

**REPORT OF PROCEEDINGS BEFORE**

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

**EIGHTEENTH GENERAL MEETING WITH THE OMBUDSMAN**

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**At Sydney on Friday 22 February 2013**

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**The Committee met at 1.30 p.m.**

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**PRESENT**

The Hon. C. Cusack (Chair)

**Legislative Council**  
The Hon. S. Mitchell  
The Hon. A. Searle

**Legislative Assembly**  
Mr L. J. Evans (Deputy Chair)

**CHAIR:** Before proceedings commence, I ask everyone to switch off their mobile phones because they can interfere with the Hansard reporting equipment. If your phone is on silent, please switch it off completely.

I now declare open the Committee's general meeting with the Ombudsman. In accordance with sections 31B(1) of the Ombudsman Act 1974, the Committee monitors and reviews the Ombudsman's exercise of his functions, examines the annual report and the other reports made by the Ombudsman presented to Parliament, and reports to both Houses of Parliament. On behalf of the Committee I thank the Ombudsman and Deputy Ombudsman for appearing here today. Can I clarify this point? You have returned answers to questions on notice from the Committee. Are you happy for those answers to be published?

**Mr BARBOUR:** Yes, absolutely. Indeed, they already have been.

**CHAIR:** Can you please confirm that you have each received a copy of the Legislative Assembly standing orders that relate to the examination of witnesses?

**Mr KINMOND:** Yes.

**Mr WHEELER:** Yes.

**Mr BARBOUR:** Yes.

**Ms WAUGH:** Yes.

**LINDA WAUGH**, Deputy Ombudsman Police and Compliance,

**BRUCE ALEXANDER BARBOUR**, Ombudsman,

**CHRISTOPHER CHARLES WHEELER**, Deputy Ombudsman Public Administration, and

**STEVEN JOHN KINMOND**, Deputy Ombudsman, Community and Disability Services Commissioner, affirmed and examined:

**CHAIR:** Thank you for appearing before the Committee today. The Committee may wish to 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 a written reply to any further questions?

**Mr BARBOUR:** Absolutely.

**CHAIR:** Mr Anderson has made an apology. He has had to leave early because of the storms in Tamworth; he thought he should return home. You know all of the other Committee members.

**Mr BARBOUR:** I do, indeed.

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

**Mr BARBOUR:** Yes, with the indulgence of the Committee, I will be happy to do so. I am very pleased to appear before the Committee for its eighteenth general meeting with the Ombudsman. There has been a relatively short amount of time since our last meeting in June and the Committee's report issued in December. This has meant that there has not been a great deal of change in relation to the broader issues discussed at our last meeting. This does not mean that we have not been busy. The past six months has seen us complete some extremely challenging, important and influential work. I do not wish to take a great deal of the Committee's time, but I thought it would be helpful to touch briefly on some of this work, and of course we are happy to answer any questions that the Committee wish to ask us.

I reported to Parliament in July following an investigation into the management of asbestos and other hazardous materials in police buildings across New South Wales. There are approximately 1,350 properties across New South Wales in which police officers and civilian employees work and in which their families live. They should have confidence that hazardous materials in their houses, offices and stations will be identified and either removed or managed safely. We found that this was far from the case, with a range of parties involved in inspecting, identifying and managing asbestos not performing their allocated roles, often as a result of confusion over the division of responsibility.

This confusion largely arose from the outsourced contractual model and can and has had a real impact. Many of these buildings are very old and in a poor state of repair. More concerning is the fact that, as a result of their age, many contain hazardous building materials such as asbestos and lead. The report contained some disturbing examples, including one family of an officer that had been exposed to dangerously high levels of lead. Elsewhere, modifications were completed by staff to a building at a training site that had asbestos fibres within its walls, but the staff had no idea. These are the kinds of situations that can and clearly should be avoided. Both the Minister for Police and the Police Commissioner are committed to change. I am informed that all of my recommendations are currently under consideration by Cabinet and we will continue to monitor that situation closely.

Prisoners in New South Wales have a right to be treated according to the law and with dignity. They should not be subjected to unnecessary and excessive use of force. I reported to Parliament in July on two separate but related investigations into the use of force and the subsequent investigation and response to the use of force in New South Wales correctional centres. The report outlines our findings in an earlier broader investigation into the use of force with specific comments following an investigation into the circumstances surrounding a single instance.

We have recommended a number of changes to relevant procedures for the management of the use of force as well as processes in place to investigate and take action following a use of force. Most importantly, we have recommended a review of closed circuit television systems in all centres and facilities. The footage that we

were provided was often corrupted, of poor quality and inconclusive. Clear, well-recorded footage is a vital accountability measure to allow for effective review and investigation, but it can also help to demonstrate when use of force was justified and appropriate and is in the best interests of both prison officers and prisoners.

New South Wales mental health and disability legislation and United Nations principles emphasise that people with mental illness and psychiatric disability have the right to live in the community and to receive support in the least restrictive environment possible. However, a recent investigation by my office has found that many people are being kept in mental health facilities beyond the point they need to be there. We found a lack of appropriate community-based accommodation and support and the exclusion of people with a primary diagnosis of mental illness from accommodation funded under the Disability Services Act. They are critical factors affecting the ability of mental health inpatients to move into the community. We also found a number of barriers to discharge within the mental health system. Detailed responses to our recommendations from the both the Department of Health and the Department of Family and Community Services are due at the beginning of next month.

At our last meeting I discussed our review of the use of taser weapons by the NSW Police Force. As I noted then, this was a substantial piece of work and project undertaken by my officers, who analysed data on 2,252 taser uses between 1 October 2008 and 30 November 2011, and reviewed in further detail 556 of those taser use incidents. This involved reviewing the taser cam footage and supporting documents, including the records of the taser review panels for each of those taser uses. We found that in a majority of cases the taser use was justified. However, out of the 556 that we looked at in detail, there were 53 instances where an officer using a taser in draw-and-cover mode failed to meet the criteria and in 27 cases members of the public were subjected to taser use when they should not have been.

