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# Review of the Police Act

Paul Carey

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## Executive Summary

This is a report to Government reviewing the *Police Act 1990* (the Police Act), in accordance with s222, which requires the Minister to review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. Section 222 of the Police Act requires that a report on the outcome of the review be tabled in each House of Parliament.

This report draws attention to changes made to, or proposed to be made to, the Police Act since the last review but outside the work of this review. Given the significant work on other areas of the Police Act, this review is focused on areas that have not been subject to reform outside of this process.

The consultation process for this report is detailed below, but was with key stakeholders only and used as a basis for determining the ideas and suggestions for change in the Police Act.

The report does not closely examine each section of the Police Act, but considers suggestions for legislative change made through consultations. The consultations and correspondence revealed broad and diverse views from stakeholders about the complaints system - indicating the need for consideration of future significant changes to the complaints section of the Police Act.

Given the diversity of views, it is recommended that a working group be established outside of this statutory review to consider the more significant and controversial reforms regarding the complaints system under Part 8A.

This report considers using DNA sampling to determine suitability for employment within the NSW Police Force as a police officer. In addition it considers using these samples for the purposes of eliminating that DNA from a contaminated crime scene. This report recommends extending these requirements to civilians in certain relevant roles.

There are a number of minor legislative changes recommended that have general agreement and would improve the operation of the Act.

### Summary of key recommendations

Detailed recommendations are set out in this report. In summary key recommendations propose the following:

1. Establish a working group with key stakeholders to develop possible reforms about the complaints system.
2. Specifically legislate in the Police Act that the Commissioner of Police can take and use the DNA of applicants to determine suitability for employment with the NSW Police Force.
3. Establish a regime in the Police Act allowing the Commissioner of Police to keep the DNA of successful applicants on a database for the purpose of using it for elimination from crime scenes only.
4. Allow prints of Police Force employees to be retained for crime scene elimination.
5. Extend the DNA requirements to relevant civilian positions.
6. Introduce a raft of safeguards to ensure that the DNA database cannot be misused.
7. Separate the functions of “show cause” and “final order” to allow delegation of the show cause notice under s181D (3)(a).
8. The Police Act be amended to require the Industrial Relations Commission when deciding a s181D application to give primacy to the public interest which is to include the interest of maintaining the integrity of the NSW Police Force, and that the Commissioner made the order pursuant to s181D(1). Further consultation is to occur to determine the best approach to achieve this.
9. Allow the Commissioner of Police to reinstate a sworn executive officer to commissioned officer ranks on a voluntary basis.
10. The proposed working group consider whether amendments are required to either the *Public Interest Disclosures Act 1994* or the Police Act to make them consistent and whether this is desirable.

11. Amend the Police Act to specify that the NSW Police Force may take into account an applicant's and employees' criminal record and its impact on suitability as a police officer and in determining eligibility for employment.
12. Amend s207B to allow the Regulation to direct what categories of persons may be permitted to be recognised law enforcement officers.
13. Amend the Police Act and Police Regulation to reflect the NSW Police Force's current policy regarding charges payable for police services.
14. Indemnify police officers against civil action when deployed outside NSW and acting in good faith.
15. References to HealthQuest should be replaced with a reference to an independent medical officer.

## 1. Background to the *Police Act 1990*

The Police Act establishes the administration and governance of the NSW Police Force, and deals with matters including the appointment of the Commissioner of Police, employment and industrial arrangements, and the investigation of complaints against the NSW Police Force.

The Act does not regulate the powers of the NSW Police Force. These are contained in other laws, such as the *Law Enforcement (Powers and Responsibilities) Act 2002*, and are not the focus of this review.

### 1.1 The modernisation of policing

The Police Act was originally the *Police Service Act 1990*, which provided the statutory basis for the modernisation of policing implemented at that time.

Before the *Police Service Act 1990* there was the *Police Regulation Act 1899*, which contained the philosophy that police need to be ‘ruled’ or ‘instructed’ on how to carry out their duties. There was a proliferation of regulations that frustrated police rather than providing practical guidance. There was also a separate Police Force and Police Department.

With the adoption of the *Police Service Act 1990* the NSW Police Force became an integrated police service. The name “Police Service” reflected the then Commissioner, John Avery’s notion of policing by and with the consent of the community. It was his idea that the name of the organisation should more accurately relate to the social function it performed.

The Act contained a statement of functions developed by the Police Board to provide a basis for senior management to plan operations, allocate resources and determine priorities. The statement of functions was supported by a mission statement aimed at capturing the concept of community based policing in a single statement.

A statement of values was also included to guide everyday policing activity. The values established a benchmark against which police decisions and actions could be gauged, including:

- placing integrity above all,
- upholding the rule of law and
- preserving an individual's rights and freedoms.

The Commissioner was given powers of delegation generally in accordance with those exercisable by chief executive officers under the *Public Sector Management Act 1988*.

The Police Board originally established in 1984 was retained. The *Police Board Act 1983* was repealed and its provisions included in the Police Act.

A Police Senior Executive Service was established to parallel the establishment of a Senior Executive Service in the public sector generally.

The Police Board determined the structure of the Police Senior Executive Service, and selected and appointed all members to maximum five-year contracts.

The Act established an integrated work force for non-executive members of the police service with only two distinctions:

1. whether the employee is required to undertake operational duties and
2. whether the employee was temporary or permanent.

## **1.2 The Royal Commission**

While the Police Act has been subject to ongoing statutory review and scrutiny since it commenced in 1990, it underwent significant change in response to the Royal Commission in 1996. Those reforms were widespread affecting form, structure, governance and oversight of the Police Force.

With the advent of the Police Integrity Commission post the Wood Royal Commission, the Police Act reflects the responsibilities of two oversight agencies: the Police Integrity Commission and the NSW Ombudsman. It also reflects the obligations of the NSW Police Force to investigate complaints and work with oversight agencies.

The role of these agencies has been the subject of much media attention in recent years and remains an area of considerable importance in the management and oversight of a modern police force.

### 1.3 The 2006 statutory review

Under s222 of the Police Act the Minister is to review the Act to determine whether the policy objectives remain valid and whether the terms of the Act remain appropriate for securing those objectives. A report of the outcome of the review is to be tabled in the Parliament.

The last statutory review of the Act was finalised in 2006. The Report on the Review of the Police Act was tabled in Parliament on 25 October 2006.

The Review concluded the policy objectives of the Act remained valid, and the terms of the Act generally remain appropriate for securing those objectives.

The Report contained 56 recommendations, most of which were legislative changes to improve the operation of the Act, having regard to its policy objectives.

Mainly the recommendations dealt with:

- Simplifying and streamlining the management of complaints about police officers.
- Measures to promote consistency between the Police Act and the *Public Sector Employment and Management Act 2002* (the latter covers public service employees more generally).

A substantial proportion of these recommendations were included in the *Police Amendment (Miscellaneous) Act 2006*, with further recommendations implemented in the *Police Amendment Act 2007*.

Attached at Appendix A is a summary of the 2006/7 recommendations not adopted. Some of these are of interest because they relate to parts of the Act that are called for reform in current discussion. Some recommendations adopted in 2006 that related to complaint management and handling, I am informed, took some 12 months of round table negotiations to implement.

A table of amendments to the Act since the recommendations of the previous review (2006/7) were implemented is attached at Appendix B.

It should be noted that the following amendments to the Police Act have not commenced:

- *Police Integrity Commission Amendment Act 2005* No 5, Sch 2.2 [1].
- *Police Legislation Amendment (Special Constables) Act 2013* No 56.

## 2. The Review

While the Police Act is under constant review to ensure it effectively meets its policy objectives, s222 of the Police Act requires a formal review to take place every five years.

In November 2013 the then Minister for Police and Emergency Services, the Hon Michael Gallacher MLC engaged Mr Paul Carey APM, former Assistant Commissioner of the NSW Police to conduct the review.

I commenced my review in late November 2013 with face to face consultations mainly taking place in December 2013 and written submissions received later.

### 2.1 Review Process

Key stakeholder organisations were asked to consider issues and provide feedback on the matters raised, or on any other matters relevant to the Police Act.

A table 'Possible Areas of Reform' (Appendix C) was developed from various documents and correspondence held by the Ministry for Police and Emergency Services. These issues formed the basis for consultation with interested parties.

Consultation meetings on key issues were held with a number of stakeholder organisations where I met with senior officers from:

#### **Ministry for Police and Emergency Services**

22 November 2013

4 December 2013

9 December 2013

21 January 2014

**NSW Police Force**

4 December 2013

22 January 2014

10 February 2014

**Police Association of NSW**

11 December 2013

20 January 2014

2 July 2014

**NSW Ombudsman**

16 December 2013

**Police Integrity Commission**

16 December 2013

**NSW Public Service Association**

16 December 2013

Stakeholder organisations were invited to provide submissions. Written submissions were received from:

NSW Police Force

NSW Ombudsman

Police Integrity Commission

Police Association of NSW

NSW Public Service Association

Police Integrity Commission Inspector

Correspondence from other stakeholders who have periodically written to the Minister were also reviewed and taken into account.

The correspondence varied in detail, content and covered multiple sections of the Act. Some stakeholders provided feedback more than once.

The correspondence was not shared across interested parties, but wherever possible issues raised were shared to assist in written submissions. Issues raised are referenced throughout this report.

It is understood that Government will consider the recommendations of this Review and further consultation will take place with stakeholders as part of that process.

## **2.2 Parts of the Police Act already under review**

A number of parts of the Police Act have been reviewed as part of other Government processes and this review does not consider these areas in detail. Nevertheless, these processes are part of the ongoing legislative review process that marks the history of the Police Act, ensuring the NSW Police Force remains a modern and effective organisation able to meet the challenges and expectations of the NSW community. In that context they form part of this statutory review; considering whether the Police Act continues to meet its policy aims.

