

**INQUIRY INTO THE CONDUCT AND PROGRESS OF THE
OMBUDSMAN'S INQUIRY "OPERATION PROSPECT"**

Organisation: Police Association of NSW

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12 January 2015

Ms Beverly Duffy
The Director
Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect"
Parliament House
Macquarie St
SYDNEY NSW 2000

Dear Ms Duffy

Please find attached a submission to the Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect".

Thank you for the inviting us to make a submission.

If the Committee has any questions in relation to this Submission or seeks the response of the Association to any matter related to the Inquiry, please do not hesitate to contact Ms Julie Carroll, Assistant Secretary Legal Services, on (02) 9265 6777.

Yours sincerely

Scott Weber
President
Police Association NSW

Police Association of New South Wales Submission to the Select Committee
on the conduct and progress of the Ombudsman's Inquiry "Operation
Prospect"

Contents

Introduction.....	2
Welfare of Inquiry Participants.....	2
Inability to access medical treatment.....	3
The Response from the Committee	5
The Response from the NSW Ombudsman	5
The Response from the NSW Crime Commission	11
The Response from the NSW Police Force.....	11
Delay.....	12
Police Oversight.....	14
ICAC as single oversight agency	14
Complaints about the multi-agency system	15
Criticisms of the PIC by the PIC Inspector	16
The investigative deficiencies of the PIC.....	17
PIC's failure to afford procedural fairness	18
The leaking of information by the PIC	19
PIC publishing incorrect information.....	19
Poor investigative outcomes from PIC investigations	20
Deterring future misconduct.....	21
The NSWPF investigates the majority of serious misconduct complaints.....	22
The cost of the PIC.....	23
The effect of multiple oversight agencies investigating the same matter	23
PIC acting beyond its powers	24
The role of the NSW Ombudsman.....	26
ICAC overseeing police	27
Conclusion	27
Annexures.....	31

Introduction

The Police Association of NSW (the Association), on behalf of its members, seeks to bring several matters to the attention of the Committee conducting the Inquiry into *the Conduct and progress of the Ombudsman's Inquiry Operation Prospect* (the Inquiry).

Firstly, this submission will highlight the importance in ensuring that former and current serving police officers (our members) who are involved in the Inquiry and also *Operation Prospect* are able to access proper medical treatment – something which they are currently being denied. This submission will then highlight the ineffectiveness of multiple agencies overseeing police and the need for the powers of the NSW Ombudsman (the Ombudsman) and the Police Integrity Commission (PIC) to be amalgamated with the Independent Commission Against Corruption (ICAC).

Welfare of Inquiry Participants

The Association appreciates the need for confidentiality in inquiries undertaken by oversight agencies. However, we are concerned that secrecy and restriction on publication provisions have unnecessarily and inappropriately trumped the rights of our members to seek appropriate medical treatment. We do not wish to see anyone make the fateful decision to end their own life or for their mental health to deteriorate for want of appropriate medical treatment. One only needs to recall the Wood Royal Commission where 12 people took their own lives to understand the devastating impact that protracted inquiries can have on our members.

With the above in mind, the Association has serious concerns about the health and welfare of members:

1. involved with matters forming part of *Operation Prospect*; and
2. who may appear before the Committee during the Inquiry.

Inability to access medical treatment

During an oversight investigation, our members must be able to access medical treatment which allows full and frank conversations. Anything less than this standard is inadequate. Unless medical and welfare assistance of this nature is available to all members, we have grave fears for their health.

Currently, our members are essentially precluded or dissuaded from accessing medical treatment for fear of:

1. compromising their position; or
2. potentially being accused of breaching legislation or a direction; or
3. waiving a privilege.

Accordingly, due to the current position adopted by oversight agencies, we are concerned that our members:

1. who are already in treatment, may discontinue treatment in an effort to comply with the general direction given by the Ombudsman; or
2. may not seek treatment despite needing medical treatment and support; or
3. if they do seek treatment, will self-edit undermining the utility of the treatment.

Furthermore, what must be considered is the fact that our members are often required to publish information in order to:

1. avail themselves of certain services e.g. a doctor's referral to a psychologist or psychiatrist;
or
2. claim a legal right e.g. workers' compensation.

However, the various secrecy and restriction on publication provisions as they currently stand effectively prevent our members from being able to access these services or claim their legal rights without possible adverse consequences.

Accordingly, to address this situation, on 2 December 2014 we wrote to the Committee, the Ombudsman, the New South Wales Police Force (NSWPF), the NSW Crime Commission (NSWCC) and

the Police Integrity Commission (PIC) raising the serious concerns that we hold about the welfare of our members involved in *Operation Prospect* and the Inquiry (see **Annexure A**). As you will recall, we sought specifically from each body:

1. a public statement that any witness availing themselves of medical services, support or treatment will not be pursued for any potential breach of secrecy provisions or publication restrictions or privileges;
2. information about what protocols each agency has in place with respect to officers at risk and those who are vulnerable; and
3. an undertaking that each agency would respect the confidentiality of medical treatment and not seek access to information or documents created as a part of seeking treatment.

The Association believes it is within the ability of all of these agencies to jointly establish processes and policies to ensure that our members who are involved in oversight investigations have their welfare needs appropriately managed. Indeed, we believe that it is imperative that agencies do everything that they can to:

1. prevent and manage injury; and
2. mitigate against risk of self-harm.

In relation to our letter dated 2 December 2014, we have received a response from the Committee, the Ombudsman, the NSWCC and the NSWPF. However, at this point in time, we have not yet received a response from the PIC. This is greatly concerning. PIC's failure to even attempt to engage in some type of constructive discussion on the serious issues that we have raised:

1. only further demonstrates to us again the callous disregard that this organisation has developed towards our members' welfare and rights; and
2. is, in our view, an abrogation of the responsibilities of a professional organisation.

However, unfortunately, PIC's lack of engagement is not surprising when one takes into account the pattern of behaviour demonstrated by the PIC towards the discharge of its functions over preceding years – something we will detail further in the second part of our submission.