Police officers work in difficult and often dangerous situations and have to have methods of dealing with serious situations as safely as possible. However, tasers are weapons and as such should be used only to avoid serious injury. They should always be used responsibly and in line with appropriate and reasonable procedures. We have identified areas for improvement in the NSW Police Force's internal accountability system relating to taser use. These changes will be essential to ensuring community confidence in the ongoing use of tasers by police. We made a total of 46 recommendations. As I noted in my answers to questions on notice from the Committee, the NSW Police Force has supported all but two of these in full and has provided us with a timeframe for implementation. We are actively engaging with them on this issue.

For the past three years, my office has been auditing the implementation of the interagency plan to tackle Aboriginal child sexual assault. We have issued four reports during the course of the audit, the last of which was tabled by the Minister for Aboriginal Affairs just a few weeks ago on 31 January. Our audit placed a spotlight on the capacity and effectiveness of a range of frontline services for all child sexual assault victims. In addition to the Department of Community Services' ongoing staffing shortages in high-need locations, NSW Health's sexual assault services are simply unable to meet the current demand for counselling.

The multiagency vehicle responsible for responding to child sexual abuse—the Joint Investigation Response Team—is also facing serious statewide resourcing challenges and is unable to cope with demand. While we recommended targeted funding in certain priority areas, this must not simply involve allocating more money to existing programs. There needs to be effective planning, allocation, implementation and review to ensure that the intended results are being achieved and money and services are being put where they are needed most.

These large-scale investigations and projects are, of course, not the only work my office has completed since we last met. We have received more than 5,000 complaints and dealt with more than 17,000 inquiries and matters informally. We have also provided 113 training sessions to more than 12,000 public sector staff, non-government service providers and private sector clients. As these large-scale projects and our ongoing workload demonstrate, and as the Committee noted in its last report following our meeting, we continue to complete a great deal of work despite facing a number of ongoing pressures.

Importantly, we also continue to look outside of our own processes and jurisdiction to better inform the way we do our business. I meet with other Australian Ombudsmen once a year and we have maintained our involvement in the International Ombudsman Institute. At the end of last year I attended the quadrennial institute world conference in Wellington and was encouraged by the level of respect in which our office is held by other officers from around the world. We are certainly seen as leaders in areas such as best practice in complaints handling. Deputy Ombudsman Wheeler was invited to provide training to ombudsman staff from

across the world in managing unreasonable complainant conduct and the response to those sessions was very positive. Other ombudsman officers continue and regularly seek our advice on the challenges and opportunities of change in jurisdictions, particularly around areas of greater responsibility for non-government service providers.

The year ahead promises to be another challenging one. For example, we are in the early stages of a particularly comprehensive investigation we have called Operation Prospect into serious allegations relating to the NSW Police Force, the New South Wales Crime Commission and the Police Integrity Commission. These have been the subject of substantial comment in the media and in Parliament. As I am sure the Committee can appreciate, given the nature of these matters I am somewhat limited in what I can say. However, I can indicate that we have required the production of a great deal of information from the agencies involved and have to date received close to 1,350 boxes of information with more to come.

We have created a separate operating environment and a purpose-built investigation database. These operate separately from our office-wide systems to ensure the integrity and security of the information that they now hold. We are in the final process of scanning all of the information that we have received to allow for efficient and effective interrogation and analysis and use of that information. We are in the process of recruiting the specialist staff needed to conduct the investigation. An operation director has been appointed and we will soon have additional investigators on staff. The investigation will not only be independent and impartial but also thorough. I thank the Committee for the opportunity to appear. My senior staff and I are very happy to answer any questions.

**CHAIR:** What was the name of the operation?

**Mr BARBOUR:** Operation Prospect.

**CHAIR:** Does it have a budget? If so, what is it and is it sufficient?

**Mr BARBOUR:** We sought funding for the operation. Obviously it was a very difficult process to determine what funding was necessary and it was out of the traditional budgetary cycle. We have received a grant from the Department of Premier and Cabinet for 2012-13 of approximately \$1.57 million for recurrent expenses, \$1.168 million for employee-related expenses and approximately \$400,000 is for capital expenditure. For 2013-2014 we estimated that we will be seeking just slightly in excess of \$2 million in recurrent expenses of which \$1.547 million will be employee related. We do not anticipate any additional capital expenditure in that period. We will be proceeding to provide details about the financial requirements for the 2013-14 year to Treasury shortly and to the Expenditure Review Committee.

**CHAIR:** The total budget is in the order of \$3.5 million?

**Mr BARBOUR:** That is at this stage, but we don't have any clarity at this point about when the operation will conclude—that is what we foreshadow to date.

**CHAIR:** You envisage it will take two years?

**Mr BARBOUR:** We do not know. We estimated and sought funding on the basis that we thought it could; to be on the safe side. We did not want to have to go back midway through and ask for more money during a particular year. We have tried to cover that. We hope that we will conclude the investigation before then, but obviously if we do not we will need to go back for further funding.

**CHAIR:** With additional information still coming in is it difficult to scope what the cost will be?

**Mr BARBOUR:** It is. The amount of information that has been returned on the basis of our summons has been extraordinary. We are literally talking about hundreds of thousands of pages and tens of thousands of documents and recordings and various other things.

**CHAIR:** The mind boggles.

**Mr BARBOUR:** The scope of the project is enormous. One aspect that has obviously been our focus to date is on making sure that we have the right capital, systems and personnel in place to work on the

investigation. Certainly if this is an area of interest to the Committee I have some steps that we have gone through that I can take the Committee through in terms of what we have done thus far in preparing for this.

**CHAIR:** The Inspector of the Police Integrity Commission this morning strongly endorsed the inquiry that you are undertaking in the interests of finalizing this matter. Obviously we support everything that you are doing and thank you for it. I realise that aspect of the investigation is an enormous administrative task. Thank you for sharing the information you have with us and we look forward to hearing more in the future.

**The Hon. SARAH MITCHELL:** Obviously with the changes the amendment that was passed in November last year introduced opportunity has opened up for you to undertake this inquiry. Do you envisage that there will be any instances or occasions in the future when you will need to conduct similar inquiries? We are looking at \$3.5 million for this one and potentially more depending on the magnitude the inquiry. I am trying to ascertain whether or not this is going to be something that we are going to have to be aware of that in the future. There may be other times when this money is going to have to be found for similar inquiries under this new amendment.