### ***2.2.1 Wider Reforms to the Management of the Public Sector***

The *Government Sector Employment Act 2013* (GSE Act) received assent on 25 June 2013, and commenced on 24 February 2014.

The GSE Act sets out a new, simpler and more modern basis for the employment of the public service and broader Government sector employees. It provides greater flexibility to manage the workforce and deliver services to the community.

Part 5 of the GSE Act applies a range of broad Government employment requirements to the NSW Police Force, including workforce diversity, employee transfers and secondments and

cross agency employment, requirements relating to contesting elections, and excess employees. Part 5 also affects the management of performance and misconduct for unsworn civilian administrative staff.

The GSE Act removes parts of the Police Act allowing unsworn civilian administrative staff to appeal promotional decisions to the Industrial Relations Commission.

The remaining parts of the GSE Act focus largely on public service agencies and employment of staff within those Departments. As the NSW Police Force is a separate service, albeit within the Government Sector, the new GSE Act does not affect the way members of the NSW Police Force are employed.

On 23 October 2013, the Government introduced the *Government Sector Employment Legislation Amendment Bill 2013* (GSLEA Bill). This Bill, if passed, would apply the broad aims of the GSE Act to the NSW Police Force.

In particular, the GSELA would align unsworn non-executive staff of the NSW Police Force with non-executive public servants. This continues the longstanding arrangements whereby administrative employees of the NSW Police Force were covered by similar employment arrangements as those covering public servants in Departments.

Employment arrangements for NSW Police Force senior executives would also be aligned with those applying to public service senior executives.

Under the reforms members of the NSW Police Force will remain employed under the Police Act and the Commissioner of Police will remain the employer of all members. Non-sworn executives may also be assigned to other areas of the Government sector.

Under the new model executives will be employed within a band and the Commissioner of Police will have the ability to assign the executive to any role within the NSW Police Force and within that band.

### ***2.2.2 Review of Critical Incidents Investigations***

On 18 September 2013, the Government announced an independent review of the investigation of critical incidents, to be undertaken by former Commonwealth Attorney-General, the Hon Robert McClelland. Mr McClelland reported to the Government on 28 November 2013.

That report was released publicly on 21 January 2014. The Government is currently considering its response.

The independent review considered issues relating to critical incidents, as well as issues relating to complaints against the NSW Police Force, given the significant areas of overlap.

The review took into account the findings of the Police Integrity Commission's report on Operation Calyx and the NSW Ombudsman's monitoring of the police investigation into the death of Mr Roberto Laudisio-Curti.

The Review specifically considered:

- (a) whether the NSW Police Critical Incident Guidelines provide adequate guidance and clarity to ensure critical incident investigations are rigorous, timely and objective;
- (b) whether operational, legal and other barriers exist to the NSW Police Force publicly reporting on the outcomes of critical incident investigations and how these might be resolved;
- (c) whether improvements can be made to the oversighting of critical incidents to guarantee accountability and transparency, including:
  - i) how and when oversight responsibilities are allocated between different agencies,
  - ii) what gives rise to and the purpose of that oversight,
  - iii) whether there is any unnecessary duplication of roles or responsibilities;

- (d) the need for amendments to relevant legislation or practices and procedures (such as the Critical Incident Guidelines) to be given further consideration by the Government.

It is important that the Government, in considering its response to this report, take account of the recommendations of the McClelland report where they are related to proposed amendments to the Police Act.

Within the McClelland Report recommendations 5 and 7 suggest changes to the Police Act. There is a strong link between critical incidents and Part 8A complaints as such I will not further comment or suggest change where an issue or section of the Act is subject to a recommendation by the McClelland Review.

### ***2.2.3 Police Amendment (Police Promotions) Act 2014***

The *Police Amendment (Police Promotions) Act 2014* was passed by both Houses of Parliament on 26 February 2014. The *Police Amendment (Police Promotions) Act 2014* and supporting changes to the *Police Regulation 2008* commenced on 4 April 2014.

The Act and supporting Regulation implement recommendations of the Wright Review into the police promotions systems. This review was conducted (after a major overhaul of the police promotions system) by the Hon. Lance Wright, QC, former president of the Industrial Relations Commission. The review made a number of recommendations regarding specialist and leadership positions including superintendents and senior sergeants.

The Act improves the ability of the NSW Police Force to fill sworn promotional positions, whilst ensuring integrity, transparency and equity. Amendments include:

- giving the Commissioner of Police a greater role in the appointment of superintendents, whilst maintaining merit requirements;
- improving the way some specialist positions can be filled by way of promotion;

- allowing the Commissioner to set certain requirements or require certain assessments for particular positions;
- removing permanent appointment to the rank of Senior Sergeant and replacing them with temporary appointments to that rank; and
- allowing the Commissioner to consider all relevant integrity information regardless of whether it has been previously considered.

Given this process and recent enactment, this review does not explore the promotions system in detail.

#### ***2.2.4 Baff v NSW Commissioner of Police [2013] NSWSC 1205***

On 30 August 2013, Adamson J in the Supreme Court of NSW held neither the Police Act nor the Police Regulation abrogate a police officer's right against self-incrimination in situations where he is suspected of, but not charged with, a criminal offence.

The implications of this decision, and the appropriate response, if any, are being considered.

### 3. Complaints – Part 8A

A considerable part of the Police Act deals with making, assessing, and investigating complaints concerning a police officer and subsequently managing the conduct and remedial steps if required.

Part 8A of the Act has not been reformed as a whole for some time. It is important the public knows there are effective measures to receive and manage complaints against police officers. The system must be transparent, and appropriate oversight provided.

The importance of these areas also means there is considerable stakeholder interest from complainants, those overseeing the complaints process and officers subject to complaints and the complaints process. Given the importance of an effective complaints system, it is appropriate that these parts of the Police Act are regularly reviewed to identify whether their purpose and intent remain fulfilled and whether better outcomes could be achieved.

#### 3.1 Background to the complaints system

There were major reforms to the Police Act concerning complaints against police officers post Royal Commission in 1996.

The context of reforms (1998) post the Wood Royal Commission is explained in the correspondence received from the NSW Ombudsman for this review:

*“The reform to the Act related to complaints was meant to replace a system that had become;*

- *Too legalistic, formal and focused upon punishment*
- *Insufficiently focused upon behavior modification*
- *Woefully dilatory and*
- *Subject to unnecessary complex appeal process”*

These reforms took place in 1998 and, within Part 8A, intended to provide a mechanism for

those who wanted to make genuine complaints against police to be heard.

At the same time the process was meant to not interfere, for minor matters, with the normal workings of the organisation or individual officers as it had done in the past. Past processes saw action taken against an officer (restrictions or removal from duties) simply upon a complaint being received.

The 2006/7 Review of the Act recommended changes to sections within Part 8A and 9 and some were achieved. Sections within these parts have been changed outside of the statutory reviews.

During the 2006/7 reviews the Police Force made submissions that sought reform, not just change, to the assessment, managing and investigating of complaints. The model proposed became known as 'streamlining'.

After consultation, submissions and representations over time, changes were made that have improved efficiencies within the complaint process.

### **3.2 Establishment of working group**

During this review, face-to-face consultations and written submissions raised a number of issues with the complaints system. The issues raised require much more detailed consultation with a wider cross section of the community than possible as part of this review. Some issues also require legal advice on the scope of existing provisions and proper analysis of whether there is a real need for amendment or an anticipated one.

The NSW Ombudsman provided detailed correspondence focusing on Part 8A and Part 9 of the Act.

The Police Association of NSW did not get the opportunity to respond extensively to the issues raised by the NSW Ombudsman, however raised concerns with duplication in the oversight system. The NSW Ombudsman also raised concerns about the distinction between oversight

and involvement in operational decisions by the NSW Police Force relating to management of its officers.

The correspondence from the Police Integrity Commission and the NSW Police Force similarly touch on both Part 8A and or Part 9 or the Regulations that relate to these matters.

While all of the submissions are helpful, the views expressed are diverse. If taken in isolation each submission could potentially take the legislation in a direction not necessarily supported by all, or any other, interested party. The views expressed require more than comment; they require proper examination, round table discussion, research and testing across stakeholders.

The key question is, from 2014 onwards, what does the community and the Government of NSW require for the making of, managing, assessing, and investigation of complaints. To answer this question, key stakeholders need to work together to develop reform that will be practically functional.

I suggest that a working group be established, and be independently chaired. The terms of reference for the working group should be to comprehensively consider the complaints system under the Police Act, with a view to it being written in plain English, with roles and responsibilities of agencies clearly articulated, and containing a clear definition of what a complaint is.

### ***Assessment of the complaints system***

An initial step for the working group should be an assessment of the state of complaints against police officers. Thorough research using information available from the NSW Police Force, the NSW Ombudsman and the Police Integrity Commission should be used to determine what change might be required and for what purpose.

The NSW Ombudsman's Annual Report for 2012/13 reports that 84% of recorded complaints were dealt with by the NSW Police Force satisfactorily. Of the remainder that are declared

deficient, the majority were deficient for timeliness when held against the NSW Police Force's own criteria for timeliness, rather than the actual investigation process.

The assessment of the complaints system should indicate the number of and type of complaints received by all agencies. The data would provide a clear picture of the current state of conduct (via complaints) for officers within the NSW Police Force.