The Response from the Committee

The concern of Committee Members for the welfare of inquiry participants in the response of the Committee Chair, dated 5 December 2014, is appreciated (**Annexure B**). It is noted that the Committee Chair has said in part that:

"Our advice to potential inquiry participants will be that the committee has no intention or desire to stand in the way of officers receiving appropriate professional welfare or mental health support, even if it involves revealing to a health professional on a confidential basis matters they may have raised in submissions or evidence. We will of course need to advise officers that such discussions would not be protected by parliamentary privilege but if such discussions occur on a confidential basis I cannot at this time envisage that there would be any reason for the committee to take any action as a consequence."

I also note that the letter indicates that follow up contact would be made with the NSW Police Commissioner and the Ombudsman on appropriate protocols. I trust that this has since occurred.

We thank the Committee for its mature response to the issues that we have raised.

The Response from the NSW Ombudsman

Since 2 December 2014, three letters have been exchanged between the Ombudsman and the Association (**see Annexures C, D and E**). Each letter that the Association has received from the Ombudsman has only further intensified our concerns regarding the welfare of our members involved in *Operation Prospect*. Our several and significant concerns are detailed as follows:

1. The Ombudsman has indicated that when a witness is summoned to an *Operation Prospect* hearing, a letter accompanies the summons advising that the individual is entitled to a free initial consultation with a counselling service engaged and paid for by the Ombudsman.

However:

- a) the information that members are initially provided is intentionally misleading as the Ombudsman has informed us that our members are actually entitled to up to six sessions of counselling for free;
- b) it is unclear how a counselling service engaged and paid for by the Ombudsman could be seen as independent in the eyes of our members involved in *Operation Prospect*, or for that matter, the public;
- c) it is simply unacceptable for any individual involved in *Operation Prospect*, who is already under intense pressure and stress, to be given the impression that the only counselling services available to them are those from a counselling service of the Ombudsman's choosing;
- d) the Ombudsman has failed to outline how the only counselling service available to our members is appropriately resourced to support our members who may:
 - i) have been involved in years of investigations from multiple oversight agencies; and
 - ii) have obligations to comply with various overlapping obligations and restrictions in different statutes; and
- e) it is astonishing that the Ombudsman considers that his office has satisfied their moral, legal and professional obligations to our members through a referral to their counselling service. Without any disrespect to the counselling service that the Ombudsman is engaging, it is unclear how it could ever be thought that referral to a counselling service could be sufficient medical treatment for an individual who is likely to be in a heightened state of stress and anxiety after being involved in an investigation that has been ongoing for over 16 years.

2. The Ombudsman has explicitly stated to us that:

“...a disclosure made by a witness to a counsellor or medical practitioner for the purpose of that witness’s welfare is unlikely to prejudice the investigation” (see Annexure E).

However, despite making this concession, the Ombudsman:

- a) refuses to issue a general direction that any witness availing themselves of medical services, support or treatment will not be pursued for any potential breach of secrecy provisions, publication restrictions or privileges; and
- b) still precludes our members from discussing information covered by statutory non-disclosure directions with mental health professionals unless a variation to a general non-disclosure direction has been made. The fact that the Ombudsman requires a witness to request such a direction is unacceptable in itself let alone considering the fact that it is unclear when a witness is ever put on notice that they can even seek such a variation to the general direction.

The Association has continually highlighted to the Ombudsman the importance of witnesses being able to freely access appropriate medical treatment and the devastating effect that denying access may have.

However, despite being equipped with full knowledge of the possible consequences of denying our members access to appropriate medical treatment, the Ombudsman remains entrenched in his position. This is a position that intentionally:

- i) places obstacles in a member’s path since a member is required to seek the Ombudsman’s permission to access what is a fundamental human right – the right to access appropriate medical care;
- ii) isolates our members and leaves them in an extremely vulnerable situation where they are unable to access appropriate medical treatment and support networks in a time of intense stress and anxiety; and

- iii) places a restriction on members who are already undergoing medical treatment from continuing this treatment.

The Ombudsman refuses to adopt a common sense approach to the matter which can only lead us to the conclusion that s19A of the *Ombudsman Act 1974* is being inappropriately used as a tool against our members. We submit that the Ombudsman can make a general direction that any witness availing themselves of medical services, support or treatment will not be pursued for any potential breach of secrecy provisions, publication restrictions or privileges but is choosing not to.

The question needs to be raised as to the underlying motivations and attitude that the Ombudsman's general direction evidences. What valid reason can there be for this approach when even on the Ombudsman's own assessment *"a disclosure made by a witness to a counsellor or medical practitioner for the purpose of that witness's welfare is unlikely to prejudice the investigation"*? In reality, there is no real risk to the integrity of the Ombudsman's investigation presented by our members seeking professional medical treatment and even to attempt to make such an assertion is fanciful and unsupportable on any objective analysis.

- 3. The Ombudsman has indicated that if they:

"...form a view there may be serious and/or immediate welfare concern for an individual who is a current serving police officer, [they] contact and speak directly to that officer's Commander to ensure the officer receives appropriate support".

However, it is unclear:

- a) how the welfare assessment undertaken prior to contacting the respective officer's Commander is undertaken and by whom;
- b) how disclosure is made without contravening s19A(1) of the *Ombudsman Act*;

- c) what protocols are followed where the officer's Commander is also involved in *Operation Prospect* or one of the other related investigations which is a real and genuine possibility; and
- d) what the Ombudsman does in circumstances where the officer is no longer a serving police officer and, therefore, does not have a Commander.

Consequently, this process that the Ombudsman apparently has in place fails to alleviate any of our concerns about how the welfare of our members is being managed. In fact, it only highlights that a proper consideration of how the health and welfare of members involved in the complex matter of *Operation Prospect* (where conflicts between the involved parties are rife) has not been given proper consideration.

Initially, we were prepared to accept that the Ombudsman's initial poor decision making stemmed from the fact that the Ombudsman has limited experience of investigations of this nature. Therefore, we hoped that once we had brought the issue of member welfare to his attention, that he would urgently address the situation. However, alarmingly, this has not occurred since there has been no rectification or risk mitigation put in place. The situation remains one of high risk which the Ombudsman refuses to address.

