is right. It has been suggested that your office has been more focused on the disclosure of information aspect than on the primary focus, referred by the Government, under the new provisions enacted to enable you to do Operation Prospect. What do you have to say to that?

Professor McMILLAN: We dealt directly with that issue in the recent report. On the top of page 14, and I refer here to figures given in the Operation Prospect report, it said that this issue of the events in 2010-12 occupied one Operation Prospect investigator part-time in 2013 and one investigator full-time with some administrative support in 2014. We estimated "between 10-20 per cent of the time in interviews and private hearings was devoted to the issue" and 12 per cent of the report deals with the issue. It is incorrect to assert, as it has been, that this became the major focus and diversion but, as this report explains, it was an element of the investigation from the very beginning.

There was never any uncertainty about that. Every foundation document for the investigation noted that this was a part of it. Indeed, it refers at footnote 73 to a document tabled in the Parliament in October 2012 which notes that this would be an element of the investigation. More important is the second paragraph on page 15. There are a large number of complaints from people who said, "This has to be investigated. I'm a person referred to in some of the documents that have been released, and I think it's been done with an agenda. It's damaging me. It's incorrect. I can't respond for a whole range of reasons." So it was inevitably a part of this investigation.

The Hon. ADAM SEARLE: Given what you have said and what is in chapter 3.4, in conducting the Operation Prospect inquiry have you formed any views about the effectiveness of the current form of the public interest disclosure legislation? A number of people say they are whistleblowers and say they have been targeted by your inquiry. I am wondering whether or not the imperfection of the current public interest disclosure legislation might be contributing to this disconnect between people who, on the one hand, think, say or assert that they are whistleblowers—and, taking a reasonable view, it seems that some of them are—but, on the other hand, are still being investigated.

Professor McMILLAN: I will make a brief comment and then I am sure that Mr Wheeler may elaborate. The criticisms that were made echo criticisms or allegations we often see—the misunderstanding that if I write a letter of complaint or if I make something that is called a public interest disclosure I am immunised from all administrative action. There is a quote on page 16. The PID Act declares that an object is not to prevent other administrative action and in particular it does not prevent proper inquiry into what was going on. There is an inquiry currently underway by this Committee into the PID Act, and we made a submission last year in which we did draw attention to a number of problems where we see uncertainty as to what conduct falls within the Act, of the difficulty with the test and the reprisal mechanisms in the Act, and the need for better understanding. There are problems but I would not draw the connection between those problems and the allegations that were made in Operation Prospect.

The Hon. TREVOR KHAN: But you would expect a senior police officer to have more than a passing knowledge of how the Public Interest Disclosure Act 2013 works, who it covers and who it does not.

Professor McMILLAN: Yes, I would. Mr Wheeler, would you like to elaborate?

Mr WHEELER: The issue of being able to take reasonable management action, no matter whether somebody has made a disclosure or not, is something I think we have recommended or suggested should be made explicit in the Act but, as the Ombudsman has said, the fact that somebody has made a disclosure—and in this case there is an issue about which organisation the actual disclosure was made to—does not preclude an investigation that might involve their conduct. It never has.

The Hon. TREVOR KHAN: And never could—

Professor McMILLAN: And never could.

The Hon. TREVOR KHAN: —otherwise it would simply frustrate effective investigation of anything.

Professor McMILLAN: It would be a convenient strategy for avoiding any detection or investigation of any kind.

Mr WHEELER: There is a specific provision of the Act which says that a disclosure cannot be made with the motive of avoiding disciplinary action, so claiming afterwards that no disciplinary action can be taken is, in my mind, equivalent to that.

The Hon. ADAM SEARLE: I turn now to pages 18 and 19 of your most recent report where you canvass the issue about whether your office was the most suitable vehicle for the Prospect inquiry. I am going to park that to one side. Based on your experience of taking over this and then finally discharging the office's responsibilities, do you have any views to share with us about whether that jurisdiction should be left in the legislation or whether it should be removed and other vehicles be found for like inquiries in the future?

Professor McMILLAN: I gave evidence on that issue last year. My evidence is essentially the same. Firstly, this is unlikely ever to arise in this form because we have no continuing jurisdiction over the Crime Commission or police. That jurisdiction rests with the Law Enforcement Conduct Commission [LECC]. That is not to say the LECC will not encounter issues of this kind. It is unlikely ever to arise with the Ombudsman again. All I have said is that if I was approached by government with the option of amending the Ombudsman Act to undertake an investigation of this scale with, the experience we have had we would have a deep discussion about what the scope of the investigation was, what the implications were, how it would be conducted within the office and whether it would be led by the Ombudsman or somebody who is appointed to the office to exercise delegated powers focusing squarely on this.