### ***Definition of complaint***

The definition of a complaint is drawn from the following sections in Part 8A of the Police Act:

- A complaint must be about the conduct of a police officer –s121.
- The complaint must allege or indicate that the police conduct is a criminal offence, corrupt, unlawful unreasonable etc - s122.
- The complaint must be in writing to an investigating authority – s127. The definition of an investigating authority - s121.
- A complaint, to the extent that it is investigated by the Police Integrity Commission, cannot be dealt with as a complaint under Part 8A of the Police Act and for that purpose is taken not to be a police complaint - s125.
- When a police officer is to report misconduct – cl49 Police Regulation.

The 2012/13 Annual Report of the NSW Ombudsman reports that the NSW Ombudsman received 3,287 formal written complaints and finalised 3,178 complaints. That annual report states that the number of complaints received about police remains stable. Of the 3,287 complaints received in 2013, the NSW Police Force notified the NSW Ombudsman of 2,616 and they received 671 directly from complainants.

The Police Integrity Commission's Annual Report for 2012/13 reports that it assessed 1,178 complaints of misconduct against sworn and unsworn officers.

The NSW Police's Annual Report for 2012/13 indicates it received 4,928 complaints against police.

Given the volume of complaints, it would be desirable to have a clearer and simpler description of 'a complaint', how to make a complaint, how to assess and manage a complaint, how to record a complaint, how to investigate and resolve a complaint, and how to report on a complaint.

Furthermore, the current system includes work performance matters, which are arguably matters that belong in a work performance system and managed as part of a personnel portfolio not a complaint system - for example when an officer is late for work, opposed to an officer accepting a bribe.

It is acknowledged by the NSW Ombudsman that there could be differences of opinion in the assessment phase, determining what amounts to a complaint.

My experience is that there are differences of opinion during the assessment phase of some complaints. However, the agencies will engage in discussion to try and resolve the difference.

If the definition of a complaint was clearer there would be potential for real efficiency savings. Currently, there are three agencies, with similar but different functions related to complaints, all assessing the complaint from different perspectives. If the definition of a complaint were clearer, a complaint would be assessed only once, and then each agency could move on with its functions related to that complaint.

The Police Integrity Commission stated that:

*"In the Commission's submission there would be benefit in consolidating and clarifying the definition of complaint in Part 8A of the Police Act (the Act)."*

The NSW Ombudsman states that:

*"it would assist when issues arise for there to be a clear and self contained section containing the definition of what constitutes a complaint about police."*

They are of the view that:

*“all written reports that indicate or allege improper conduct should be registered as a complaint.”*

The NSW Police Force also supports a full review of the complaints legislation (ie Police Act, Public Interest Disclosures Act and the Police Integrity Commission Act).

**Recommendation 1:**

Establish a high level working group to consider comprehensive reform of the complaints system in the Police Act. There should be a particular focus on the Act being written in plain English, with roles and responsibilities of agencies clearly articulated and containing a clear definition of what a complaint is.

The working group should be chaired by an independent person.

The working group should report to Government with their recommendations for reform to the complaints system.

The working group should include the Ministry for Police and Emergency Services, the NSW Police Force, the Department of Premier and Cabinet, the Police Association of NSW, the NSW Ombudsman and the Police Integrity Commission. Consultation is to occur with the Coroner and other stakeholders as appropriate.

### **3.6 Technical matters that may be considered**

The NSW Ombudsman has made a number of suggestions for amendment to the complaint system, which have been briefly detailed below. Recommendations have not been made on each of these issues given the key recommendation that a working group be established. Given the working group will be considering comprehensive reforms to the complaints system, the below recommendations may not necessarily be relevant. Therefore, I include the analyses of the below suggested reforms for consideration by the working group as relevant.

The Ombudsman requested that its submission be attached to the Report and is at Appendix E.

### **3.6.1 Final determination about whether a matter is a complaint (s121)**

There can be differing views about what amounts to a complaint. If the Commissioner considers a matter is by definition not a complaint and the Ombudsman has an opposing view, there is no convenient mechanism for resolving the difference of opinion.

The NSW Ombudsman notes that given his role to oversight the complaints system, it would be appropriate for his office to determine whether a matter constitutes a police complaint or not when there is a difference of opinion between the Ombudsman and the NSW Police Force.

The Ombudsman suggests using s139(5) of the Act as a model, which states:

*S139(5) If the Ombudsman disagrees with the Commissioner's decision that the complaint does not need to be investigated:*

- (a) the Ombudsman must notify the Commissioner and the complainant of that fact,*
- and*
- (b) the Commissioner must cause the complaint to be investigated.*

The need for a resolution process would also depend on the definition of 'complaint' that is adopted, so the working group may consider this proposal as they deem appropriate.

### **3.6.2 Statutory obligation to report police misconduct (cl49)**

Clause 49 of the Police Regulation requires a police officer who sincerely believes that another officer has engaged in a criminal offence or other misconduct to report that conduct. There is a legislative protection from reprisals under s206 of the Police Act for police officers that make a report under cl49 of the Police Regulation.

The Police Integrity Commission in its submission states that:

*"The drafting of any new definition of complaint in Part 8A should also encompass the duty of police officers under clause 49 of the Police Regulation 2008 and amend the language used in that clause to achieve a more practical outcome.*

*The Commission considers that the requirement in cl49(1)(b) that a police officer must “sincerely believe” that another police officer has engaged in criminal conduct or other misconduct before a requirement to report arises is an inappropriate test, and would be better replaced by a requirement that a report be made to a senior officer where an officer “suspects” that another police officer has engaged in conduct of that kind.”*

The Police Integrity Commission also recommends cl49 of the Police Regulation be extended to unsworn members of the NSW Police Force. The Commission notes that if this was adopted, consideration would need to be given to ensuring that commensurate protections against reprisals are provided. This seems sensible given the role of civilians within the NSW Police Force. While civilians are generally obliged by other laws to report corruption, they are not required by law to report misconduct or criminal conduct.

The NSW Ombudsman is of the view that any mandatory reporting requirements should be set out in the Act and not the regulation and recommends that s11(2) of the *Independent Commission Against Corruption Act 1998* be used as a precedent. Section 11(2) provides:

*“A person to whom this section applies is under a duty to report to the Commission any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct.”*

This would move the requirement to report from a subjective to an objective test. The NSW Police Force supports adopting similar wording to s11 of the *Independent Commission Against Corruption Act 1998* ie “suspects on reasonable grounds”, rather than the current requirement that a “genuine belief” is held.

### **3.6.3 Verbal complaints (s127(1))**

Section 127(1) of the Police Act states that:

*“A complaint must be made in writing to an investigating authority.”*

The NSW Ombudsman has proposed:

*“all verbal complaints by members of the public should be registered as a complaint.”*

The NSW Ombudsman is of the view that there should be a provision requiring police officers to reduce to writing complaints by members of the public about any conduct that falls within s122 of the Police Act to ensure that these matters are recorded on the complaints information system.

The NSW Ombudsman proposes a new provision that stipulates that the police officer reporting the matter does not become the 'complainant' merely because the police officer reduces an allegation or information to writing.

The NSW Ombudsman also suggests that the police officer taking the complaint should be afforded all of the protections under s206 of the Police Act.

The NSW Police Force considers that something heard and committed to writing is sufficient to be a written complaint and can validly support an investigation into the matter, based on the decision in the case of *Police v Hughes [2009] NSWCA 309*. Specifically, the NSW Police Force notes any consideration of the definition of complaints should clarify issues identified by the NSW Court of Appeal in *Commissioner of Police v Hughes [2009] NSWCA 306 (113 - 114)*. The Court noted:

*"Although s127 as to the form of complaints appears to be mandatory, it is an error merely to focus on the person from whom the information initially derived which led to the investigation. If (an officer) or even a lay employee hears something which he or she considers must be reported to internal affairs, and commits what he or she heard to writing, that is sufficient to be a written complaint which can validly support an investigation into the matter."*

In practice, verbal complaints are reduced to writing and are investigated under Pt 8A of the Police Act. The NSW Police Force considers cl49 of the Police Regulation already requires an officer who receives information about allegations of criminal or corrupt conduct or serious misconduct to notify a senior officer. These are generally reduced to writing and therefore become a complaint.

The NSW Police Force considers requiring all verbal complaints to be reduced to writing would mean minor matters may not be resolved in a timely and efficient manner.

The Police Association of NSW notes that complaints may be made verbally under s127 of the Police Act in exceptional circumstances, and suggests that a clearer definition of exceptional circumstances may be more appropriate.

#### **3.6.4 Registering information about implied misconduct (s129)**

Section 129 of the Police Act outlines the statutory requirements regarding the registration of complaints.

The NSW Ombudsman has proposed that s129 of the Police Act be amended to make it clear that any written information that *implies* conduct as defined by s122 of the Police Act should be categorised as a complaint and registered on the complaints system.

For example, a transcript of a telephone intercept may imply misconduct but is not technically a complaint. Consideration should be given as to whether this type of ‘complaint’ would be captured by cl49 of the Regulation either as currently drafted or within any proposed revision.

#### **3.6.5 Ministers and MPs making complaints on behalf of constituents**

Under s135 and s136 of the Police Act, a Minister or an MP may refer a person’s complaint about a police officer to an investigating authority. The Ombudsman notes:

*“A member of Parliament does not become the complainant merely because the member of Parliament makes a complaint to an investigating authority on behalf of some other person (a client), except for the purposes of the provisions of this Act that require the complainant to be informed or notified of any matter or given or sent any matter.”*

The NSW Ombudsman interprets s135 and s136 to oblige the Ombudsman (and the NSW Police Force and the Police Integrity Commission) to write not only to the complainant, but also to the Minister or MP, in any circumstances where the provisions of Part 8A of the Police Act require information to be provided to the complainant. The NSW Ombudsman is of the

view that this appears to create an unnecessary administrative requirement and may require clarification.