- 4. The Ombudsman has failed to advise how the welfare of our members subject to the secrecy provisions of the *Crime Commission Act 2012* is being managed. This is a significant issue and one that must be appropriately dealt with since s80 of the *Crime Commission Act 2012* creates an impossible situation for members sworn in under that Act.
- 5. The Ombudsman has indicated that when a witness is summoned to an *Operation Prospect* hearing, a letter accompanies the summons advising of the availability of legal assistance from the NSW Government's Legal Representation Office. The Association is concerned that no additional information is provided indicating that legal advice or representation from any suitably qualified legal representative may be sought.

Consequently, despite having moral, legal and professional obligations to manage potential risks to our members, the Ombudsman is clearly failing to appropriately manage the welfare of our members involved in *Operation Prospect*. In fact, the Ombudsman has created a scenario where his office has all of the information and all of the control, yet then use this situation to:

1. actively isolate members;
2. unjustifiably refuse them access medical treatment; and
3. withhold information relating to accessing legal advice.

The Ombudsman then, in this high risk situation which his office has created:

1. fails to tell us how he assesses officers at risk; and
2. seeks to mitigate his liability by attempting to pass on the duty of care to the NSWPF by a telephone call to a Commander.

Our position remains that the situation is totally untenable and responsibility lies squarely with the Ombudsman. The arrogant stance that the Ombudsman has taken demonstrates a callous disregard for the welfare of our members current and past. The Ombudsman continues to refuse to address the high risk situation that he has created by their acts and omissions.

We believe that it is highly unprofessional and utterly negligent for the Ombudsman to act in a manner which prevents our members accessing medical treatment. We strongly recommend that the Committee make recommendations in the strictest terms mandating that no agency has the ability to prevent any witness seeking access to appropriate medical treatment nor should they attempt to do so. The fact that our members are currently precluded from accessing medical treatment and support networks due to secrecy and restriction on publication provisions cannot be ignored.

We believe that many of the concerns that we have raised could be easily alleviated with appropriate changes to protocols by the Ombudsman which would not jeopardise the integrity of the Ombudsman's investigation process in any way.

The Response from the NSW Crime Commission

Since 2 December 2014, three letters have been exchanged between the NSWCC and the Association (see Annexures F, G and H). In the letters from the NSWCC, the NSW Crime Commissioner has advised us that he:

1. is comfortable with the Ombudsman's arrangements for the provision of legal and counselling services and sees no need to put in place additional processes;
2. does not believe that it is in his capacity to undertake that breaching secrecy provisions would not result in individuals being prosecuted; and
3. would not make directions permitting disclosure while *Operation Prospect* is with the Ombudsman.

While the NSW Crime Commissioner's initial position was somewhat disappointing, we are pleased to note that on 17 December 2014 the NSW Crime Commissioner indicated that:

"Whilst there may be uncertainty about the legality of providing secret information to counsellors or medical practitioners when receiving mental health support, punitive action for doing so is not something that I would support." (see Annexure H)

The Response from the NSW Police Force

The response from the NSWPF confirmed the attempts that the NSWPF has made to manage a situation which is essentially beyond their control (Annexure I). It should be noted that the NSWPF, when it is undertaking investigations, does not in any way impede members from seeking access to medical treatment. In fact, they strongly encourage the seeking of a range of support services and do not ever limit an officer's ability to seek treatment as required. This position is reinforced through the directions that are given to officers whether they are a "witness" or "subject officer".

Furthermore, the NSWPF also have a number of support and information packages that are provided to witnesses and involved officers clearly outlining an officer's rights and the support

services which are available to them. The NSWPF also have a comprehensive amount of information available to all officers through their Human Resources and Professional Standards intranet sites.

The manner in which the NSWPF approach officer welfare and legal rights, particularly in regards to investigations which they undertake, clearly demonstrates that mature organisations are able to make good policy decisions which ensure that the welfare of employees, whether they be involved officers or witnesses, are able to be managed at the same time as ensuring that the integrity of investigations are not compromised.

Delay

One of the significant issues which has plagued this situation over many years is the inability to deal with the substantive complaints and concerns relating to and arising from Operations *Mascot* and *Florida*. The Association submits that no organisation or agency should be above the law and beyond review. The difficulties with the way in which our members' concerns have been managed over time have only reinforced our concern that the current structure does not:

1. allow for a transparent review when concerns are raised – the various secrecy provisions have precluded proper review and limited both complainants and investigators from resolving any concerns;
2. allow for complaints or concerns to be adequately raised and addressed from within – multiple investigations have been and are being undertaken without any satisfactory resolution. Even when government recognised the difficulties and created legislation to facilitate the Ombudsman conducting the inquiry, the problems weren't resolved as they created a perception, real or otherwise, that barriers were being created to limit review and transparency; and
3. afford legal, procedural or natural justice to complainants or investigators or any other person who may choose to raise a concern. The concerns that have been raised remain unaddressed in any satisfactory way for either the complainants or those complained about.

We note that the Ombudsman has indicated that the complex nature and extent of the investigation has caused further delay. It must be acknowledged that this further delay has only further exacerbated concerns on all sides. It is unacceptable that complaints of this nature are allowed to languish for many years essentially unaddressed in any meaningful way.

This matter has impacted on the morale and leadership of the NSWPF for many years. A failure to deal with the substantive issues has caused:

1. a breakdown in relationships (which has been publicly documented);
2. dysfunction within the organisation; and
3. embarrassment to the organisation.

The concerns that were raised should never have been allowed to fester and allowed to cause so much harm to the functioning and reputation of the NSWPF and our members.

The time has come for government to introduce structural change so that agencies in NSW have the capacity to investigate and resolve concerns wherever they come from in a timely and transparent manner. Secrecy provisions designed to manage risks to ongoing investigations should not be used as a shield to prevent review – no agency should be above the law, particularly agencies which have significant cohesive powers and spend a significant amount of public resources.