At the end of the day I keep reiterating that I think no organisation would have found this investigation easy. Indeed, it was referred twice to judicial officers before. I think it was a difficult investigation for any agency. We completed it and I think we did it to a very professional and high standard. There is no doubt it can be a distraction from a lot of the other work of the kind that I outlined in my introductory statement.

The Hon. ADAM SEARLE: A distraction that might be better avoided in the future, perhaps?

Professor McMILLAN: Yes.

The Hon. ADAM SEARLE: One of the controversies that arose in relation to Prospect, although not the central controversy, was about the efficacy of the process by which warrants were issued. I note that the subject of one of your recommendations to the Attorney General is to consider, for example, the creation of a public interest monitor or a like function. I note your report says that the department is considering that. Do you have any updates about that?

Professor McMILLAN: I am aware that they are considering it but I have got no update on when the Attorney General will formally respond. I cannot enlighten the Committee.

The Hon. ADAM SEARLE: You say that the police force has advised you that it accepted the recommendations to provide written apologies to former officers. Was that to all former officers who were the subject of this?

Professor McMILLAN: The recommendation was the police force apologise to two people essentially for the way their complaints were handled. Those apologies, I understand, have both been given.

The Hon. ADAM SEARLE: Do you know who those two persons were?

Professor McMILLAN: Yes, I do know who they are but they are anonymised in the report. Volume one of the report has a list of all recommendations and two of those recommendations are for apologies. So, yes, I am aware.

The Hon. ADAM SEARLE: Was one of them Mr Kaldas?

Professor McMILLAN: I will not comment on that. What I will say is that the apologies were to do with the way people's complaints were handled. I think if you look back at those apologies and go back to the sections of the report it will give you the picture of what the lead-up was and why it was to be given. There are some people you can rule out.

The Hon. ADAM SEARLE: It was not an apology in relation to being caught up in the original Emblems inquiry in the first place?

Professor McMILLAN: No, they were apologies directed to the Crime Commission.

The Hon. ADAM SEARLE: Although in the subject matter of the Emblems report it was not only the Crime Commission that was involved; it was also the NSW Police Force.

Professor McMILLAN: It was. Of course Emblems was established by the NSW Police Force so that it could deal with the complaints and allegations that it had received. Police Commissioner Moroney later in correspondence and evidence to us expressed great dissatisfaction that Emblems could not complete its task. There were a number of recommendations made by the interim Emblems report but nobody really gave those any weight because the view was that they were based on insufficient material to draw any proper conclusions. The only recommendations that really have any evidentiary support are those in the Prospect report.

The Hon. ADAM SEARLE: In chapter 5 of your most recent report you deal quite extensively with, shall we say, the interaction that played out at least in part in public between the Ombudsman's office and the Crime Commission. You seek to come to grips with the criticisms made by the Crime Commission. We have the situation where as recently as this morning the Crime Commissioner, who also gave evidence here, does not seem to be taking any backward steps from those criticisms. I note what you say in your report. I am not going to go through it chapter and verse, but where do we go from here?

The Hon. TREVOR KHAN: It would be fair to say that, notwithstanding your forensic probing, he did not seem to wish to maintain a dispute going forward. If the Ombudsman were to take from your question an impression that the gloves were off this morning that would be a bit unreasonable.

The Hon. ADAM SEARLE: That might be your view.

Mr STEPHEN BROMHEAD: It is certainly my view as well. He said he did not want to say anything that inflamed the situation and he did not want to delve into—

The Hon. ADAM SEARLE: I do not understand the Crime Commissioner to have resiled from any of the public criticisms he has made. He did say he did not want to go into it in great detail in the hearing but he did not take a backward step from having made those observations. I am trying to explore with this witness the relationship between the two institutions going forward.

Professor McMILLAN: I can remove myself from that debate by saying that, as this report says, we have no continuing jurisdiction in this area and it is not my intention to continue to be an active player in the debate. We still have some functions to perform; we still receive some inquiries. Really the only issue of any controversy going forward in which we will be involved is the issue of apologies. But, as I have outlined in the report, even there our function is very limited. It has always been the case that an agency can disagree with an Ombudsman's recommendation and refuse to give an apology. All we say is if it wants to do that it has got to explain, in reference to the recommendations and evidence that supports it, why it is not accepted.