The NSW Police Force agrees that there are difficulties in communicating with an MP/Minister who is a third party to a complaint, eg privacy of complainant and subject officer. However, the NSW Police Force does not interpret s135 and s136 as necessarily requiring updates be given to MPs/Ministers.

Given both agencies are of the view that Ministers/MPs need not be updated on complaints, there may be benefit in amending the Police Act to make this clear if the issue remains relevant after the comprehensive review of the working group.

### ***3.6.6 Providing reasons for the Commissioner's decision not to investigate a complaint (s139)***

Section 139 of the Police Act provides that:

*"The Commissioner may decide that the complaint should be, or does not need to be investigated."*

After deciding that a complaint need not be investigated, the Commissioner must notify the Ombudsman and the complainant of the decision (s139(4) of the Police Act).

Section 139 of the Police Act does not require the Commissioner to give either the Ombudsman or the complainant reasons for the decision.

The NSW Ombudsman is of the view the Ombudsman and the complainant should be provided with reasons for the Commissioner's decision not to investigate, to enable the Ombudsman, in appropriate cases, to exercise his power under s139(5) to require the NSW Police Force to investigate. The Ombudsman was also of the view that it is good administrative practice for any public sector agency to give reasons for decisions, and that this change would reflect the current NSW Police Force policy.

The NSW Police Force considers it appropriate to give reasons to the NSW Ombudsman in appropriate cases, but is not of the view that it would be appropriate to require the

Commissioner of Police to mandatorily provide reasons to the Ombudsman or complainant in all circumstances.

The NSW Police Force provides the following examples of where it would be inappropriate to provide reasons:

- A matter declined or discontinued because it would interfere in other investigations being conducted.
- Decisions about management action involving decisions about the mental health of subject officers that are private and confidential but still form part of the decision making process.
- Responses of police officers to 'show cause' notices during the Part 9 process that often outline personal and private issues affecting the subject officer.
- Information over which legal professional privilege is claimed.
- Information obtained through telephone intercepts.

This is a complex issue with countervailing interests of transparency, confidentiality and law enforcement. Developing a system with the appropriate balance requires careful consideration.

The NSW Police Force has also noted that if this amendment was made, protections should be provided under Part 8A of the Police Act similar to those available under Schedule 1 and 2 of the *Government Information (Public Access) Act 2009* to prevent disclosure of confidential information and matters not in the public interest, ie. matters subject to legal professional privilege, law enforcement, and personal information.

### ***3.6.7 Ombudsman's power to require the NSWPF to investigate a complaint (s140)***

Section 140 of the Police Act deals with the Ombudsman's decision to investigate:

- The Ombudsman may decide that the complaint should be, or does not need to be, investigated.
- If the Ombudsman decides that the complaint should be investigated:

- the Ombudsman must notify the Commissioner of Police and the complainant of the decision, and
  - the Commissioner of Police must cause the complaint to be investigated.
- If the Ombudsman decides the complaint does not need to be investigated he must notify the complainant of the decision and of his reasons, and must send to the Commissioner a copy of the notification, and the Commissioner may notify the police officer whose conduct is the subject of the complaint of the decision.

The NSW Ombudsman has suggested that an amendment be made to s140 of the Police Act to enable the Ombudsman to decide that information (that is not a complaint) about police conduct should be, or does not need to be, investigated by the NSW Police Force. For example, if it appears to the Ombudsman that any conduct of a police officer could be - but is not - the subject of a complaint, the Ombudsman may notify the Commissioner of the decision that it should be investigated.

The NSW Ombudsman requests this amendment as there may be circumstances in which the NSW Police Force is best placed to investigate the relevant conduct and it is in the public interest for the Police Force to undertake inquiries.

This is a significant increase in the NSW Ombudsman's powers and would benefit from being discussed by the working group.

### ***3.6.8 Vexatious complaints (s141)***

There is some concern that complaints may be lodged vexatiously as a means to 'get at' or affect the promotion of individual officers.

Section 141 of the Police Act provides that in deciding whether a complaint should be investigated, the Commissioner or Ombudsman may have regard to such matters as he or she thinks fit, including whether the complaint is frivolous, vexatious or not made in good faith.

Section 167A of the Police Act makes it an offence for any person to knowingly make a false complaint about police or gives false information, and attracts a fine of up to \$5,500 and/or imprisonment for up to 12 months.

While existing provisions allow the Commissioner or Ombudsman to decline a complaint because it is vexatious, consideration should be given to bolstering the ability not to pursue vexatious complaints.

Both the NSW Police Force and the Police Association of NSW support in principle the ability to not pursue vexatious complaints. The NSW Ombudsman is of the view that current provisions are sufficient.

Given the concerns that remain, there may be benefit in the working group considering the extent and perception of this issue and whether the existing provisions are adequate to prevent vexatious allegations being pursued.

### ***3.6.9 Use of information requested under s143 for investigative purposes***

Section 143 of the Police Act provides that for the purpose of determining whether a complaint should be investigated, the Ombudsman may request information from persons other than the complainant.

However, s143(2)(a) states that the Ombudsman is not authorised to investigate the complaint or to collect information for the purposes of the investigation of the complaint or of a report under this part. Consequently, it is unclear whether the information obtained by the NSW Ombudsman can subsequently be provided to the NSW Police Force for the purposes of investigating the complaint, or be used by the NSW Police Force and/or the Ombudsman in investigating and reporting the matter.

The NSW Police Force agrees that the Police Act needs to be amended to clarify whether the information obtained by the Ombudsman under s143 can subsequently be provided to the

NSW Police Force for the purposes of investigating the complaint, or used by the NSW Police Force and/or the Ombudsman in investigating and reporting on the matter.

The Police Association of NSW understands that the purpose of subsection 143(2) is to provide limitations on the requests, in order to ensure the proper procedures under Part 8A for conducting an investigation are not circumvented by subsection 143(1).

### ***3.6.10 The institution of criminal proceedings, sufficiency of evidence and the Commissioner's approval for the institution of proceedings (s148)***

Consultation has indicated that there is confusion about s148 of the Police Act. Section 148 states:

*148 Proceedings to be instituted if warranted*

*(1) If it appears to a police officer conducting an investigation that sufficient evidence exists to warrant the prosecution of any person for an offence, the police officer is to cause appropriate proceedings to be instituted against the person.*

*(2) The Commissioner must inform the Ombudsman of the institution of any such proceedings and of the particulars of the proceedings.*

*(3) A police officer is not to institute any such proceedings against another police officer without the approval of the Commissioner.*

Investigation should be interpreted to mean an "investigation conducted under Part 8A". This reflects the location of s148 within Part 8A and the obligation on police officers to report conduct suspected of being criminal.

The *Report to Parliament Review of the Police Act 1990* recommended that section 148(1), achieve this by being limited to police officers or former officers, not 'any person'. Ultimately this was not adopted in the Government response.

The Police Association of NSW notes that during the course of investigating a Part 8A complaint, evidence may implicate both police and non-police. Section 148(1) requires an investigating officer to cause appropriate proceedings to commence where warranted and

s148(3) requires the approval of the Commissioner before those proceedings commence where they involve a police officer.

The NSW Ombudsman suggests s148(3) of the Police Act should allow the Commissioner to exercise his discretion in respect of civilian members of the Police Force (or other civilians), not just police officers.

The NSW Ombudsman also suggests the Commissioner should be required to set out in writing the reasons for not commencing proceedings.

The NSW Police Force points out it is not clear whether reasons should be provided to a particular body, or just recorded. The NSW Police Force is of the view that there may be difficulties in making it 'mandatory' as there may be certain sensitivities surrounding the reasons.

Again, there are countervailing views that reflect the desire for transparency and for maximising legitimate law enforcement.

### ***3.6.11 Provide reasons for the decision to take no further action (s148A)***

Section 148A(1) of the Police Act provides that:

*“The Commissioner [Police Commissioner], or the Ombudsman may, at any stage during an investigation of a complaint, decide to conclude the investigation by taking no further action with respect to the complaint.”*

The NSW Ombudsman considers the section should require both the Commissioner and the Ombudsman to provide reasons to the complainant for decisions under s148A(1) .

The NSW Police Force does not support a mandatory provision as some reasoning may be sensitive and inappropriate to be released. Any change would therefore require appropriate safeguards.

### ***3.6.12 Power of the Ombudsman to ‘discontinue’ oversight on a particular matter (s150).***

Section 150 of the Police Act details when the Commissioner is to send information to the complainant and Ombudsman, including providing the Ombudsman with a Report.

The NSW Ombudsman has suggested an amendment to enable the Ombudsman to formally ‘discontinue’ his oversight and excuse the NSW Police Force from having to provide a report to the Ombudsman under s150 of the Police Act in relation to a particular matter. This could be a useful mechanism if the Police Integrity Commission decides that it wishes to take over the oversight role of an investigation.

### ***3.6.13 Oversight of action taken or to be taken following a complaint investigation (s151)***

The NSW Ombudsman is concerned that Part 8A of the Police Act does not give the Ombudsman power to oversee the adequacy of action taken, or to be taken, by the NSW Police Force as a result of the Part 8A investigation.

The NSW Ombudsman suggests an amendment be made to s151(1)(b) of the Police Act to include records relating to the taking of reviewable and non-reviewable actions.

The NSW Ombudsman also suggests defining action as:

*“including the taking of reviewable and non-reviewable action, systemic and procedural changes or improvements, and court/tribunal proceedings and outcomes, including settlement proceedings and outcomes.”*

The NSW Police Force is of the view that matters submitted to the Commissioner’s Advisory Panel or the Internal Review Panel to consider dismissal or other reviewable action as an alternative to dismissal cannot, and should not, be reviewed by the Ombudsman. These are subject to Industrial Relation Commission review and the NSW Police Force considers there would be no purpose to the Ombudsman’s review of such matters. However, while the

Industrial Relations Commission can oversee reviewable action, it does not consider non-reviewable action.