With the above in mind, the State Crime Command (SCC) Commissioned Officers Branch on 9 January 2015 passed the following motion:

"That the SCC Commissioned Officers Branch advise the Parliamentary Inquiry that the members want the public allegations concerning misconduct and criminality resolved. That the method and processes undertaken should be open and transparent, where appropriate. That the continued failure to deal with them is demoralising and debilitating."

Police Oversight

ICAC as single oversight agency

What has become clear over a significant period of time is that there are serious issues with the structure of oversight in NSW. We believe that these problems can be resolved by the introduction of a single Police Oversight Agency.

The Association supports rigorous oversight of New South Wales Police Officers. Therefore, we have been and are seeking the establishment of the ICAC as a single wide-ranging integrity agency to:

1. deliver improved outcomes for police accountability; and
2. greater procedural fairness for officers involved in investigations.

A perfect example of how the current multi-agency oversight system is not achieving the above outcomes is demonstrated through the combined effect of:

1. the multi-agency system being unable to effectively deal with complaints arising out of *Operations Florida, Mascot and Prospect*; and
2. the continued complaints relating to the behaviour and poor performance of the PIC.

The multi-agency system has clearly lost the confidence of police officers and is failing the community.

As the Committee is very aware, *Operation Prospect* has been looking at the conduct of officers from the NSWPF, the NSWCC and the PIC. The original investigations date back as far as 1998/1999 and have been the subject of review by a number of government oversight agencies and at least one Inspector of an oversight agency.

There is little doubt the review of the matters that led up to the Ombudsman's Inquiry *Operation Prospect* would have been simplified if there were a single oversight agency for police. Indeed, the necessity of *Operation Prospect* may never have arisen.

When the PIC was established in 1996 there was a recognised need for an oversight agency which was entirely dedicated to preventing, identifying and addressing corruption with the ranks of police. However, with the passage of some two decades since the Wood Royal Commission concluded its hearings, the need for a dedicated agency has diminished.

The Association believes more than ever that:

1. the police oversight functions of the PIC and the functions of the Ombudsman need to be transferred to the ICAC; and
2. the ICAC needs to be given all powers and resources necessary to properly oversight police.

The Association is seeking the support of the Committee in our campaign to have additional powers and resources provided to the ICAC to allow them to perform police oversight functions. In seeking your support so, we aim to improve police oversight, not create less oversight.

What is clear to the Association, and we are confident will become clear to the Committee, is that the current system with multiple levels of oversight for the NSWPF is simply not working. Currently, the multi-levelled approach to oversight involves:

1. internal review and investigation by the NSWPF;
2. external review by the Ombudsman;
3. PIC investigations;
4. the Inspector of the PIC;
5. the State Coroner (in cases involving death);
6. Department of Public Prosecutions;
7. the ICAC and the Ombudsman providing oversight of public officials and authorities; and
8. potential external review by WorkCover NSW where safety concerns are raised.

Complaints about the multi-agency system

It is inevitable when multiple agencies monitor or direct police investigators and multiple agencies conduct their own investigation that the efficacy of investigations will come into question. In this regard, when reviewing the history of police oversight, the NSWPF and every oversight agency

at one time or another appears to have either complained about the system or complained about the findings of another agency. For example, in the 2013 McClelland Review:

1. the NSW Police Commissioner stated that:

"oversight agencies collide in a way that was not intended and can at times impede police investigation".¹

2. the Acting State Coroner stated that:

- a. *"duplication (or multiplication) of bodies overseeing such investigations is likely to lead to inefficiency, confusion, conflict and unnecessary expense"²; and*
- b. *"if two or more bodies claim oversight of a critical incident investigation, there is a significant potential for differences of approach and views which may in turn reduce public confidence in the system for no benefit"³.*

Furthermore, there can be little confidence in the investigation and oversight process when multiple agencies are involved in the same matter and make contradictory findings. Dividing the functions, resources, expertise and organisational knowledge across multiple agencies has led to poor investigative practices and fragmentation of best practices and proficiencies.

Criticisms of the PIC by the PIC Inspector

The Inspector of the PIC repeatedly acknowledges that the PIC consistently:

1. fails to meet acceptable standards of procedural fairness;
2. fails to act in an impartial manner; and
3. engages in poor investigation practices.

Clearly, the embedded practices within the PIC fall short of the standards the community expects from an agency with such far-reaching powers. In fact, in 2011 a report by the Inspector of

the PIC stated:

*"The analysis of the Commission's investigation and Report conducted in the preceding pages of my Report has uncovered a situation so serious and so far removed from what is expected of a law enforcement body invested with very considerable resources and the powers of a Royal Commission as to be well-nigh incomprehensible"*⁴.

What must be highlighted is that such findings have been made in a number of high profile PIC investigations, including the Alford Report⁵, Operation Whistler⁶, Operation Mallard⁷ and Operation Rani⁸.

The investigative deficiencies of the PIC

In relation to investigative deficiencies, the Inspector has previously found the PIC:

1. engaged in a systematic skewing of the evidence⁹;
2. engaged in a persistent pattern of omitting relevant evidence and failed to have regard to the whole of the evidence so as to present that evidence fairly and intelligibly¹⁰;
3. *"...became imbued with the notion that it had solved the mystery of the disappearance of the woman"*¹¹;
4. relied on and published witnesses that were acknowledged as unreliable¹²;
5. *"spent an enormous amount of time and resources investigating the sensational claims comprised in the June 2005 anonymous allegation"*¹³;
6. *"gave credence to gossip and rumours"*¹⁴; and
7. issued reports which *"contained inaccuracies concerning the Complainants, lacked clarity and precision, in some cases failed to refer to exculpatory material, failed to refer to relevant evidence or to explore relevant issues, and failed to present a fair and balanced account of the evidence"*¹⁵.

Again, these are not isolated findings. In 2009, the Parliamentary Committee of the Office of the Ombudsman and the PIC - at which time the Hon. Lynda Voltz MLC was a Member of the

Committee - requested the Inspector of the PIC to consider making a Special Report regarding the cumulative effect of multiple critical reports and whether they amounted to systematic failures by the PIC¹⁶. In response, the Inspector of the PIC reported that there had been *"systemic and substantive problems underlying the practices and procedures adopted by the Commission"*¹⁷. The conclusion these deficiencies are systematic and entrenched was again highlighted in another report two years later¹⁸.