**Mr BARBOUR:** Let me answer that in a number of ways: First, one would hope this is an exceptional set of circumstances. I would preface my remarks on the basis that this is an unusual set of circumstances involving multiple agencies and that is very rare. The amendments that have been provided, particularly in relation to the schedule, which now give us the capacity to receive matters referred from either the Police Integrity Commission inspector or the Crime Commission inspector and to review them would, if left in our Act—and there is no suggestion that they will be removed—certainly mean it is possible for us to look at other matters. The scale of this inquiry and the nature of it involving the three agencies that I have identified are most exceptional. I think it would be very rare, but certainly it is possible; or a matter involving one of the agencies could possibly be the subject of a referral.

**CHAIR:** In the course of the legislative amendments facilitating this investigation has the Ombudsman acquired new powers?

**Mr BARBOUR:** Yes, in one sense, and no perhaps in the way you are asking. Let me explain: We basically have all of the previous powers that we always had to conduct the investigation. In other words, we have the full suite of Royal Commission a power that we have always had available to us to conduct investigations and to exercise those powers and that is what we will be using in this investigation. Where the difference in power comes from is that we are now able to compel the Crime Commission and also the Police Integrity Commission to provide information and/or evidence to us for the purposes of those inquiries.

Prior to the amendments we did not have the capacity to do that. We could inquire into a matter referred to us by the Police Integrity Commissioner into the Police Integrity Commission but we could not compel them to provide evidence or to provide documentation. Clearly, that would have been an impediment to a successful investigation in this matter and we had no jurisdiction in relation to the Crime Commission prior to the amendments. That is why I answered your question in the way I did. In terms of actual powers we do not, except in relation to requiring secrecy in relation to any evidence given during the course of the hearings.

**CHAIR:** Is the power to compel witnesses specific to the Police Integrity Commission and the Crime Commission or is that a power available to you now?

**Mr BARBOUR:** We normally have that power with all public authorities that we have jurisdiction over for the purposes of the exercise of Royal Commission powers, but we did not have it in relation to the Police Integrity Commission or the Crime Commission.

**CHAIR:** Why is that?

**Mr BARBOUR:** We normally did not have any jurisdiction at all over the Crime Commission so that needed to be amended to facilitate this inquiry. There was a bit of a lacuna with the Police Integrity Commission because with the introduction of a Police Integrity Commission inspector referrals could be made to us about matters, indeed to any agency he thought appropriate. Under the legislation we could conduct an investigation into those matters but the Police Integrity Commission was not required to comply with any of the requests that we made and they were noncompellable. They were able to provide information if they chose to do so, but if they chose not to do so that was potentially going to be a problem. That problem has now been removed.

**CHAIR:** In the course of removing that problem are you able to compel other people as well as the Police Integrity Commission and the Crime Commission?

**Mr BARBOUR:** We have always been able to do that.

**CHAIR:** In relation to the public sector?

**Mr BARBOUR:** Yes, and private. Anybody. We have a full suite of Royal Commission powers unless they are specifically excluded by way of want of jurisdiction over a particular agency.

**CHAIR:** Are you saying that the Police Integrity Commission and the Crime Commission were specifically excluded?

**Mr BARBOUR:** Yes, from compulsion. The Crime Commission was completely excluded, the Police Integrity Commission was not excluded from investigation but we could not compel them during the course of any investigation, which has now been remedied.

**Mr LEE EVANS:** Thank you for coming along today, it is greatly appreciated. At the last general meeting you proposed a grouping of all independent integrity agencies so you could negotiate directly with Treasury on budget matters. Has there been traction made on that proposal?

**Mr BARBOUR:** At this stage the integrity agencies are not being dealt with as a group entity, but I am pleased to advise that since our last meeting there have been meetings between Treasury and Premier and Cabinet discussing the special nature of integrity and watchdog accountability agencies and the need for them to be appropriately and independently dealt with around budgetary issues. To that extent Treasury is dealing with our agency—I cannot speak on behalf of the others—much more as an independent agency. Indeed, my head of corporate and I are meeting with Treasury and other people shortly before the expenditure review committee, to go through our Treasury needs and issues. That is a very positive sign.

**The Hon. SARAH MITCHELL:** In your opening statement you spoke about asbestos in police housing. I think it was in 2010 when you reported into the asbestos problem and you talked about Woodsreef mine. We might have discussed that when you appeared six months ago. Has there been an update, in terms of the remediation work, that you can tell the Committee about?

**Mr BARBOUR:** I can indicate to the Committee what our current understanding is and that is that there has not been any actual remediation work undertaken. As we indicated to the Committee on the last occasion there was a lot of conflicting concerns around how that might take place and there were discussions going on at a State government and local government level and there were community issues raised. Since that time a colony of bats has been identified having taken up residence in the Woods Reef Mine and now there are negotiations with the Commonwealth about the protection of the bat colony. As a result, no further work has been done. We are a little bit concerned that the protection of the bat colony appears to have taken precedence over the protection of human life but, nonetheless, those issues are progressing but very, very slowly. We are continuing to monitor them.

**CHAIR:** It cannot be very good for the bat colony either.

**Mr BARBOUR:** I am not sure but I imagine not, no.

**Mr LEE EVANS:** Pay them compensation and there will not be a problem.

**The Hon. ADAM SEARLE:** You raised with the Corrective Services Commissioner the issue of what your office considered to be the inappropriate use of the separation provisions in the administration of sentences legislation following an inmate's complaint that he was to be removed from segregated custody and put on separation which would remove his right to second independent review of the direction after 14 days. Were you satisfied with the commissioner's response? What observations do you have to make of that?

**Mr BARBOUR:** If I could deal with that both specifically and generally by saying that we now have a new commissioner, and very recently appointed new senior staff within the Corrections agency. The level of co-operation, negotiation and discuss with that agency has improved dramatically. We are now getting advanced notice of changes. Any issues that we raise are being taken up very promptly and we are getting prompt

responses. There seems to be a much greater willingness on the part of the new commissioner to engage effectively with the office, and recognise that we, in fact, have the capacity to not only, on the one hand, exercise formal powers but, on the other hand, add value to the organisation.