The NSW Police Force does not object to the NSW Ombudsman raising deficiencies in investigations or management outcomes with the Commissioner or his delegate – this is established practice.

This is however addressed to some extent in the *Police Integrity Commission Amendment Act 2005 No 5*, Sch 2.2 [1] (uncommenced), which requires the Commissioner to consult with the relevant agency before making an order under s173 (misconduct and unsatisfactory performance) in relation to a Part 8A complaint. Therefore it is not suggested that this issue be further progressed.

The NSW Ombudsman is also of the view that s150 of the Police Act should be amended to require the Commissioner to provide the NSW Ombudsman with reasons for the findings of the investigation, or the reasons for any action already taken, or to be taken.

The NSW Police Force does not support mandatory provisions of this nature, for the reasons previously discussed.

It should be noted that significant information regarding the decision making process can be requested by the Ombudsman under s151 of the Police Act, but not the reasons.

#### ***3.6.14 Ombudsman requests for overview of action (s154)***

Section 154 of the Police Act provides that the Ombudsman may request a review of the Police Commissioner's decision on action *to be* taken on a complaint.

The NSW Ombudsman proposes that this be extended to action *already* taken, noting that s154(2)(a) of the Police Act makes it clear the Police Commissioner does not need to change the decision, but only consider the Ombudsman's request.

The NSW Police Force is of the view that the extension of the Ombudsman's ability to ask the Commissioner to review action already taken should be limited to serious deficiencies only - ie the action taken was non-reviewable action but the officer should have been the subject of s181D consideration.

The NSW Police Force also raises the potential industrial implications of making police officers subject to further action once he or she has already been dealt with by non-reviewable action.

This raises issues that subsequent action could be defeated on the principles of double jeopardy, rendering the process futile. To be operationally effective this would need to be legislated against.

#### ***3.6.15 Complaint satisfaction with the action taken or to be taken as a result of the complaint (s150(c)(iii))***

Section 150(c)(iii) of the Police Act requires that the NSW Police Force provide the Ombudsman with advice as to whether or not the complainant is satisfied with the action taken, or to be taken, as a result of the complaint.

The NSW Ombudsman has raised concerns that the NSW Police Force does not have clear guidelines to assist police to consistently determine complainant satisfaction.

The NSW Ombudsman therefore suggests an amendment to s150(c)(iii) of the Police Act to include requirements that advice be provided as to whether or not the complainant is satisfied with the investigation process, the outcome of the complaint or action taken, and police communication during the investigation.

While there may be benefit in developing a clear means of assessing a complainant's satisfaction, legislation may not be the most effective mechanism to do this.

### ***3.6.16 Determining the scope of 'own motion' investigations by the Ombudsman (s156)***

Section 156(1) of the Police Act states that if in the public interest, the Ombudsman may make a Part 8A complaint the subject of an investigation under the *Ombudsman Act 1974*. This means the Ombudsman may use his own Act to investigate a matter before, during or after a complaint under the Police Act.

The NSW Ombudsman is concerned that the section may suggest that the Ombudsman must investigate the complaint and the NSW Police Force investigation and any related issues - rather than just the complaint or the investigation. Consequently, they seek an amendment to s156(1) of the Police Act to make it clear that the Ombudsman may investigate the complaint and/or the NSW Police Force investigation of the complaint and/or any 'related' issues.

The NSW Police Force questions whether such investigations would be further complicated if some aspects are later found to be interrelated. Given the Commissioner is to discontinue any investigation of a complaint if this provision is activated, this view may have validity. Neither the NSW Ombudsman nor the NSW Police Force identified where these issues arose, which may be a useful starting point for the working group.

The Ombudsman's proposal would allow them to investigate only 'related issues' and it is not clear what this would amount to.

### ***3.6.17 Compelling police officers employed by the Ombudsman to give evidence (s165)***

Section 165 of the Police Act provides immunity to officers of the NSW Ombudsman from being compellable in legal proceeding about the administration of matters under Part 8A of the Police Act. The immunity does not apply to criminal matters. Section 165 of the Police Act excludes police officers.

The NSW Ombudsman seconded police officers under s32 of the *Ombudsman Act 1974* to its office. The NSW Ombudsman is of the view that seconded officers should not be compellable about the work that they do for the Ombudsman. The present distinction merely results in seconded police officers being excluded from certain decision making processes.

The NSW Police Force supports this proposal.

### **3.6.18 Admissibility of documents (s170)**

Section 170(1) of the Police Act specifies that a document brought into existence for the purpose of a complaint is not admissible in evidence in any proceedings other than proceedings:

- (a) that concern the conduct of police officers,
- (b) and that are dealt with by the Commissioner, by the Industrial Relations Commission or by the Supreme Court in the exercise of its jurisdiction to review administrative action.

Subsection 170(2) provides that subsection (1) does not apply to or in respect of:

- (a) a document comprising a complaint, or
- (b) a document published by order of, or under the authority of, the Presiding Officer of a House of Parliament or either House, or both Houses, of Parliament, or
- (c) a document that a witness is willing to produce.

The NSW Ombudsman suggests that s170(2) of the Police Act be amended to specify that the privilege in s170(1) does not extend to criminal or coronial matters. This proposal by the NSW Ombudsman overlaps with recommendations 5.8 and 6 of the McClelland Report and proposals to protect information given in coronial investigations. As outlined earlier I will make no comment on matters related to that report.

The Police Association of NSW has advised that it strongly opposes any amendment to s170.

## 4. Forensic sampling for employment purposes

Consideration is being given to:

- Taking the DNA of applicants to the Police Force for determining employment suitability as a police officer when considering criminal history.
- Retaining the DNA of applicants to include in a database for the purpose of eliminating their DNA from future crime scenes.
- Obtaining existing police officer’s DNA for elimination from crime scenes, in limited circumstances.
- Retaining the prints of applicants to the NSW Police Force for the purpose of eliminating their prints from crime scenes.
- Extending these requirements to civilian members of the NSW Police Force.

### 4.1. Part 8 of the *Crimes (Forensic Procedure) Act 2000*

Currently DNA samples can be taken from police officers under Part 8 of the *Crimes (Forensic Procedure) Act 2000* on a voluntary basis. These samples can then be kept on the NSW Police database and be used for matching as permitted under s93 of the *Crimes (Forensic Procedure) Act 2000*:

Index of profile to be matched	Is matching permitted?							
	column 1	column 2	column 3	column 4	column 5	column 6	column 7	column 8
	crime scene	suspects	volunteers (limited purposes)	volunteers (unlimited purposes)	offenders	missing persons	unknown deceased persons	
crime scene	yes	yes	only if within purpose	yes	yes	yes	yes	
suspects	yes	yes	no	no	yes	yes	yes	
volunteers (limited purposes)	only if within purpose	no	no	no	only if within purpose	only if within purpose	only if within purpose	
volunteers (unlimited purposes)	yes	no	no	no	yes	yes	yes	
offenders	yes	yes	only if within purpose	yes	yes	yes	yes	

missing persons	yes	yes	only if within purpose	yes	yes	yes	yes
unknown deceased persons	yes	yes	only if within purpose	yes	yes	yes	yes

The *Crimes (Forensic Procedure) Act 2000* is however not designed for the purpose of taking samples from police officers for elimination purposes. The *Crimes (Forensic Procedure) Act 2000* is structured for solving crime.

The Police Association of NSW is of the view that:

*“the use of volunteer provisions in current legislation will not give first responders and recruits appropriate legislative protection and therefore is not an acceptable form of protection from the misuse of a DNA sample”.*

Consequently, consideration needs to be given to developing specific amendments in the Police Act to regulate the taking and use of DNA and other forensic material.

## 4.2 Jurisdictional analysis

Before determining the position NSW should take on the issue of forensic sampling of police officers, it is useful to see what other jurisdictions do.

The majority of Australian jurisdictions (including NSW) have adopted forensic procedures legislation based on the model developed by the Model Criminal Law Officers Committee. The model legislation, does not specifically address taking DNA from police officers for elimination purposes.

However, Tasmania introduced *Part 4A - Non-intimate forensic procedures on police officers and members of the police service* into the *Forensic Procedures Act 2000 (Tas)*. The Tasmanian legislation provides for both voluntary and compulsory direction to officers to undergo forensic procedures to differentiate the officer’s forensic material from that at particular crime scenes. The legislation also provides safeguards:

- material must not be matched with any information obtained from an analysis of any forensic material other than information obtained from an analysis of forensic material found at a crime scene,
- forensic material taken from a police officer or member of the Police Service, and any information obtained from an analysis of such forensic material:–
  - must not be used for the purposes of an internal Police Service investigation; and
  - may not be received or admitted as evidence in any disciplinary proceeding, or proceeding for an offence, against the police officer or member of the Police Service.

Section 22 of the *Criminal Investigation (Identifying People) Act 2002* of Western Australia gives the Commissioner authority to require a police officer to undergo an identifying procedure for a forensic purpose. Section 64 of the *Criminal Investigation (Identifying People) Act 2002* stipulates that a police officer's DNA can be compared with other information on the DNA database and must be treated as a volunteer sample. It is practically similar to using the existing NSW volunteer provisions under the *Crimes (Forensic Procedure) Act 2000*.

The United Kingdom has a police elimination database, which is administered for the purposes of eliminating DNA that may have been inadvertently left at the scene by police officers and other forensic workers. When the database was originally developed in 2000 inclusion was voluntary, but since 2002 all new recruits to the service must provide a sample. There are safeguards for the UK database – checks may only take place against named personnel and only when there is a real risk they could have contaminated the scene.