PIC's failure to afford procedural fairness

In relation to procedural fairness, the Inspector of the PIC has made the following findings regarding the PIC:

1. there was *"a clear and significant failure to accord procedural fairness to these witnesses"*¹⁹;
2. the lack of procedural fairness can cause considerable damage to the reputations of the persons involved in inquiries and that the PIC failed to act to limit this damage; and
3. there are *"...substantive problems underlying the practices and procedures adopted by the Commission"*²⁰.

The conduct of the PIC shows a clear tendency to becoming preoccupied with making an adverse finding. In fact, in its reports, the Inspector of the PIC stated:

1. in relation to Operation Rani, that *"...early in its investigation, if not at the outset, the Commission became imbued with the notion that it had solved the mystery of the disappearance of the woman, and that [REDACTED] was the culprit"*²¹;
2. in relation to Operation Whistler, that the PIC's *"...covert decisions leave themselves open to inferences of prejudice and prejudgment on the part of the Commission"*²²;
3. in relation to Operation Mallard, that the Commission publicly aired, and provided to the media, recordings of a private conversation which contained disparaging comments about an officer, without a single piece of evidence that the comments were true, nor indeed was there even an assertion on the part of the Commission that they were true²³; and

4. *"an entrenched and debilitating bias on the part of the Commission appears to have deeply coloured and influenced not only the Commission's investigation, but the conduct of the hearings, and the content of the Report"*²⁴.

The Association remains concerned the PIC has acted with little apparent regard to its own credibility and the accuracy of its findings but with seeming regard for boosting its public status. We note that the Senior Counsel asked to review the PIC's findings in Operation Rani by the NSW Police Commissioner concluded that the specific adverse findings made against two officers were not justified²⁵. Furthermore, the Police Commissioner did not accept any of the recommendations of Operation Rani.

The leaking of information by the PIC

In February 2011, the then Labor Minister for Police wrote to the Inspector of the PIC requesting him to establish whether the PIC had breached secrecy provisions by leaking information from confidential hearings to the media²⁶. In his Annual Report, the Inspector stated:

*"Despite the seriousness of the breach of the Commission's confidential processes demonstrated by this unauthorised release of confidential information, the PIC informed me that it had not itself initiated an internal investigation with a view to establishing how the breach of its security had occurred."*²⁷

PIC publishing incorrect information

The Inspector has also criticised the PIC's practices in publishing particular information regarding the Police Commissioner's response to adverse findings made by the PIC. The 2009/2010 PIC Annual Report reported Sergeant [REDACTED] had been medically discharged. The Inspector of the PIC found the PIC did so in order to imply the medical discharge related to the Commissioner of Police accepting the adverse findings made by the PIC against Sergeant [REDACTED]. This was done despite the PIC receiving no indication from the Police Commissioner the adverse findings had been accepted. The PIC had instead obtained information about the medical discharge "from the Police

personnel database” and published that information. This was despite the fact that previously the Inspector of the PIC having found that the PIC had failed to afford procedural fairness, and therefore had no authority to publish the adverse findings, and that no reliance should be placed on those opinions and recommendations²⁸.

In summary, where other state government agencies and statutory bodies are almost routinely indicating an investigative agency’s reports have unreliable findings, and has on numerous occasions failed to meet the community’s expectation of the integrity and professionalism required from an oversight agency; that agency has little place in the police oversight system.

The PIC has far too often denied our members involved in investigations procedural fairness, damaged their careers and caused significant personal harm, only for no adverse findings to be made or none acted on by the Commissioner of Police.

Poor investigative outcomes from PIC investigations

Currently, NSWPF internal investigations deal with most of the serious complaints and cases; with the PIC only making up a small proportion of investigations, disciplinary actions or criminal proceedings against police officers.

Below are the outcomes from finalised full and preliminary investigations by the PIC for the past 5 reporting years, as shown in the PIC Annual Reports. For an agency which received \$106.6 million²⁹ in State Government funding over the same period there are serious questions raised about the value for money for taxpayers with these outcomes:

Full Investigations that resulted in...	2009-10	2010-11	2011-12	2012-13	2013-14	5 Year Total
Referral to DPP for consideration of prosecution action	4	5	5	4	0	18
Dissemination of information to the NSWPF	7	15	3	6	5	36
Dissemination to other law enforcement agencies	4	4		1	0	9
No further action	5	8	3	4	2	22

Source: PIC Annual Reports

Preliminary Investigations that resulted in...	2009-10	2010-11	2011-12	2012-13	2013-14	5 Year Total
No further action	52	42	71	66	59	290
Progressed to full investigation	5	10	14	8	13	50
Referred to full investigation		3	2	1	0	6
Dissemination of information to the NSWPF	5	1	2	7	19	34
Dissemination to other law enforcement agencies	3	1		1	0	5

Source: PIC Annual Reports

Over the past 5 reporting years, the PIC has contributed to the prosecution of 70 individuals.

Of these 70 individuals, approximately 40 were police³⁰ with:

1. 24 officers convicted;
2. 11 matters not yet finalised; and
3. 5 officers not convicted of any offence.

Accordingly, over the 5-year period, the prosecutions of police officers to which the PIC has contributed represents less than 12% of the total number of police charged³¹. Charging taxpayers \$106.6 million for the PIC to achieve such limited outcomes is highly questionable.

Deterring future misconduct

One of the arguments in favour of oversight agencies is that public hearings and investigations deter future misconduct. If the role of the PIC is to expose misconduct, even if there is not enough evidence to launch a prosecution, once again the PIC has failed to achieve significant results. The PIC has made only 36 disseminations of information from full investigations to the NSWPF over the past five years, and 34 from preliminary investigations³², representing a small proportion of the total number of internal investigations.

In regard to exposing police misconduct to the public, in the past 5 reporting years the PIC made 6 investigation reports to Parliament³³, compared to 45 by the ICAC³⁴.