I foreshadowed the only step open to me now if the Crime Commission does not engage any further with this is that I can consider the option of a further report to the Parliament under section 27. The Minister will then have to give a response on the record within 12 days and that will effectively complete the function. The other way it may play out of course is that any one of those 17 may complain to the Law Enforcement Conduct Commission when it has jurisdiction. But it is important to say that the Ombudsman's office has no wish to keep this alive or to continue playing any active role.

The only reason I have done this report is, first, to respond to the criticisms. I think it is very important that on the public report is a response to many of the criticisms so that it is understood that this was done thoroughly and this can be the end of it. Secondly, if a government agency on a categorical single basis says it will not accept any of our recommendations because we displayed bad faith or we lacked competence we will press the issue of our apologies.

The Hon. ADAM SEARLE: Essentially both of your organisations have said that this issue is now done and we are all moving on but we still have this unsatisfactory situation where there is a formal dispute about whether your office discharged its responsibilities properly.

Professor McMILLAN: There is still a formal dispute. That is why it is incorrect to say that this issue is all done. In fact, the report quotes Police Commissioner Moroney in evidence he gave to Operation Prospect. He said that he tried to get this resolved in 2002 by establishing the Emblems inquiry, but it came to nothing because the Crime Commission refused to provide documents. His feeling was that they thought that if we stopped talking about this it would go away. I ask the question: Would that still be the response; if we just said "issue closed" or "issue finished"? Would it will all go away?

The Hon. ADAM SEARLE: It has not so far.

Professor McMILLAN: That is because there are recommendations on the record that 17 individuals, who in our view were wronged, who have not received apologies. According to three of the emails that I read this morning, those people still feel strongly about it. I understand that, and they may wish to pursue it. However, the Ombudsman's office will not be campaigning on this issue. As I have already said, I am moving on. I could have added that I will not be applying for the vacant position.

The Hon. ADAM SEARLE: Thank you for that update, but I think we have all made that assumption.

Professor McMILLAN: The main substantive link with the Operation Prospect investigation will be leaving the Ombudsman's office.

The Hon. ADAM SEARLE: Thank you. My next question, which everybody will be relieved is on a completely different matter—

The Hon. TREVOR KHAN: We are not relieved; the honourable member can do what he thinks is best.

The Hon. ADAM SEARLE: Where are you up to in terms of the transition to the National Disability Insurance Scheme and the impact that that will have on your office's oversight?

Professor McMILLAN: We have a function at the moment under the disability reportable incidents jurisdiction. We have a unit of people who work in that area. Under the timetable announced by the Federal Government, the function that we have will merge into, or will be transferred into, a Federal agency in probably June 2018. There were some announcements on that in the budget the other day. The Department of Social Services has circulated consultation draft legislation. If the timetable goes according to plan, we will lose that jurisdiction in June next year when the new national quality and safety framework commences. There will be an agency for that purpose. The budget allocated \$200 million over four years, which is a budget of \$50 million a year, to administer the new framework.

The Hon. ADAM SEARLE: How many of your staff will that affect?

Professor McMILLAN: It will affect 30 staff.

The Hon. ADAM SEARLE: Full-time equivalents?

Professor McMILLAN: Yes.

The Hon. ADAM SEARLE: Is it your current expectation that they will be redeployed to other work roles within your organisation?

Professor McMILLAN: Our expectation is that many will go to the new quality and safety framework. That will be a new national agency, and there will be a transition process. We had 32 people working in the police oversight area, and only three of them have gone of their own choice to the Law Enforcement Conduct Commission [LECC]. Others have taken jobs elsewhere and in the office, and some have taken voluntary redundancies. It is hard to predict. I hope some will go to the new agency because there is enormous experience and skill in that area in the office.

The Hon. ADAM SEARLE: Is your organisation losing any budget as a result of that transfer?

Professor McMILLAN: Yes.

The Hon. ADAM SEARLE: How much?

Professor McMILLAN: I do not know.

The Hon. ADAM SEARLE: I am happy for you to take that question on notice. It is not a trick question.

Professor McMILLAN: I will. We will have lost over the past two years two substantial oversight functions with regard to the police and disability reportable incidents. We pick up little bits of work in other areas.