### **4.3 DNA sampling be used to determine suitability for employment**

The position of a police officer is one of significant responsibility and significant power. Police officers need to be held accountable not only while they are employed, but also in determining suitability for employment.

Currently, applicants to the NSW Police Force have their finger and palm prints taken and these are used to determine if they have a criminal history. However, given that DNA is taken from most crime scenes, and there is an extensive NSW and National DNA database, analysing an applicant's DNA would improve detection. A rigorous process for identifying whether an applicant has a criminal history before they attest as a police officer helps fulfil the responsibility to society of ensuring police officers are suitable for the role.

Since February 2014, the NSW Police Force has taken DNA from police officer applicants under the requirements of the *Crimes (Forensic Procedure) Act 2000*. Although providing a DNA sample is a requirement of the application process, it is considered a voluntary action for the purposes of the Act and must therefore be used accordingly.

It is proposed that amendments be made to the Police Act to allow taking and using recruits' DNA for the purposes of determining suitability. While it is possible to take the DNA samples under the *Crimes (Forensic Procedure) Act 2000*, it is preferable to make it clear under the Police Act that samples can be taken for use by the Commissioner in determining the applicant's suitability for employment. There is also an intention that DNA samples be stored on an elimination database, and reforms for this are better situated in the Police Act.

It should be clear that samples may be run through both NSW databases and the National Criminal Investigation DNA Database.

When considering taking DNA the *Privacy and Personal Information Protection Act 1998* and *Health Records and Information Privacy Act 2002* legislation must be taken into account. Any amendment must comply or overcome limitations on use under the *Health Records and Information Privacy Act 2002*.

**Recommendation 2-1:**

The Police Act be amended to allow DNA samples to be taken from applicants to the Police Force for use by the Commissioner to determine an applicant's suitability for employment.

### 4.3.1 Safeguards in taking DNA for suitability for employment purposes

When dealing with a person's private information appropriate safeguards must be implemented to protect an individual's privacy. Safeguards applied to prints in s96A(2) - s96A(4) of the Police Act provide a useful precedent. These safeguards are:

- informing applicants in writing the print may be retained and used for the purpose of performing a check of the applicant's criminal history; and
- destroying any print taken under this section from any person who is not appointed to a position as a police officer as soon as practicable after the decision is made not to appoint the person to the position.

**Recommendation 2-2:**

Amend the Police Act to require applicants to be informed in writing that their DNA profile may be retained and used for the purpose of performing a check of their criminal history.

Require any DNA sample and profile taken under this section from any person who is not appointed to a position as a police officer to be destroyed as soon as practicable after the decision is made not to appoint the person to the position.

The Police Association of NSW recommended a further safeguard - that once the profile is complete the sample must be destroyed.

As part of an employment contract, all staff in the NSW Forensic and Analytical Science Service (FASS) are required to provide a swab from the cheek (buccal sample). Each sample is placed on FTA paper (DNA preservative paper) and then stored at room temperature. The advantage of storing a sample is that when the laboratory upgrades its DNA profiling kits, as it did in 2013, it does not have to resample staff but can use these stored samples. These samples are stored securely. Within the *Crimes (Forensic Procedures) Act 2000* there are severe penalties for using the sample for purposes other than what it was intended, or for disclosing the profile. Similar provisions are recommended in the Police Act for misuse of a sample.

**Recommendation 2-3:**

Further discussion occurs between the NSW Police Force, the Police Association of NSW and FASS about options for secure storage of samples. Part of these discussions should include an analysis of the cost and likelihood of having to store DNA samples from all police officers weighed against privacy risks.

The Police Association of NSW has also recommended that the taking of the DNA sample be witnessed to ensure verification of the source.

This is a sensible recommendation and should be adopted into police policy to ensure the accuracy and reliability of samples.

**Recommendation 2-4:**

The NSW Police Force policy require a witness be present when a DNA sample is being taken to ensure verification of the source of the DNA sample.

#### **4.4 DNA sampling for crime scene elimination purposes**

NSW police officers attend crime scenes and on occasion leave their DNA at the scene of the crime. Modern methods of DNA analysis are incredibly sensitive and becoming increasingly so – results can be obtained from minute trace amounts of a sample. DNA is found in blood, hair, skin, semen, faeces, urine, vomit, bone marrow and cells present in saliva, sweat and tears.

There are incidents relating to major crime involving the *known* accidental contamination of a crime scene. Inadvertent contamination by police officers may delay investigations with false leads. An unexplained DNA sample at the scene of a crime may create uncertainty and provide the defence with an argument that creates reasonable doubt.

A Memorandum of Understanding between the Commissioner of Police and the Police Association of NSW made as settlement of 2008 Award negotiations provided:

*"The parties agree to explore the creation of a voluntary police DNA database for first responders for elimination purposes only, including a legislative and policy regime."*

For various reasons this proposal has not been pursued, with legislative difficulties being one issue, as well as a wholesale review of DNA collection - "The Barr Review". It is understood that the Barr Review acknowledges the issue of obtaining police officers' DNA for elimination purposes but leaves it to be addressed in this review.

The review of the Police Act now provides an ideal opportunity to progress this issue. The NSW Police Force support in principle the DNA elimination database, but are of the view that there needs to be further consideration of operational, cost and industrial issues.

#### **4.4.1 Retaining DNA from successful applicants for crime scene elimination**

It is proposed that DNA samples be taken from applicants to the NSW Police Force for the purposes of determining suitability for employment as police officers. The DNA profiles of applicants who go on to attest and become police officers should be stored on the DNA elimination database.

The Police Association of NSW considers that samples/profiles taken from applicants for employment suitability purposes should not be kept and later used for a different purpose. If the DNA is needed for elimination purposes, the Association argues that the police officer should go through the process in place for confirmed constables (see discussion below) and DNA should only be taken when there is evidence of actual contamination.

It is recommended that DNA samples/profiles collected for recruitment purposes be retained and placed on an elimination database, rather than requiring police officers provide a further DNA sample as suggested by the Police Association of NSW. This is the process in the UK and Tasmania.

The vast majority of constables undertake frontline policing and are the first responders to crime scenes. It would be a costly and repetitious process to destroy the DNA from recruitment only to have to take the sample again for elimination; resulting in double cost, delays, and inconvenience to individual officers.

A populated elimination database will allow DNA samples from contaminated crime scenes to be quickly and efficiently eliminated.

However, it is important the DNA samples only be used for the purposes they are taken for. Applicants should be advised that if they are successful and attest as a police officer their sample will be retained and stored on the DNA elimination database.

***Recommendation 2-5:***

That the Police Act be amended to allow police officers' DNA samples taken as part of the recruitment process to be retained for the purposes of eliminating the police officers DNA from crime scenes.

Applicants be advised before providing the sample that if they attest as police officer's their DNA will be stored on the DNA elimination database.

#### ***4.4.2 DNA samples from existing police officers***

It is recommended that DNA samples be taken prospectively, unless there is a specific need to obtain it from an existing specific police officer. It will take some years to build up the elimination database, but with each sample contained in the database there is an investigatory benefit. As often constables are the first at the crime scene, they may be more likely to contaminate the crime scene. Newer constables will also have been advised from the outset of their career that providing DNA is part of being a police officer.

The Police Association of NSW is of the view that consent to the inclusion of the DNA profile in the elimination data base should be voluntary.

There will be circumstances where an existing police officer contaminates a crime scene with their DNA, and it may be essential for the purposes of the investigation that their DNA be eliminated. Therefore, an approach similar to the Tasmanian model should be considered:

- An existing police officer may volunteer a DNA sample for elimination purposes generally (and then it may be placed on an elimination database) or, if specified by the police officer, only at a particular crime scene (in which case the DNA will not be stored on the DNA database).
- The Commissioner of Police may require an existing police officer to undergo forensic procedures for elimination purpose from a particular crime scene specified by the Commissioner and which the police officer has attended in the course of his or her duties.

If this recommendation is accepted, care should be taken to ensure it does not affect the power of the Commissioner in cl8(1) of the Police Regulation to give lawful directions.

***Recommendation 2-6:***

The Police Act be amended to allow:

- an existing police officer to volunteer to provide a DNA sample for elimination purposes generally and for that DNA profile to be placed on the elimination database.
- an existing police officer to volunteer to provide a DNA sample and specify that it is to be used for a particular crime scene only.
- the Commissioner of Police to require an existing police officer to provide a DNA sample for elimination purpose from a particular crime scene specified by the Commissioner and which the police officer has attended in the course of his or her duties.

#### **4.5 Fingerprinting or hand printing for crime scene elimination purposes (s96A).**

Section 96A of the Police Act currently allows the Commissioner to take a fingerprint or handprint to determine suitability for employment as a police officer. The applicant must be

informed under s96A(2) of the Police Act that the print may be retained and used for the purpose of performing a check of the applicant's criminal history.

Currently, the prints of applicants who attest as police officers are retained, as there is no legislative requirement for destruction. Prints are held and used for crime scene elimination purposes.

As is the case for DNA, prints may be left at crime scene despite training and preventative measures such as gloves. An unexplained print at the scene of a crime may create uncertainty and provide the defence with an argument that creates reasonable doubt. There is significant utility in the prints of relevant officers being kept for the purposes of elimination.

It is recommended the Police Act be amended to make it abundantly clear that a police officer's prints may be retained for crime scene elimination in addition to checking criminal history during recruitment. The NSW Police Force supports this proposal.