The NSWPF investigates the majority of serious misconduct complaints

The majority of serious misconduct or corruption cases and the overwhelming majority of charges laid against police are investigated and achieved through internal NSWPF investigations. Of those cases in which the PIC has contributed to a successful conviction, a significant number fall outside the role of the PIC as a specialist investigator of serious police misconduct.

In the *10 Year Review of Police Oversight*³⁵, the then Assistant Ombudsman (Police), Mr Simon Cohen, is quoted as stating:

*"...almost 95 per cent of the most serious complaints – Category One complaints, including police perjury allegations and complaints about interfering in an internal investigation – are investigated by police commands, including the Professional Standards Command, with direct oversight by the Ombudsman"*³⁶.

The conclusions reached in the *10 Year Review of Police Oversight*, released in 2006, are still likely to reflect the current trends in police oversight. Prior to 2007, police misconduct was categorised as either Category 1 or Category 2 misconduct. However, this categorisation is no longer reported on so it is difficult to assess exactly the proportion of serious misconduct investigated internally by police compared to the PIC. However, the volume of complaints handled through internal investigations, and the small number investigated by the PIC, means serious misconduct and corruption must still mainly be investigated by police with Ombudsman oversight. This would seem to be confirmed by prosecutions resulting from the PIC investigations being a small proportion of the total number of prosecutions.

The most serious cases of police misconduct or corruption are not reflected in the prosecutions to which the PIC contributes. Of the 24 officers convicted of a criminal offence with the assistance of a PIC investigation in the past five years, at least 7 of them received non-custodial sentences and at least 5 were sentenced to terms of imprisonment that were suspended.

The Association does not seek to diminish the importance of thoroughly investigating and prosecuting any case. However, we do question whether a standalone specialist investigative

agency is justified when so many of the few police convictions it assists with are not serious cases of corruption or misconduct. Most allegations of misconduct or corruption by police could be investigated by the NSWPF with an appropriate external agency monitoring the investigation where necessary and serious allegations could go to an oversight agency that also dealt with other matters beyond policing.

The cost of the PIC

Currently, it is hard to justify the extensive legislative powers and the \$106.6 million³⁷ the NSW Government has spent of taxpayer's money on the PIC over the past five years.

The 2014/2015 NSW State Budget saw a total budget allocation to the PIC of \$21.4 million, the ICAC \$34.3 million and the Ombudsman \$29.9 million (a proportion of which is used for police oversight). In excess of \$1.2 million³⁸ a year is spent on the salaries of the Commissioner of the PIC, the Commissioner of the ICAC and the Deputy Ombudsman – Police and Compliance.

The Association notes comments made by the ICAC Commissioner that any amalgamation would require additional staff and resources to perform the PIC function. A single oversight agency would see a reduction in the costs of senior executives while the global ICAC budget would need to be proportionally increased to perform the police oversight function.

The involvement of multiple agencies overseeing police, each competing to maintain their budgets and justify their continued existence, in an era of tight State Government Budgets is no longer fiscally responsible.

Matters involving a NSWPF investigation, Ombudsman oversight, a Coronial Inquiry, a PIC investigation, and prosecution by the DPP can take years to reach a conclusion. This is hardly an effective use of scarce State resources.

The effect of multiple oversight agencies investigating the same matter

In a system where there are multiple oversight agencies, a matter may be assessed by one or more agencies as not warranting further investigation, only for another agency to launch a full

investigation. In such cases, justice is put at risk and important questions are raised about the reasons for the differing decisions and the appropriateness of the decision to investigate where more than one agency declined to do so.

Under current arrangements a single matter can result in the involvement of multiple agencies. As a result police officers, complainants and involved persons and their families are subjected to the demands of multiple long and feasibly traumatic investigations. Some matters may take years to finalise, and individuals go through constant investigations, hearings and inquiries. In the end, they often will not receive one consistent finding; instead each agency will have made separate findings, which can even conflict. Emotional closure is difficult from an oversight system that does not provide them with a single, consistent outcome.

In the *Review of Oversight of Police Critical Incidents*, the Hon. Robert McClelland found the inconsistent findings of agencies can undermine the public confidence in the oversight system³⁹. When agencies make varied decisions on the same matter, the conclusion must be at least one is wrong.

PIC acting beyond its powers

Recently, the PIC has sought to act outside of New South Wales, attracting criticism from the judiciary and elected representatives.

Media reports have indicated that a November 2014 ruling in the Queensland Magistrates Courts⁴⁰ heavily criticised the PIC for seeking to use private criminal prosecutions to take action in that state against five people who, at the time of the incidents in question, had been current and former police officers. It is noted a spokesperson for the PIC had indicated they were considering appealing the ruling, however, it is unknown whether such an appeal has been lodged. Regardless, the decision by the PIC to attempt to use private prosecutions has deservedly drawn criticism of the legal decision making process within the organisation. The court's judgment reflects some of the issues police officers have with the PIC and is underlined by a *Sydney Morning Herald* article claiming in his ruling Magistrate T M Duroux found in part:

*"I am satisfied that the actions of the PIC...is in fact an abuse of process. It is oppressive and will bring the administration of justice into disrepute."*⁴¹

It is noted a Committee Member, David Shoebridge MLC, on his website indicated:

*"This agency is acting well outside its statutory limits, ignoring the fact that Parliament has not given it prosecutorial powers and the even more obvious fact that it is limited to operating in NSW. The PIC risks its reputation when it indulges in what looks like subterfuge to run a pretend private prosecution in a State where it has no jurisdiction to operate. This is meant to be an integrity commission dedicated to investigating serious police corruption matters, but instead it is itself operating beyond the limits imposed on it by law."*⁴²

Mr Shoebridge has included on his website extracts of correspondence reporting to be between the Hon. Bruce James of the PIC, Dr Ken Levy Acting Chairperson of the Crime and Misconduct Commission (CMC), Ross Martin Chairperson of the CMC and Mr Warren Strange Acting Chairperson of the CMC. The Committee may seek full details of the correspondence from the Member directly.