In terms of that particular issue and a range of issues which relate to the disciplining of prisoners, we have taken those on board and we have got reasonably good responses from the agency. Recently we have been advised that they are setting up a working party to look at all disciplinary issues under the Crimes (Administration of Sentences) Act which I think will be a very positive review, and we will be able to work with them to ensure that some of these issues are dealt with more effectively.

**CHAIR:** When the Inspector of Prisons is appointed will it have any impact on your role and work? How do you envisage a relationship, if any, with him or her?

**Mr BARBOUR:** It will be interesting. I think I indicated to the Committee during previous evidence that we did not see the need or real benefit for a separate agency to be set up. We thought that the inspectorate role and what was envisaged for that agency could have been contained in an expanded Corrections unit within my own agency and that there was the risk, as a result of duplication, but more importantly, I think, confusion. One of the issues that was identified when the first inspector was reviewed and a decision taken not to continue with that model was that for those within the Correctional environment there was a great deal of confusion about who you went to for particular issues and who was responsible for dealing with problems, and the like.

I think we have indicated, given the Government's decision to create the inspector, that we would obviously work as constructively and co-operatively as we could with a view to ensuring that there was as little duplication as possible. We were consulted about the legislation prior to it being introduced and we had the opportunity to provide input to that—not all of it was taken up but some of it was. Of course, notwithstanding the passage of that legislation there is yet to be an appointment made and I am not sure of the reasons why that is so.

The only area where I think there may be potential risks is in relation to the introduction of a monitoring scheme under OPCAT. I think that there will be challenges if, as indicated during the reading speeches, the plan of making the inspector the monitoring agency for custodial environments under OPCAT. That is likely to cause problems because we do not believe that that would be seen as being sufficiently independent to meet the requirements of the protocol under the United Nations charter. It also concerns us because we think it is in the best interests of that process working properly to only have, wherever possible, a single agency doing all of the inspections across multiple areas.

Obviously we visit Correctional institutions on a regular basis, as we do police cells, mental health facilities, child out-of-home care facilities and so forth, all of which will be caught by OPCAT.

**CHAIR:** What is OPCAT?

**Mr BARBOUR:** The Optional Protocol to the Convention Against Torture which is being signed, but not yet ratified by the Australian Government. It will commit the Australian Government and therefore the States to a monitoring regime for all facilities where people are housed against their will to ensure that they meet guidelines and the appropriate requirements of the United Nations.

**CHAIR:** I will come back to that because it seems a very significant change for a large number of agencies given the number of facilities not only in Justice but also in Health, Police.

**Mr BARBOUR:** Correct. It has been fully introduced and has been operational in New Zealand for some time. As you know, New Zealand has a population about the size of New South Wales, maybe a bit less. It has generated an enormous amount of work for a number of agencies—Human Rights Commission, the Ombudsman, the Prison Complaints Authority and others. Certainly in observations that they have made about the introduction of it, it is extremely resource-intensive to meet the requirements of the United Nations.

**CHAIR:** Is that administrative requirements?

**Mr BARBOUR:** Absolutely, and just the visiting requirements and the inspections because there have to be regular inspections conducted of these facilities. It will be made all the more difficult in a country like Australia because of the vast distances involved and the fact that facilities are so spread out. If you just look at



police cells, for example, or Correctional institutions, they are scattered all around the State and to conduct regular inspections is physically a quite onerous and time-consuming activity.

**CHAIR:** Is it necessary?

**Mr BARBOUR:** The visits or the OPCAT?

**CHAIR:** OPCAT.

**Mr BARBOUR:** I do not think I would want to pass a comment on that. OPCAT, as far as I am aware from my research, was introduced because the United Nations had concerns about the quality and human rights conditions that attached to areas where people were detained in certain countries around the world. As many United Nations Protocols are introduced, signatories to them are not only those where there are problems but also those where there are probably less problems in place, such as New Zealand and Australia. We already have fairly significant monitoring and examination processes but none that are quite as complex or will offer, if you like, the degree of consistency that this will.

It is envisaged, I think, given the State's responsibilities for so many of these areas to have monitoring mechanisms within each of the States. They would then report to a central national body—quite possibly the Human Rights Commission or alternatively the Commonwealth Ombudsman, that is yet to be determined—and then that body would then work with the Commonwealth Government in terms of reporting to the United Nations. There are very specific requirements that need to be met and observers and delegates from the United Nations who work in this particular area can come and visit the countries and ensure that the inspections are being undertaken appropriately.

**CHAIR:** Correct me if I am wrong that a regime of reporting requirements that could work quite well in Guantanamo Bay will also be applied to the unit for the confused and elderly disabled people in, say, Port Macquarie?

**Mr BARBOUR:** The reporting requirements would be similar but obviously the issues that would be looked at would be different depending on the nature of the particular facility.

**CHAIR:** I understand that. I am not so concerned about the investigation or any action that might arise, I am actually concerned about the obligations of the facility to comply with something that is really not going to be good value in terms of improved consumer outcomes for their facilities.

**Mr BARBOUR:** My understanding was that Australia signed up for the protocol without there being a great deal of consultation and discussion around the States. It was signed off by the Commonwealth. I think part of the reason why it is yet to be ratified, and why it is unlikely to be ratified for some time, is the complexity now of trying to deliver.

**CHAIR:** Understanding the resource implications of it. New Zealand is obviously a help in that regard. Has New South Wales estimated the cost?

**Mr BARBOUR:** I do not know. I understand there has been some work done by Premier and Cabinet and they are in consultations with the Commonwealth. Because the Ombudsmen throughout Australia are heavily involved in agencies that are likely to be the subject of inspection, we have all had discussions. We have written jointly about the appropriateness of our role in relation to this to a Federal standing committee that was looking at certain issues. My understanding is that there are discussions at the Premier and Cabinet level about how this might be undertaken within New South Wales. Certainly we were conscious of the references to it during the course of the introduction of the Inspector of Corrections model and that was why we were a little bit concerned.