Mr PAUL LYNCH: I go back to the LECC and preface my question by saying that I think it has a statutory power to employ people in parts 1 to 3 of the Act, on assent, unlike the rest of the Act, which is still to be proclaimed. Three of your people are working in an organisation that does not have any functions to fulfil. Do you know how many other people are working there?

Mr GLEESON: No, we do not. We know that it has been recruiting, but we cannot provide the numbers.

Mr PAUL LYNCH: Granted that it does not seem to have any statutory functions to fulfil at the moment, do you know what it is doing?

Mr GLEESON: No.

Professor McMILLAN: Having established two agencies before, I know that there is an enormous amount of productive work that can be done developing guidelines, procedure manuals and new computing systems for case handling and so on.

Mr PAUL LYNCH: Hard brief well argued.

The Hon. TREVOR KHAN: There has been considerable controversy about how inquiries are run in terms of public hearings as opposed to in-camera hearings. Do you think with the benefit of hindsight that Operation Prospect would have been more effective if there had been public hearings?

Professor McMILLAN: I do not think it was practical to have public hearings in Operation Prospect because of the nature of the information involved. A good deal of the work of Operation Mascot was based on the assistance of three police informers who have never been identified.

The Hon. TREVOR KHAN: I think some of us had more than a fair idea of their identity.

Professor McMILLAN: One of the main complaints was from people who said they were listed on a warrant without any justification. To expose the evidence as to why they were listed on a warrant, which we found in the report was often unsatisfactory, would have done more damage rather than anything else. That said, it would have required an amendment to the Act to have public hearings. There is the option of having a more public profile in two ways: first, when you are dealing with the structure of the conduct of the Mascot task force and when there was a joint police task force that had already put a lot of information on the public record. You could probably have got some of the submissions and perhaps some oral evidence on the public record on that issue.

I accept that sometimes the advantage of a public hearing is that you draw attention to the dispute very quickly and clarify it. It is a concern that five years later the Crime Commission is arguing whether it had any responsibility for the Mascot task force. We are clearly of the view that it did, and that is well known. That kind of issue could probably be exposed on the public record, and you would get many people joining the debate, perhaps who have not joined it until now. Secondly, and again with hindsight, in the course of a four-year inquiry there was scope to make many more progress reports to the Parliament on what stage we had reached so that we were not exposed to the criticism of conducting secret star chamber investigations.

The CHAIR: Thank you for appearing before the Committee today. Members may have some additional questions, which will be forwarded to you. Your replies will be part of the evidence and will be made public. Are you happy to provide written replies to any further questions?

Professor McMILLAN: Yes, I would be happy to do so.

(The witnesses withdrew)

JOHN McMILLAN, AO, Convenor, NSW Child Death Review Team, on former oath

The CHAIR: You have already been affirmed so we will begin questions. Would you like to make an opening statement?

Professor McMILLAN: Yes, I will, thank you, Chair. I will touch on the work of the Child Death Review Team since our last meeting and focus on two reports that we tabled in Parliament in 2016. First, the Committee may be aware that we undertook a strategic planning process in the last year and provided a copy of the new strategic plan to the Committee, and that strategic plan for 2016-19 focuses on four areas. The first is delivering substantial and well-targeted projects with the aim of preventing the deaths of children; secondly, to enhance the infrastructure of the team, particularly on matters such as data capture and analytical and reporting capability; thirdly, to communicate with key stakeholders to communicate our messages more widely; and fourthly, to do sustained analysis and research on issues to do with preventing the likelihood of deaths of children. That is really the plan for the next four years.

I will now look backwards to the figures reported by the Child Death Review Team for 2015. The 2015 report was tabled in November last year. It is the last annual report on child deaths. In future, it will be a biennial report combined with our reviewable deaths function. We will still report annually on the work of the team, but the statistical analysis and recommendations will be contained in the biennial report. A few key features from the figures for 2015 is that we reported that 504 children—from birth to 17 years of age—died in New South Wales in 2015. That is a mortality rate of 29.61 deaths per 100,000 children. Pleasingly, that is the lowest annual rate reported by the team since it was established in 1996, so the trend line of child deaths is down. Of those who died in 2015, 81 per cent died as a result of natural causes and 19 per cent died as a result of injury. Of those who died as a result of injury—close to 100—just over half were unintentional injury; some were accidents, some were drowning. Then there were 34 deaths that were intentional, such as suicide and as a consequence of abuse.