Based on the reported extracts, the reluctance of the PIC to wait until the CMC could consider the full brief reinforces the concerns of the Association with:

1. the operations of the PIC; and
2. the PICs inability to act in the best interests of the community to uphold standards and natural justice principles while investigating police corruption.

The role of the NSW Ombudsman

As the Committee would be aware the Ombudsman:

1. oversees how the police complaints system works through reviewing investigations of complaints;
2. audits the processes police use to resolve complaints; and
3. makes recommendations to the Police Commissioner and the Minister for Police and Emergency Services on issues arising from the complaints system and complaints themselves.

Under the *Police Act 1990*, the NSWPF are required to notify the Ombudsman of certain complaints so they can be independently oversighted - usually complaints relating to corruption, criminal activity or lack of integrity allegations. The NSWPF also has to notify any complaints of unlawful or unreasonable conduct from the use of police powers.

According to the 2013/2014 Annual Report, the Ombudsman received 3,390 formal and 2,301 informal complaints relating to Police. Over the five year period 2009/2010 to 2013/2014:

1. an average of 3,270 formal complaints were received each year; and
2. just over 36% were complaints made by police about fellow officers.

The Ombudsman has consistently found the NSWPF does an excellent job in complaints handling and investigations. In the 5 year period from 2007/2008 to 2010/2011, audits by the Ombudsman of complaint handling by the NSWPF shows more than 90% of police complaint investigations have no deficiency in regards to investigative practice or outcomes (86% had no deficiencies at all⁴³, and in years where statistics were provided, timeliness was the only deficiency for a further 6%). Of those having deficiencies, the vast majority are rectified by implementing the Ombudsman's recommendations.

The 2013/2014 Ombudsman Annual Report notes that submissions were made to relevant Ministers to strengthen the Ombudsman's ability to independently oversight the police complaints system and oversee police investigations of critical incidents. The Annual Report also recognises the

NSWPF has undertaken significant work to improve and streamline their complaint-handling process. It is noted *"We have been concerned for a number of years that considerable resources are spent by both us and the police consulting and negotiating about whether certain matters should be recorded and/or managed as 'complaints'."*⁴⁴

ICAC oversighting police

The Association maintains that if the police oversight role of the Ombudsman was incorporated into the ICAC there should be every opportunity for enhanced efficiencies in the complaint handling process to be achieved through the adoption of new cooperative processes.

The Association recognises the importance in ensuring that enhanced oversight powers for the ICAC are supported by providing at least equally enhanced powers to the Inspector of the ICAC as well as the Parliamentary oversight committee. Legislative changes and resourcing enhancements would likely be required to provide greater review capabilities of disputed actions by the ICAC.

It is not anticipated that there will be an unmanageable level of complaints in any one year to the Inspector of the ICAC. In 2013/2014, the Inspector of the ICAC received 27 new complaints and the PIC Inspector received a further 10 complaints. The Inspector of the ICAC would also be responsible for those coming from the police investigations formerly undertaken by the Ombudsman.

Since February 2014, following legislative changes in September 2013, the roles of the Inspector of the ICAC and the Inspector of the PIC have been concurrently filled by the Hon. David Levine each in a part time capacity ensuring a transition to a combined oversight role an easier process.

Conclusion

The Association strongly believes in procedural fairness for all individuals including our members. We believe in fundamental rights for all including the right to access medical treatment

and independent legal advice. No agencies should be above the law or beyond review. The end result should never be used as an excuse to justify the means. Noble cause corruption is still corruption and should not be tolerated. Good professional investigators understand the value of approaching investigations without bias and in a balanced manner. They also understand the importance of gathering evidence lawfully and the results that this approach brings to prosecutorial outcomes and the serious damage to public confidence and our judicial system when fundamental rights are ignored or abused.

Mature organisations are able to make good policy decisions which demonstrate that they can act objectively and are able to see beyond self-interest and self-promotion. They have healthy cultures that ensure that they are able to discharge their functions in a balanced, objective and fair manner. These are the organisations that the community can rely upon to be professional and trust.

As this submission has highlighted, the Association supports rigorous oversight of New South Wales police officers. We want to see improved oversight, not less oversight and believe the interests of the community are better served by a single police oversight agency.

The Association seeks the support of the Committee in the matters we have raised and in conclusion we appreciate the Committee's time in considering this submission.

Explanatory Note

The Association has chosen in its submission to redact the names of individuals relating to matters before the PIC and involving the PIC in the interests of fairness to those individuals. Where possible details allowing the identification of the cases referred to are included. Should the Committee not be able to identify a particular matter in the submission the Association has no hesitation in providing that information.

Mr Scott Weber

President

POLICE ASSOCIATION OF NEW SOUTH WALES

12 January 2015

¹ The Hon. Robert McClelland, *Oversight of Police Critical Incidents*, 29 November 2013, p101.

² Ibid, para 7.113, p67.

³ Ibid, para 7.114, p67.

⁴ Special Report of the Inspector of the Police Integrity Commission Pursuant to Section 101 of the *Police Integrity Commission Act 1996*, 19 October 2011, para 376.

⁵ Report by the Inspector of the Police Integrity Commission, RE: Complaint made by [REDACTED], C09-09ZB, 9 June 2010. RE: Complaint made by [REDACTED], C04-08ZC, 9 June 2010. RE: Complaint made by [REDACTED], C11-09ZC, 9 June 2010.

⁶ Report by the Inspector of the Police Integrity Commission, Re: Complaint by [REDACTED] of the NSW Police, 11 December 2007. Re: Complaint concerning certain aspects of the Whistler Report by [REDACTED] of the NSW Police, 12 March 2008. RE: Complaint made by [REDACTED], C09-09ZB, 9 June 2010. RE: Complaint made by [REDACTED], C04-08ZC, 9 June 2010. RE: Complaint made by [REDACTED], C11-09ZC, 9 June 2010. Re: Complaints made by [REDACTED], 9 March 2011.

⁷ Report by the Inspector of the Police Integrity Commission, Re: Complaint by [REDACTED], C11-08ZC, 23 February 2009. Re: Complaint by the Police Association of New South Wales, 2010. Investigation by the Inspector concerning the Publication by the Police Integrity Commission of Certain Telephone Intercept Material, 2011.