**CHAIR:** Can I ask you on notice to provide the Committee with more information that you may have about it because we should consider making inquiries of the Premier about this matter? Is this one of those issues that you would not want to slide through without proper scrutiny—

**Mr BARBOUR:** No.

**CHAIR:** It is not just government agencies; there would be many non-government agencies impacted as well by these requirements I would imagine—drug rehabilitation facilities, community groups who are providing remand services to young Aboriginal detainees; there is an enormous range of facilities that could technically fall under the requirements and be very severely impacted?

**Mr BARBOUR:** I share the Chair's concern. We have done a fair bit of work in relation to this obviously. I am more than happy to provide you with some of our summaries of what is likely to be involved, the sorts of areas that we think are going to require inspection. I am also happy to provide the Committee with a copy of the letter that the Ombudsmen provided to the Commonwealth for the purposes of their inquiry.

**CHAIR:** Thank you. That is very much appreciated. At this point we might seek to raise awareness of the problem in support of the work that you have done on it. In your opening remarks you referred to poor quality video footage in our prisons. Without wanting to traverse across an inquiry that is currently being conducted by PIC into an incident at Ballina police station, I was astounded to discover that an issue in relation to that evidence was that Ballina police station has an old-fashioned video recorder which just gets recorded over and over again when the standard at not great expense would be to have a digital system. As I understand it, it is not expensive; the cost of these has come down such that people are going into hardware shops, buying them and sticking them up in their own houses as security. Can you comment on that? I do not understand why any prison or police station would not be accessing modern digital monitoring equipment which is freely available and is not very expensive?

**Mr BARBOUR:** Certainly we thought that the recording and CCTV systems at prisons would universally be of better quality than what we experienced in that particular investigation. I am heartened to some extent to say that the system that was in place in that particular centre was one of the least modern and updated systems available in Corrections. Certainly that system was in black and white; it was a very slow recording system. As a result of it being particularly slow and not necessarily set up in the right places either with cameras, the quality of the footage was not particular good and, as we said in our report, that footage is a prime accountability ingredient in terms of not only protecting prisoners but also protecting prison staff.

**CHAIR:** Exactly.

**Mr BARBOUR:** We thought that there needed to be a review and one of the recommendations we made at the conclusion of our inquiry was that there be a review of all CCTV equipment and that there be efforts made and a plan put in place to ensure that any of the older systems be replaced by new and more modern systems. I agree with you; I think in one sense the cost of upgrading to digital systems is relatively small but my understanding in large-scale operations is that it can be quite expensive depending on what you need to do in terms of putting in additional cameras, how many cameras you need, how you in fact support that system through your IT systems and so forth. Certainly the cost associated with Corrections of putting in the top-of-the-range system, as they have in new facilities such as Cessnock, which has just opened, is quite high and we are going to be continuing to monitor the rollout of improvements to that system.

**CHAIR:** That is great. Can I suggest to you that there may also be an issue in police stations?

**Mr BARBOUR:** Yes.

**CHAIR:** It was interesting in a recent case where some police officers managed to lose their vehicle to a suspected offender, who took the vehicle. It appears that because everything inside the vehicle is so networked they had to chop off all access to police information services but in the course of that dropped off access to the GPS, which would have told them where the vehicle was so they lost the car altogether. The policeman asking for the public's assistance referred to it as a \$120,000 police vehicle, which then caused eyebrows to be raised as to how a police vehicle could be worth that much. The answer appeared to be all the video and digital equipment and technology inside the car. It seems quite ironic that in Ballina there are police cars outside the station with all this monitoring equipment but inside the station they still have an old-fashioned video camera recording onto VHS tape that has been recorded over more than 200 times.

**Mr BARBOUR:** As I mentioned in my opening, the police are responsible for 1,350 properties and some of them are riddled with asbestos and they do not even bother telling their staff. I have to say that the notion that they have out-dated video equipment does not come as a huge shock to me. Certainly in any particular cases if we identified that, that would be something that we would be raising as well, but I agree with you. In terms of the motor vehicles, police vehicles are incredibly expensive these days not only because of the

video equipment but because of the technology that is included—the IT systems, the connection back to base. They are able to do pretty much everything that they use to have to do in stations now in the vehicles, and of course the cameras are not only internal but also external.

**CHAIR:** It sounds like there is nothing you can do in a police station that you cannot do in a police car?

**Mr BARBOUR:** That is really the intent; the intent is to try to make them mobile police stations.

**CHAIR:** In relation to tasers, it has become apparent, particularly an incident where police have multiple tasers and they are being discharged and offenders are basically pulled down. Is there is the possibility that police could electrocute each other as well as the offender with the taser wires? A police officer may be caught up in the wires of a taser as he is trying to land an offender and as a result he is in contact with the taser wires fired by a colleague. Is he going to be electrocuted as well as the offender?

**Mr BARBOUR:** There is arcing from the equipment and that means that somebody might be exposed to arcing, but certainly in the training for the use of tasers police are advised to not be close when the taser is being fired and to be away from the fire and also the person who is being fired upon. They are not supposed to be in close proximity. I think sometimes through poor practice or particular circumstances they become in close proximity. I am unaware though of an officer actually receiving the full effect of a taser as a result of being nearby but they would be exposed to arcing, which is the flashing that comes out when the taser is actually fired.

**Ms WAUGH:** If there are multiple officers they can get tangled in the wires but I think the most significant risk is actually to lay your hands on a person while they are neuromuscular incapacitation and they are instructed not to do that. I have not heard of a case of that happening.

**CHAIR:** I understood that was a big problem with the Brazilian boy, that he was being wrestled to the ground, but that is okay. You have answered my question. It sounds as though the training would guard against that.

**Mr BARBOUR:** If there was ever a case where police would get tangled up in the wires it certainly would have been the Laudisio Curti matter, because there were so many tasers being fired and so many wires everywhere there would have been high likelihood of that. I am not aware of there being any major problems in that particular case with that—lots of other problems though.

**Ms WAUGH:** You have got to remember that if both the probes are not in then a circuit is not made, so there is no risk. So if you are handling a person who just has one probe in.