The Police Association of NSW is of the view that given the ambiguities of the law and the similarities of issues to DNA and prints these matters should be dealt with together so that an appropriate regime for the collection of samples and the provision of protections can be managed consistently across both areas. This is supported. The NSW Police Force should develop a specific database for elimination purposes only, containing both DNA samples and prints. Consistent safeguards should then be implemented to ensure the data cannot be misused. Further detail on appropriate safeguards comes later in this report.

***Recommendation 2-7:***

The Police Act be amended:

- to confirm the use of currently held hand and finger prints for crime scene elimination purposes, and
- to explicitly allow prints to be retained for the purposes of eliminating police officer's prints from crime scenes.

## 4.6 Civilians

Many civilian members of the NSW Police Force attend crime scenes and work in crime sensitive areas, such as Scene of Crime Officers and Intelligence Officers and have access to Customised Operation Policing System (COPS) and other sensitive information.

Consequently, a number of the reasons for obtaining and storing police officers' DNA being obtained and stored apply equally to some civilian members of the NSW Police Force. Similarly, some civilian roles should be required to provide hand and finger prints for both employment suitability and crime scene elimination.

Applying these provisions to civilians is consistent with vetting provisions in s96B of the Police Act, which does not distinguish between civilian and sworn members of the NSW Police Force.

It is recognised however that not all civilians work in crime sensitive areas. Consequently, the taking and storing of DNA and prints should not apply to all roles, but be limited to those nominated by the Commissioner of Police. The requirement would apply to existing members of the NSW Police Force moving to a position in which forensic material would be taken. Civilians may move roles with fluidity and there is no comparable attestation process.

The NSW Police Force supports extending reforms to civilians.

The NSW Public Service Association of NSW does not oppose the reforms, but suggests a number of safeguards be implemented as outlined below. All safeguards should apply equally to both sworn and civilian members of the NSW Police Force.

***Recommendation 2-8:***

The Police Act should be amended to empower the Commissioner to nominate civilian roles for which DNA, hand and/or finger prints can be required:

- to be used to determine an applicant's suitability for employment, and
- for eliminating forensic material from a crime scene.

The Police Act should also be amended to allow acquisition of DNA, hand and/or fingerprints from currently employed civilians if they occupy or move into a nominated role.

#### 4.7 Limit elimination checks to those who have attended the crime scene

The NSW Public Service Association of NSW suggests that DNA should only be sampled and compared where civilians had a direct involvement with the case.

There is precedent for this in the UK, where checks may only take place against named personnel and only when there is a real risk they could have contaminated the scene.

There is no utility in checking all DNA profiles contained in the elimination database against the contaminating DNA. It is only the DNA of members of the NSW Police Force who have had contact with the crime scene or subsequently handled forensic material that need to be eliminated. Given this, and the UK precedent, it is recommended that checks can only take place against members of the NSW Police Force who have had contact with the relevant crime scene.

It is recommended that this restraint on the database be legislated to ensure the limit can be effectively enforced.

***Recommendation 2-9:***

The Police Act be amended to stipulate that a DNA/print profile contained in the elimination database can only be checked against a particular member of the NSW Police Force who attended the crime scene when there is a risk that the members' DNA contaminated the scene.

The Police Association of NSW suggested that consideration be given to also using the elimination database for disaster victim identification. This would be a practical usage of DNA

profiles to assist in identification in times of crises and help assist family and friends of the victim.

Consideration would need to be given to advising applicants to the NSW Police Force that if they are successful, their DNA sample may also be used for disaster victim identification.

The ability to use DNA and prints for disaster victim identification should be legislated to overcome any barriers the *Privacy and Personal Information Protection Act 1998* and *Health Records and Information Privacy Act 2002* legislation may present.

**Recommendation 2-10:**

The Police Act be amended to allow DNA samples and prints to be used for disaster victim identification.

#### **4.8 Using the elimination database**

The NSW Forensic and Analytical Science Service (FASS) will need to have access to the elimination database as they complete the DNA analyses and appear in court regarding the analyses.

A possible process for eliminating a member of the NSW Police Force from a crime scene is as follows:

The samples in the DNA database could be de-identified through the use of a barcode only – FASS would have access to the de-identified database.

Specific senior members of the NSW Police Force would have access to the “police name – barcode link”. The NSW Police Force would then specifically ask FASS to check a barcode against the DNA of a particular crime scene.

This process would ensure that only select and senior members of the NSW Police Force could access both the DNA profile and who it belonged to. This process would also be regularly audited.

The process however does not need to be enshrined in legislation and may develop and progress subject to discussion between FASS, the NSW Police Force, the NSW Public Service Association of NSW and the Police Association of NSW.

#### **4.9 The elimination database safeguards**

The Police Association of NSW is of the view that an elimination database needs to be underpinned by comprehensive legislation prescribing a regulatory regime for the creation of such a database and effective privacy protection.

It is integral that adequate and appropriate safeguards are applied to the database. It may be appropriate for some to be enshrined in legislation or regulation, whereas others may be provided for in police policy. Recommended safeguards are outlined below.

##### **4.9.1 Limited use database**

The elimination database will be a specific database for elimination purposes only. The elimination database should be independent of all other DNA databases; such as the National Criminal Investigation DNA Database, National Automated Fingerprint Identification System, the NSW DNA database and any other jurisdiction's database.

The Police Association of NSW recommends that profiles contained within the DNA elimination database should only be used for the purpose for which they were collected (ie. elimination from potential crime scene contamination).

The Police Association of NSW also recommends that legislation should prohibit profiles being used for internal disciplinary matters or paternity testing, and any misuse should carry significant penalties.

This is appropriate as the database should only be used for elimination from crime scenes attended by members of the NSW Police Force. Tasmanian legislation provides:

- a safeguard that information obtained from an analysis of the police officer's or member's forensic material must not be matched with any information obtained from an analysis of any forensic material other than information obtained from an analysis of forensic material found at a crime scene. This eliminates the possibility that the DNA may be used for paternity testing for example.
- Forensic material and information obtained from an analysis:
  - (a) must not be used for the purposes of an internal Police Service investigation; and
  - (b) may not be received or admitted as evidence in any disciplinary proceeding, or proceeding for an offence, against the police officer or member of the Police Service.

It is recommended the Tasmanian provisions be used as a precedent.

***Recommendation 2-11:***

The Police Act should be amended to stipulate that the only purpose the DNA elimination database should be used for is to eliminate a police member's DNA from an investigation. It cannot be used for other matters such as discipline, internal police investigations or paternity testing.

#### ***4.9.2 Audit and access to database***

Access to the database must be strictly limited; both in who has the authority to access it and the reasons they may access it. All access to the database should be strictly audited.

The NSW Public Service Association of NSW strongly advocates that the database should be regularly audited and maintained by senior officers, rather than the standard DNA review team.

It is recommended that access and audit issues be developed in police policy rather than legislation to accommodate technological or organisational change. This should however occur in consultation with the NSW Police Force, FASS, the Public Service Association of NSW and the Police Association of NSW.

***Recommendation 2-12:***

Further consultations occur between NSW Police Force, Police Association of NSW, the NSW Public Service Association of NSW and FASS to develop appropriate auditing and access procedures.

#### ***4.9.3 Retrospective comparisons***

The NSW Public Service Association of NSW considers that there should be no attempt to compare members of the Police Force's DNA to samples or exhibits from crime scenes taken prior to the sample being submitted. For example, the NSW Public Service Association of NSW argues that if a Scene of Crime Officer attended and contaminated a crime scene the week before they provided DNA for the elimination database, the database could not be used to eliminate the Scene of Crime Officer's DNA from that crime scene.

The NSW Public Service Association of NSW proposal should be agreed to as it is best practice to avoid retrospective application of a law, particularly when it affects an individual's privacy. However, there should be an allowance for the comparison to occur if the member of the NSW Police Force provides their consent.

***Recommendation 2.13***

The Police Act be amended to specify there should be no attempt to compare a member of the NSW Police Force's DNA to samples or exhibits taken prior to the sample being submitted, unless expressly consented to by the member.

#### **4.9.4 Criminal offence for misuse of database information**

Unauthorised access or use of database material should be a criminal offence. This is consistent with the *Crimes (Forensic Procedures) Act 2000* and will assist in reinforcing the gravity of the misuse of such information. The offence should carry a penalty of 100 penalty units or two years imprisonment. This is consistent with s109 of the *Crimes (Forensic Procedures) Act 2000*, which makes it an offence to disclose information.

**Recommendation 2-14:**

Insert a criminal offence into the Police Act for unauthorised access, use or dissemination of elimination database material.

#### **4.9.5 Removal of sample from database**

The NSW Public Service Association of NSW recommends that as soon as employment with the NSW Police Force ends, the DNA information should be removed from the register and the record destroyed. This should be done without members of the NSW Police Force needing to request the removal and destruction.

The Police Association of NSW has a similar view.

The Police Association of NSW also recommends that police officer DNA should not be transferred to another jurisdiction if the officer is transferred.

It is agreed that profiles should not be transferred between jurisdictions, but treated as the profile of a member of the NSW Police Force that is leaving the NSW Police Force.

While it is agreed that the DNA sample should be removed from the elimination database when a member of the NSW Police Force ceases work, consideration needs to be given to investigatory lag time. For example, a member of the NSW Police Force may leave the NSW

Police Force, but some of the matters he or she was a first responder to may still be being investigated.

Therefore it is recommended that a member of the NSW Police Force upon leaving the NSW Police Force may request the sample be removed from the database, or it will be automatically removed a reasonable time after the member has left. A 'reasonable time' should take account of whether it is likely the member may have contaminated a crime scene or not. If it is not likely, the sample should be destroyed and the profile removed from the database when they cease employment.

The Commissioner for Police should determine when a 'reasonable time' for each officer is – this should be a responsibility that can be delegated.