⁸ Report by the Inspector of the Police Integrity Commission, Re Complaint by [REDACTED], C05-08ZZ, 6 March 2009.

⁹ Special Report of the Inspector of the Police Integrity Commission Pursuant to Section 101 of the *Police Integrity Commission Act 1996*, 19 October 2011, para 377.

¹⁰ Ibid, para 377.

¹¹ Ibid, para 382.

¹² Ibid, para 383.

¹³ Ibid, para 383.

¹⁴ Ibid, para 385.

¹⁵ Special Report of the Inspector of the Police Integrity Commission Pursuant to Section 101 of the *Police Integrity Commission Act 1996*, 2 April 2009, para 10.

¹⁶ Ibid, para 1.

¹⁷ Ibid, para 6.

¹⁸ Special Report of the Inspector of the Police Integrity Commission Pursuant to Section 101 of the *Police Integrity Commission Act 1996*, 19 October 2011, para 377.

¹⁹ Special Report of the Inspector of the Police Integrity Commission Pursuant to Section 101 of the *Police Integrity Commission Act 1996*, 2 April 2009, para 7.

²⁰ Ibid, para 6.

²¹ Special Report of the Inspector of the Police Integrity Commission Pursuant to Section 101 of the *Police Integrity Commission Act 1996*, 19 October 2011, para 382.

²² Inspector's Report, Pursuant to Section 89(1) of the *Police Integrity Commission Act 1996* Dealing with Complaints made by [REDACTED] arising out of Police Integrity Commission's Whistler Report, 9 March 2011, para 134.

²³ Inspector's Report Pursuant to Section 89(1)(b) of the *Police Integrity Commission Act 1996* Arising out of Complaint by the Police Association of NSW Concerning the Police Integrity Commission, 2010, para 50.

²⁴ Special Report of the Inspector of the Police Integrity Commission Pursuant to Section 101 of the *Police Integrity Commission Act 1996*, 19 October 2011, para 391.

²⁵ Memorandum of Advice of Mr P Taylor SC, para 171.1.

²⁶ Inspector of the PIC Annual Report 2010-11, para 124.

²⁷ Inspector of the PIC Annual Report 2010-11, para 134.

²⁸ Inspector Annual Report 2010-11, para 94 to 123.

²⁹ NSW Budget Papers, revised costs 2009-10 to 2013-14.

³⁰ **PIC Convictions:** According to the prosecutions reported on in the past 5 PIC Annual Reports, PIC has contributed to the prosecutions of 70 individuals: 40 police officers, 2 other law enforcement officers, 13 persons not in law enforcement, and 15 persons about whom the PANSW could not find information.

³¹ **Police Charged:** Adding up all the prosecutions provided in the PIC Annual Reports for this period (40) amounts to approximately 12% of the total number of police charged, reported on in NSW Ombudsman Annual Reports. NSW Ombudsman Annual Reports 2009-10 to 2013-14.

³² **PIC Disseminations:** PIC Annual Reports: 2013-14, 5 full investigations and 19 preliminary investigations resulted in dissemination of information to NSWPF, page 23. 2012-13, 6 full and 7 preliminary investigations resulted in dissemination of information to NSWPF, page 25. 2011-12, 3 full and 2 preliminary investigations resulted in dissemination of information to NSWPF, page 23. 2010-11, 15 full and 1 preliminary investigation resulted in dissemination of information to NSWPF, page 27. 2009-10, 7 full and 5 preliminary investigations resulted in dissemination of information to NSWPF, page 28.

³³ **PIC Investigation Reports:** PIC Annual Reports: 2013-14, 1 investigation report to Parliament, p 8. 2012-13, 3 investigation reports to Parliament. 2011-12, 0 investigation reports to Parliament, p10. 2010-11, 0 investigation reports to Parliament, p12. 2009-10, 2 investigation reports to Parliament, p12.

³⁴ **ICAC Investigation Reports:** ICAC Annual Reports: 2013-14, 12 investigation reports to Parliament, page 9. 2012-13, 6 investigation reports to Parliament. 2011-12, 6 investigation reports to Parliament, p11. 2010-11, 12 investigation reports to Parliament, p9. 2009-10, 9 investigation reports to Parliament, p11.

³⁵ *Ten Year Review of the Police Oversight System in New South Wales*, Committee on the Office of the Ombudsman and the Police Integrity Commission, Report No. 16/53, Nov 2006.

³⁶ Ibid, para 2.2.10.

³⁷ NSW Budget Papers, revised costs 2009-10 to 2013-14.

³⁸ Based on 2013-14 Annual Reports the Commissioner of the PIC receives a remuneration of \$448,685pa. The Commissioner of the ICAC \$644,496pa. The Deputy Ombudsman – Police and Compliance is nominally at a Band 2 Senior executive level position prior to transition to the new executive structure.

³⁹ The Hon. Robert McClelland, Oversight of Police Critical Incidents, 29 November 2013, para 7.115, p68.

⁴⁰ Magistrates Courts of Queensland, citation [redacted] –v- [redacted] & ors. 28 November 2014.

⁴¹ *Sydney Morning Herald*. "Police Integrity Commission under scrutiny" 14 December 2014.

⁴² David Shoebridge MLC, The Greens. Access at: <http://davidshoebridge.org.au/2014/12/09/pic-so-called-private-prosecution-dismissed-as-an-abuse-of-process/>

⁴³ **Ombudsman quality reviews:** NSW Ombudsman Annual Reports: 2010-11, 1978 quality reviews, 1645 satisfactory, 157 in which only deficiency was delay, p53. 2009-10, 1896 quality reviews, 1613 satisfactory, 122 in which only deficiency was delay, p74. 2008-09, 1838 quality reviews, 1608 satisfactory, 110 only deficiency was delay, p69. 2007-08, 2082 quality reviews, 1752 satisfactory, p100. 2006-07, 2303 quality reviews, 2101 satisfactory, p55.

⁴⁴ 2013-14 NSW Ombudsman Annual Report. Page 45.