While the overall decline rate of child deaths is positive, there are some sobering features. The death rate of Aboriginal and Torres Strait Islander children is 2.3 times the rate of other children, so 12 per cent of the children who died in 2015 were identified as being of Aboriginal and Torres Strait Islander background. Suicide is the leading cause of death for children in the 15- to 17-year-old group and the suicide mortality rate in 2015 was the highest since 1997. The infant mortality rate for sudden unexpected death in infancy, while it has declined since 2001, the rate has plateaued since 2008, so there has been no overall reduction there.

The report makes 12 recommendations and I will focus on three of those recommendations. The first is to do with vaccine preventable infectious diseases. We commissioned research last year from the National Centre for Immunisation Research and Surveillance. It identified that 54 deaths of children were due to vaccine preventable infectious diseases and of those 54, it is thought that 23 were preventable or potentially preventable had vaccine been available or administered to the children. Some of 54 that were not preventable, for example, the child was too young to be vaccinated.

The Hon. LOU AMATO: Are deaths of children not vaccinated high in the Indigenous population? Have you got a break-up of the statistics?

Professor McMILLAN: We do not have the break-up. We'll take that on notice and obtain a specific response. What the figures show is that vaccination and immunisation is important and can dramatically reduce the rate of child death.

The other area of concern and subject to recommendations is quad bike fatalities. There have been 10 child deaths in quad bike and side-by-side vehicle crashes over the past 10 years to 2015, with two deaths from quad bike incidents in the past year. Of the 10 children who died from quad bike or side-by-side vehicle crashes, seven were aged under 12. Eight occurred on private property. The picture is that quad bikes and side-by-side vehicles are inherently unstable. They are difficult to manoeuvre, particularly for a child, and that shows up in those statistics. The child can be tipped or flipped from the quad bike. The concern is that there is no legislative prohibition on children using quad bikes on private property, so we have recommended to the Attorney General in the report that this matter be referred to the Law Reform Commission for review to consider the introduction of legislation to prohibit any child under the age of 16 from using an adult-sized quad bike or side-by-side vehicle on private property or for recreational use.

The third area of recommendation is on sudden unexpected death in infancy. The work we have undertaken in that area over the years has identified difficulties with the investigation of sudden unexpected death in infancy—the investigation, that is—in the hours or days following the death of the child. Unless there is

a proper investigation at that stage and proper categorisation of the death, it is difficult to know what the problems are and how to address it. Our figures show that cause of death was unable to be determined for almost three-quarters of the infants who died suddenly and unexpectedly, so there are gaps in that area to be addressed. In particular, there is no centralised model in New South Wales for responding to sudden unexpected deaths of infants, no whole-of-government policy that regulates this. There are even difficulties with how things are classified in the statistics, and we have done some work that has now been circulating internationally to get agreed definitions on what the reporting categories are. That is the report from the team. Thank you for the opportunity to present it. I am happy to take questions.

Mr STEPHEN BROMHEAD: In relation to the Aboriginal infant deaths, have you been able to identify why there has not been the same reduction in deaths among Indigenous children?

Professor McMILLAN: It probably shows up particularly—and I can be corrected—in the deaths that are not intentional or the deaths of young children are sometimes for unexpected reasons, so that raises questions about the conditions of birth and dealing with early onset injury, prenatal injuries, and problems and so on within those communities.

Dr HUGH McDERMOTT: Your report stated that there were 26 deaths of young people attributed to suicide in 2016. Are you able to tell us if any of those deaths occurred when the juvenile was in custody?

Professor McMILLAN: No.

The Hon. TREVOR KHAN: Sorry, that is no you do not know?

Professor McMILLAN: No, there were not any, not that I am unable to answer.

Dr HUGH McDERMOTT: What about in foster care or State care?

Professor McMILLAN: There is a small proportion. We can provide the precise figure later, if that is handy.

Dr HUGH McDERMOTT: I would appreciate that. Secondly, recently we received documentation from the South West Sydney Local Health District in regards to deaths in the maternity ward at Fairfield Hospital—what we believe are child deaths—but we have no details on the deaths in the maternity ward in 2016. Are you aware of those deaths?

Professor McMILLAN: I am not personally aware.

Dr HUGH McDERMOTT: Or have you seen an investigation or information regarding that?

Professor McMILLAN: We are not aware specifically of those matters. Again, we can take that on notice and check our records to see.