**CHAIR:** I understand. In the 27 cases where you found that tasers should not have been used did you, as the Ombudsman, inform the complainants of that outcome and is there any remedy for the complainants from that outcome?

**Mr BARBOUR:** They were not complainants in this particular case; we were reviewing taser uses. In fact we get very few direct complaints about taser use, which is interesting in itself. These were reviews of taser uses. In reviewing all of the documentation and the footage we made a decision that people were tasered in those particular circumstances that were not consistent with the operating procedures and therefore they should not have been tasered. They ranged from somebody being tasered perhaps once that should not have been tasered because they were not providing a particular threat that we think warranted it, through to situations where somebody had been tasered more than once in circumstances where either the second or the third tasering were not warranted. So there were different cases for those. A few of those have been picked up by the Taser Review Panel, that not all. That is one of the reasons why we made recommendations for changes in the processes of the Taser Review Panel accountability mechanisms as well.

**CHAIR:** Would that have an impact on the court cases of those who I presume would have been arrested? Is that not information that should be made available to victims of inappropriate taserings?

**Mr BARBOUR:** Two of those cases were ones that received a great deal of public attention, where the magistrate or judicial member hearing the case actually rejected the police evidence and said there was inadequate force used by the person to warrant the taserings and the case has been thrown out of court. That material has definitely been made available to courts where it has been raised in legal proceedings.

**CHAIR:** Some of these victims might not know that their tasing was not consistent with tasing guidelines. In fact, I imagine most of them would not know that.

**Mr BARBOUR:** That is possible. We were also looking at cases that were some time ago as well and not all of them would have been matters that would have gone to court.

**Ms WAUGH:** I might just add that during the consultation with police on this project there was quite a bit of that with individual cases that we identified. So we were collecting data for the purpose of this report but on a case-by-case if there was an issue that we thought needed to be further pursued we took that up with police.

**CHAIR:** Did the police pursue it?

**Ms WAUGH:** Yes, in some cases matters were revisited.

**CHAIR:** You are quite happy on that front?

**Ms WAUGH:** Yes.

**The Hon. ADAM SEARLE:** I understand your office has had discussions with senior police personnel about including police intelligence in the Working with Children Check process. Will you update the Committee on those discussions?

**Mr BARBOUR:** Yes. I will ask Mr Kinmond to do the update on that. If I can just say by way of introduction, we negotiate and engage with police around a whole range of issues to do with child protection matters obviously, and certainly the Working with Children Check is one area that we do. As the Committee would appreciate, that system is currently under review and there is new legislation that is going to change the system. Mr Kinmond is the officer that directly deals with police on those matters so I will hand over to him.

**Mr KINMOND:** We have had some discussions with police raising the issue of police intel and looking at particular circumstances where it might be appropriate to raise it. We are using it, for example, in our employment-related child protection area where we are convinced that the information has some probative value in the context of employment-related matters. That has proved to be quite important. In fact, in a couple of cases the intel that we have used has led to some police investigative action and in several cases a number of charges have resulted. But apart from raising it with police we have not reached a view about whether one could guarantee that there be sufficient safeguards to ensure that information that was of low probative value was not factored in to an employment-screening process and thereby unfairly prejudicing the individual.

The police have indicated to us that they think it is a significant issue. I think we all recognise that there is a lot of difference between information and intelligence. We need to move forward carefully in terms of the discussions around that issue so that we strike an appropriate balance on the one hand in terms of ensuring the safety of children, but on the other hand not unfairly prejudicing people's rights. I think the appropriate stage to continue with those discussions will be once we finally reach a landing in terms of the new Working with Children Check process.

**The Hon. ADAM SEARLE:** Also with the transfer of the majority of out-of-home care placements from Community Services to the non-government sector your office has been concerned that there may be no equivalent to the Reportable Conduct Unit of the Department of Community Services. Does that transfer affect the work that you are able to do in that regard? Does there need to be some sort of consideration of changes to your jurisdiction to cover the non-government sector?

**Mr BARBOUR:** No. We have got the coverage; it is just a question of whether or not we have got the resources.

**The Hon. ADAM SEARLE:** Will you talk the Committee through the resourcing implications that the transfer may cause?

**Mr BARBOUR:** The unit within Community Services was set up to basically review those matters that we did not review in detail and as a result of the amendments to legislation, which meant that there was a reduction in the number of matters referred to us that we required to review. They did that review and they now

publish their reviews annually, and that system is working reasonably well. In terms of the out-of-home care movement, I am not sure how much it is going to change that particular issue because if it is abuse, neglect or suspicious circumstances we are going to still review it. If we became aware through any other means—through a complaint or something else—of particular poor conduct or inappropriate practice then we have got the capacity to investigate that in any event whether it fits within the death review category. Do you wish to add anything?

**Mr KINMOND:** Yes. The other area in relation to the transition, of course, is in the reportable conduct area. They do have a Reportable Conduct Unit, which is currently funded in excess of \$2 million a year. That unit carries out the direct investigation of reportable conduct matters and they are largely allegations that are made against carers—maybe a sexual misconduct allegation, sexual offence allegation, physical assault allegation. Now with the transfer of carers over time to the non-government sector, without an equivalent transfer of a centralised unit that has the competency and skills to deal with very difficult issues pertaining to allegations against carers, that presents a significant challenge. We have raised that issue not only with Community Services but also with the Association of Children's Welfare Agencies [ACWA], as the peak body. ACWA, subsequent to us raising it, then convened a meeting, which was attended by Community Services and the Children's Guardian has also been involved. We think it is an issue that must be addressed.

You simply cannot have a situation where a sector has a transfer of very large numbers of carers and from that will come an increase in the numbers of matters that the non-government sector has to deal with—which are reportable conduct allegations—without grabbing them. The question is how do they deal with the inevitable result of large numbers of reportable conduct matters that require a sophisticated response without the benefit of a centralised unit?

**The Hon. SARAH MITCHELL:** Returning to the question of outdated equipment, in the "Year at a Glance" section at the start of the annual report you mention that you want to have some negotiations with Treasury about replacing some of your obsolete assets to help improve your efficiency. I assume you mean computers and other technological pieces of equipment. How is that negotiation going?