Dr HUGH McDERMOTT: If you could please.

Professor McMILLAN: Sometimes things are reported under different headings and the deaths that you are thinking of may have actually occurred outside and been registered. We will have a look at that and see if we can identify them.

Dr HUGH McDERMOTT: If you do have any information I would appreciate it. The area health district has not provided any information on these deaths, or has refused to.

The Hon. TREVOR KHAN: Can I just ask about the protocols applying for sudden unexplained deaths? Are there any other jurisdictions in Australia where there is a model that is more appropriate than—

Professor McMILLAN: Yes, there are. Each jurisdiction has a framework for reporting deaths of children, and sudden unexpected deaths is one of the major elements. Some jurisdictions also have comparable bodies to the Child Death Review Team and there is regular interaction between them. Also, there are other bodies in this area as well. The Coroner gets to review some deaths, so there is overlap between what we are doing; there is overlap between our work and the work of the Department of Family and Community Services. I would like to think that our team has highlighted the problems in categorisation and definition and has taken the lead, in consultation with the other bodies, in trying to draft descriptions in categorisation for sudden unexpected deaths. It means then from jurisdiction to jurisdiction at least you are getting comparable statistics. At the moment you cannot even be sure that we are classifying deaths or approaching issues in the same way.

The Hon. TREVOR KHAN: So when in your report you refer to about three-quarters there is an unexplained cause, does that mean that it cannot be determined if it is intentional or unintentional, for instance, or is it that there actually is no, in a sense, physical evidence as to what the—

Professor McMILLAN: That is correct. It spans all possibilities. We look at matters that are registered as sudden unexplained death and if we see factors that cause us concern from our trending and mapping and we are aware of one incident we will draw that to the Coroner's attention and we will say, "Is this really a sudden unexpected death or could this come under another category of intentional injury?" But you start off with a cohort where it is registered as sudden unexplained death.

If a child dies, they may ring the police, they may ring the doctor and somebody comes and does an analysis, and in part that is why our recommendation is focused on the need for proper protocols and investigation at that stage. It could be that the reason there is such a high number—three-quarters of unexplained deaths—is because of inadequate investigation and detection of problems shortly after the death of the child. My colleague was just saying it is important to look at the paediatric history at that stage to see whether there are links to anything else.

The CHAIR: You mentioned deaths relating to non-vaccinations. Is there an area where that is prevalent? Because I know the herd scenario of vaccinations is that most are vaccinated and it protects the majority. Is there an area in New South Wales that that does not relate to?

Professor McMILLAN: I am not quite sure. I am just looking at the section of our report that says, "54 confirmed and probable cause—the highest number of deaths was in infants under six months of age, with male children overrepresented, while most deaths occurred in major cities. The highest per capita mortality rate was in regional areas and meningococcal disease deaths tended to occur more in children residing in regions of greater disadvantage".

I mentioned earlier that one of the themes in our strategic plan for the next three years is to improve our data analysis and capture, and one of the issues on which we want to concentrate more is whether there is a locational pattern for that. It is an issue that is constantly raised within our CDRT discussions about whether if there are distinct patterns in location then that tells you something indeed. We had a presentation recently on that; a person from the Australian Institute of Health and Welfare had been trying to map that locational issue as well. So there could be a more important picture there yet to be uncovered by a proper statistical collection and analysis.

The Hon. TREVOR KHAN: With respect to youth suicide, are you able to identify whether there are any trends or emphases in terms of where those are occurring? I am not suggesting more on the south coast than wherever, but are they disproportionately regional as opposed to city-based, for instance?

Professor McMILLAN: My colleague tells me it is difficult—it can fluctuate; it is difficult to get an exact pattern. But, again, if it would help the committee it is one of the things on which we are prepared to provide a supplementary statement of information.

The Hon. TREVOR KHAN: I would be most interested, and, if you can, I would be grateful if you could identify if there are any trends in terms of Aboriginal youth suicide rates in that as well.

Professor McMILLAN: I thank the committee for the interest in the work of the team; it is very important work, as our questioning today indicates.

The CHAIR: Thank you for appearing before the committee today. We may send you some additional questions in writing. Your replies will be part of your evidence and will be made public. Would you be happy to provide any written reply to any further questions?

Professor McMILLAN: Yes, we would be happy to do so.

(The witness withdrew)

The Committee adjourned at 14:37