**Mr BARBOUR:** I am just looking at exactly what we said.

**The Hon. SARAH MITCHELL:** I do not have a copy of it with me, sorry.

**Mr BARBOUR:** There are two issues. Normal asset usage will mean that there will be a depreciation of assets over a period of time and then you have to basically bring your asset base in. That is always part and parcel of your negotiations. The only major area where we have been looking to Treasury support for outdated or ineffectual equipment is in relation to our Child Death Review Team [CDRT] database, and it may well be that that has specifically caught your attention. In relation to that, we provided some questions on notice for our CDRT hearing and I have got updated information that I can give you in relation to where we are at with that in the assessment in terms of what we need and why we need it.

**The Hon. SARAH MITCHELL:** We might leave that for a little bit later then.

**Mr BARBOUR:** I am just not sure whether that was the area that you were particularly interested in.

**The Hon. SARAH MITCHELL:** That is fine; that is sufficient, thank you.

**Mr LEE EVANS:** In your opening statement—and I just need clarification that you were speaking about Indigenous child abuse?

**Mr BARBOUR:** Child sexual assault, yes.

**Mr LEE EVANS:** The resources, not only in the Indigenous space overall, do I understand by your statement that joint investigation response teams [JIRTs] and the Department of Community Services [DOCS] are under some real budget pressure with referrals?

**Mr BARBOUR:** Certainly JIRT has major resource issues, and we have identified those and that has been put to us quite squarely by senior officers within JIRT. As the primary response and investigative body in relation to child sexual assaults, that is a very concerning issue because if they do not have the capacity to

respond appropriately to matters then that threatens the capacity to investigate and also to investigate in a timely fashion, which with these sorts of matters is very important<sup>1</sup>.

The community services issue is not so much a matter of finances but rather the capacity to appoint and retain staff in regional New South Wales. There needs to be an improvement in terms of its capacity to have people on the ground to respond to these and other child protection issues. What we have identified as a result of this review, both within response to Aboriginal children but also in terms of non-Aboriginal children, is that due to staffing resources and problems in community service centres in western New South Wales, the response rate is very poor. Indeed, the figures across New South Wales for a face-to-face response for a significant risk of harm report is about 55 per cent—and that is a much improved figure—but in western New South Wales it is less than half that; it is a little over 20 per cent in relation to indigenous children and under 20 per cent for non-indigenous children.

So that response rate is clearly unacceptable. Part of the problem is that they just do not have staff out there. We have made recommendations and it is currently a matter, we understand, which is before the Public Service Commission, and the Public Service Commission has been charged with looking at strategies that can be utilised by not just community services but other universal and smaller service providers to ensure that there are better resources and appropriate incentives to permit ongoing staffing levels to be what are needed in those areas.

**Mr LEE EVANS:** What sort of levels are the referrals though? They must be horrendous.

**Mr BARBOUR:** The amount of work that community service centres get to in terms of western New South Wales is extremely low. Many cases are closed because of what is called competing priorities, and those that remain open very little work is done in terms of a face-to-face situation, which is clearly something that was not only recommended by us many times but also by Justice Wood when he did his commission of inquiry into child protection matters.

**CHAIR:** Can I ask you about the issue of surveillance devices? In answer to questions on notice the question really related to why did the number of audits on surveillance devices increase from 449 in 2009-10 to 882 in 2011-12, and the answer, as I read it, is that the number of devices has increased and that that is what drove your number of audits. How many agents can apply for these warrants and is there any centralised record of how much surveillance is going on across New South Wales, and is your sense that it is really escalating?

**Mr BARBOUR:** Firstly, the agencies that are able to seek warrants and utilise surveillance devices are the Crime Commission, the Independent Commission Against Corruption, the Police Integrity Commission and, of course, NSW Police. The system that is in place is that a warrant, under particular circumstances, must be formally applied for and there must be satisfaction on the part of a judicial officer for the issuing of the warrant. Our role is to make sure that the requirements that govern the administration of those processes, the record keeping and security of the record keeping, are maintained by the agencies who secure those warrants. So our role is to go in and to check to make sure that they are meeting their obligations in terms of what is required under the legislation. What that means is that our inspection and the numbers will vary from year to year, depending on how many are authorised to be issued by judges to whom those applications go. So the figures will fluctuate, and that is the reason for the difference in the figures.

**CHAIR:** Does it strike you that it is increasing as a trend?

**Mr BARBOUR:** I think it is difficult to say. When you look at the whole suite of covert operation activities and look at controlled operations and telecommunication intercepts and surveillance devices and so forth, I think what is clear is that there are fluctuations around their use. You see particular increases sometimes because of particular operations that are being undertaken, and sometimes those operations, particularly as they involve lots of people, will mean that you will see spikes in numbers for different things. I would not say that we are observing a significant trend of increase and I think probably it would be something that one would need to monitor over a period of time to see whether that sharp increase continued or whether that was a particular aberration at that time.

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<sup>1</sup> On 4 March 2013 the Ombudsman provided further information in relation to this issue. To access this further information, please click on this link:  
<http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/E7AC96A227A8E959CA257B2E000A9A8B>

**CHAIR:** Who would be the best person to do that monitoring?

**Mr BARBOUR:** We provide reports of our inspection functions, and those are ultimately, of course, referred to Parliament for at least controlled operations and surveillance devices, not for telecommunication intercepts. So the information is there for anybody to access, obviously including Parliament. I do not think, given the role that we have under the Act, that it would be our place to make comment about whether or not they are being used too frequently or not. I think that would be something that would be more appropriately done with the information that we provide.

**CHAIR:** Is it possible to know how many people have their phones tapped by State agencies in a particular year?

**Mr BARBOUR:** Yes, that is part of the process of our review—and it is not just State agencies, it is also Federal agencies that use those powers within New South Wales for telecommunication intercepts.

**CHAIR:** Do you have access to those records as well?

**Mr BARBOUR:** No, I am just thinking that is actually controlled operations that the Federal agencies are involved with. The telecommunication intercept is just the State agencies that I indicated to you before, and of course the relationship with the Federal legislation and that legislation in terms of telecommunication intercepts is a consistent framework that is a national framework. The Federal legislation is currently under review but our reports to the Attorney General would indicate how many approvals for telecommunication intercepts are granted each year, and he is also provided, under our report, with details of our inspection to make sure that those processes that are required to be followed are being followed.

**CHAIR:** It has been suggested that the judges or magistrates have to issue warrants and it is their responsibility to be convinced that it is necessary. But we are hearing that at times information-seeking warrants can inundate the person whose responsibility it is to issue it and that there has been a substantial increase. So, just from a volume point of view, that system which relies on the scrutiny of the individual judge it is probably becoming not very practical for them to scrutinise to the degree that perhaps might have been envisaged 30 years ago when these systems were devised.

**Mr BARBOUR:** I think that is certainly an issue and an observation that has been raised. In terms of committees that you oversight, both the current PIC inspector and the current PIC commissioner were formerly on the bench of the Supreme Court and I understand have direct experience in the issuing of them. It may well be something that you could seek comment from them on and what their experience was when they were actually issuing them.

**CHAIR:** That is what they have told us.

**Mr BARBOUR:** Okay. I do not issue them so I am loathe to get involved.

**CHAIR:** No, it is just interesting, in terms of the issue of the warrants, that if a police officer were to make incompetent, false or fabricated information, what is the test? How does that get tested? How does that get detected? How does that get rectified? It just seems that there is not—

**Mr BARBOUR:** And I think that is a sound observation and I think that is a risk with the system. I think with judges who sometimes are very overburdened and have to make decisions very quickly, there is a potential risk for something like that to happen and one hopes that it does not. Certainly at the core of some of the issues that we are currently investigating are those very issues, so we will have to turn our mind to that to some degree as well. Of course, we do not have any jurisdiction over the judiciary—nor do I want it—but that in itself is interesting how you get to see whether or not there is any evidence of that, rather than just the anecdotal discussions.

**CHAIR:** Yes, and it is very confidential information. I emphasise that I am not making any criticism of the judiciary. I am just wondering if the design of the task could be improved. I have another question in relation to the prisons inspector. Is there anything that would prevent a member of your staff being appointed to that position so that the position could still potentially be undertaken within your office?

**Mr BARBOUR:** As the legislation currently sits, I would not permit somebody within my office to have the role because there would be obvious conflicts because there are particular responsibilities in relation to the Minister and powers to provide directions in relation to activities and so forth which would not sit comfortably with our independence. The model that I put to the Attorney in discussions prior to the introduction of the legislation was a model similar to the model that we have in relation to community services: We could have a dedicated person appointed who could be either an assistant Ombudsman or a deputy Ombudsman who could also be inspector of custodial services and then the unit could sit within that area. Clearly, we would provide the community with the necessary independence in relation to the tasks at hand but that certainly was not the position that was accepted. But as the legislation is currently drafted, I think it would be an uncomfortable fit. It would need to be redrafted.

**CHAIR:** Because of that reporting relationship to the Minister.

**Mr BARBOUR:** Partly that and partly the way in which the functions have been observed within the legislation. I would need to look at that in detail. I have not turned my mind to it.

**CHAIR:** That is all right. Clearly it will not happen so I do not want to waste your time.

**Mr BARBOUR:** I thought you might have known something that I did not know.

**CHAIR:** No, I have no information. I can see what the issues are but it does not sound like there is not an answer to it at the moment. Interestingly, under the Surveillance Devices Act you are reporting to the Attorney General and the Minister for Police and Emergency Services?

**Mr BARBOUR:** Yes, our reports go to them and then they must be tabled in Parliament shortly after. I make the point, in case there is a nexus there, that those reports go to them for the purpose of them having a look and then tabling it in Parliament. It is not actually us responding to a reporting obligation that they impose on us. So there is no issue around independence in relation to that.

**CHAIR:** They are the post box?

**Mr BARBOUR:** Correct.

**CHAIR:** Is there an issue in relation to the timeliness with which they are tabling those reports?

**Mr BARBOUR:** I think from memory they have to do it within a specified time that is set out in the Act. I can certainly look at that for you but I think they have to do it within several weeks of receiving it. I think that is fine.

**Ms WAUGH:** They do, and there has been in the past an issue with the time frame not being met but I do not think there has been more recently.

**CHAIR:** It would be nice if there was some sort of standard so everybody knew what to expect and it would happen. There were, as I recall, a whole batch of Ombudsman's reports to do with policing.

**Mr BARBOUR:** Yes, they were legislative review reports. One of the concerns we observed was that in some of the legislation which set out our review role there was a timeline within which the report had to be tabled in Parliament once it was received by the relevant Minister but in other legislation there was not and the language that was used was "as soon as practicable" after receiving it—

**CHAIR:** That is right, yes.

**Mr BARBOUR:** —and as a result they were not tabled. I think as a result of motions in the upper House for service of those, they were all served in one hit.

**CHAIR:** I think I remember that; it is all coming back to me. Is legislation still using the term "as soon as practicable"? My recollection is that that was the problem and what we needed was a standard approach to make sure that these reports are tabled and that the timing of tabling an Ombudsman's report could not be determined at a political level.



**Ms WAUGH:** The provisions are in there but they are worded differently in different pieces of legislation. I think from memory, with surveillance devices it specifies the number of days, but with the legislative reviews I do not think they specify the number of days.

**Mr BARBOUR:** The legislative reviews do not follow a standard pattern and one of the things we have recommended consistently is that they do so that the model that is being used in the legislation is largely the same. That would include a dedicated requirement in terms of timeline from the time the Minister receives it until the time it is tabled in Parliament. Certainly I can understand that there needs to be a gap between the two.

**CHAIR:** Yes.

**Mr BARBOUR:** When we are making recommendations which go to the heart of particular legislation or recommendations about change, there needs to be advice obtained by the Minister from their agency and so forth. So there is good reason before it is tabled for them to be able to look at that and form a view about whether they agree with it or not. We would see no reason why there could not be a timeline in every case so that within 28 days or within 60 days it must be tabled.

**CHAIR:** I think that is a good idea. Thank you very much.

**(The witnesses withdrew)**

**Committee adjourned at 2.45 p.m.**