***Recommendation 2-15:***

Amend the Police Act to stipulate that a member of the NSW Police Force upon leaving the NSW Police Force may request their DNA sample be destroyed and their profile be removed from the database, or this will automatically occur a reasonable time after the member of the Police Force has ceased working with the NSW Police Force.

DNA samples and profiles are not to be transferred between jurisdictions.

#### **4.10 Cost of elimination database**

The NSW Police Force raised the issue of the financial implications of the DNA elimination database.

It is understood that the NSW Police Force is already obtaining DNA samples from applicants to the NSW Police Force for the purposes of determining suitability for employment as a police officer. It is understood that there will be some additional costs in maintaining and using an elimination database. If Government supports these recommendations, I suggest that the NSW Police Force be asked to provide details of costs as part of determining whether to proceed.



## 5 Part Nine – Management of Conduct within NSW Police Force

This chapter deals with proposals to better manage conduct within the NSW Police Force. Stakeholders raised a small number of issues with the unique “loss of confidence” process applying to police officers.

### 5.1 Delegate authority to issue a “show cause” notice under s181D(3)(a)

Section 181D of the Police Act allows the Commissioner to remove a police officer from the NSW Police Force if the Commissioner does not have confidence in the police officer’s suitability to continue as a police officer, having regard to the police officer’s competence, integrity, performance or conduct.

Before making a s181D order, the Commissioner must give the police officer a notice setting out the grounds on which the Commissioner does not have confidence in the officer’s suitability to continue as a police officer and the officer has 21 days to respond. This is called a show cause notice.

Section 31 of the Police Act allows the Commissioner to delegate to another member of the NSW Police Force any of the functions conferred or imposed on the Commissioner by or under this or any other Act, other than the power of delegation.

There is concern that issuing a show cause notice and making a s181D order are linked; as the former is a preparatory step for the later. Consequently, the Commissioner cannot delegate only the show cause notice.

The NSW Police Force considers that deciding to dismiss an officer under s181D of the Police Act should ultimately rest with the Commissioner. However, there would be benefits in delegating the power to request a show cause notice, which is an administrative step, including reducing delays in some cases where officers are suspended with pay.

This approach is supported by the NSW Police Force.

The Police Association of NSW is concerned that if the show cause notice was delegated, the Commissioner of Police would be able to remove a police officer without being required to consider that officer's response to the show cause notice. This is considered an unlikely outcome given current appeals processes, but is an important consideration in any legislative drafting. For example, provision could be made requiring the officer's submission in response to the show cause notice be considered by the Commissioner (or other delegate) when making the s181D order.

**Recommendation 3:**

The Police Act separate the functions of issuing a show cause notice s181D(3) from the final determination of the s181D order to enable the separate delegation of these functions.

If necessary, an amendment be made to ensure that the outcome of the show cause notice is to be considered by the person who determines the s181D order.

## 5.2 Review of the loss of confidence decision (s181D and s181E)

Section 181E of the Police Act allows the Industrial Relations Commission to review the decision of the Police Commissioner to remove an officer under s181D of the Police Act.

While the Police Commissioner's decision is based on competence, conduct, integrity or performance, the Industrial Relations Commission assesses the dismissal to ensure the decision was not "harsh, unreasonable or unjust".

Section 181F of the Police Act establishes a strict procedure for the review of management action (including s181D of the Police Act) by the Industrial Relations Commission:

- the Industrial Relations Commission must consider the Police Commissioner's reasons; then
- the appellant's case as to why the removal was harsh, unreasonable or unjust; then

- the Police Commissioner's response to the applicant's case.

Section 181D was introduced in the *Police Legislation Amendment Act 1996*. Its introduction was in response to the Wood Royal Commission and the political will to rid the NSW Police Force of its 'deadwood'. The intention was that it would provide the Commissioner of Police with a strong power for dismissal.

However, there was concern with the lack of appeal rights and in 1997 s181E was introduced in the *Police Service Amendment Act 1997*. Parliament hoped "the result is a process that retains the Commissioner's power to ensure the service is able to quickly free itself of those who fail to live up to professional standards of integrity, competence and behaviour, but also protects against injustice." (The Hon. J. W. Shaw, NSW Parliament, Hansard, 19 June 1997, 8:00pm).

There is concern that s181E may make it difficult for the Commissioner to dismiss police officers who have been charged with a criminal offence. I have been advised that the Industrial Relations Commission has reinstated at least eight officers who were charged with a crime. It is acknowledged that this is just a proportion of appeals. However, these include convictions for assault and medium to high range proscribed concentration of alcohol offences. It should be noted that a criminal conviction does not automatically make an individual unsuitable for the NSW Police Force.

The Police Association of NSW is vehemently opposed to any change to the powers of the Industrial Relation Commission and is of the view that there are no flaws in the s181D review mechanism and difficulties raised do not reflect actual circumstances.

There have been a number of concerns raised with s181D:

- The NSW Ombudsman's office has noted a conflict between the test used to determine the Police Commissioner's loss of confidence due to competence, conduct, integrity or performance and the Industrial Relations Commission's test that the removal is harsh, unreasonable or unjust (which is informed by s181F). The Police

Association NSW notes the tests are different but disputes they conflict. The Police Association of NSW is of the view the considerations the Commissioner makes in deciding whether they can have confidence in an officer's continual suitability are encompassed by the public interest consideration that the Industrial Relations Commission is required to make.

- The NSW Police Force has advised that a key is that the Industrial Relations Commission does not provide adequate consideration to the range of orders available under s89 of the *Industrial Relations Act 1996*.
- Section 181F(3)(b) requires the Industrial Relations Commission to give weight to the public interest, this is not being given sufficient weight in determining the order.

Commissioner's confidence provisions are essentially about an officer's suitability based on his or her integrity to continue to be a police officer. However the Commissioner, given past decisions, may suppress integrity issues knowing that the Industrial Relations Commission may nevertheless consider the dismissal harsh and reinstate the officer. The higher standard should be integrity.

Police officers must have a genuine right to appeal a s181D order, but the public interest should be given primacy. This could occur in a number of ways.

An option is to amend s181E of the Police Act to require the Industrial Relations Commission to determine if the decision by the Commissioner was "harsh, unreasonable or unjust" and prevent fresh evidence being introduced. Following the decision in *Hosemans v Commissioner of Police* (at [134]), the Commission is "to make a fresh and independent review decision itself, based on the material before the IRC Commissioner as well as any new evidence admitted." If the Industrial Relations Commission did not conduct a new hearing for an appeal of a decision, but rather reviewed the evidence considered at the time, it could dissipate the tension between the two tests. This was the original intent of Parliament:

"The key aspect review to be conducted by the IRC will be a review of the merits of the *decision* of the Commissioner. It will allow both the fairness of the process by which the decision was arrived at, the facts on which the decision

was based, and whether dismissal was too harsh, unjust or unreasonable.” (The Hon. J. W. Shaw, NSW Parliament, Hansard, 19 June 1997, 8:00pm).

The Police Association of NSW has indicated it is strongly opposed to the Industrial Relations Commission’s role being limited to reviewing the decision only. They are particularly concerned that the Industrial Relations Commission will not be given the opportunity to review the accuracy of the documents the Commissioner used in making his decision under a s181D order.

Another option is removing the ‘harsh’ component of the test and relying on the appeal grounds being that the decision was ‘unreasonable or unjust’. This may overcome the situation that occurred in *Commissioner of Police v Evans [2006] NSWIRComm 170*, where an officer was convicted of Assault Occasioning Actual Bodily Harm in Company, was dismissed under s181D, and then reinstated by the Industrial Relations Commission on the basis that the removal was “harsh in its consequences for his personal and economic situation.”

Another option is to remove s181F(3)(a) which provides that the Industrial Relations Commission must take into consideration the interests of the applicant. This is to be balanced against the public interest [s181F(3)(b)], which focuses on the integrity of the NSW Police Force and the fact that the Commissioner made the order pursuant to section 181D (1) of the Police Act. This approach would elevate the public interest test thereby ensuring the integrity of the Police Force. The interests of the applicant are inherent in the ‘harsh, unjust and unreasonable test’ and therefore do not need to be reiterated in s181F(3)(a).

Section 89 of the *Industrial Relations Act 1996* provides for a range of remedies, including compensation rather than reinstatement. Another option would be to require the Industrial Relations Commission to consider all possible remedies in s89 of the Industrial Relations Act, and to consider the public interest test when determining a remedy.

There is a tension between the two tests that may undermine the Commissioner of Police’s decision to dismiss an officer that he has lost confidence in. It is considered essential that a

right of appeal is preserved, but that the public interest of the integrity of the NSW Police Force is given primacy. Given the divergence of views and options available to address the issue, it is considered appropriate that further consultation be undertaken on the best way to elevate the public interest test.

***Recommendation 4:***

The Police Act be amended to require the Industrial Relations Commission when deciding a s181D application to give primacy to the public interest, which is taken to include the interest of maintaining the integrity of the NSW Police Force, and the fact that the Commissioner made the order pursuant to section 181D(1). Further consultation is to occur to determine the best approach to achieve this.

## 6 Amendments to other Police Act provisions

### 6.1 Allow the Commissioner to appoint a member of the Police Senior Executive Service to a Commissioned Officer position (s52)

There is no general power to move a sworn officer from executive to commissioned officer ranks, other than for disciplinary/performance issues.

Section 52 of the Police Act allowing Police Senior Executive Officers the right to return to the position of a commissioned officer was only available for inclusion in the officer's first contract and the election could only be made before 1996, making the provision redundant for all practical purposes. In addition *Government Sector Employment Legislation Amendment Bill 2013* would repeal Part 5 of the Police Act, which includes s52.

Section 69(2)(b) of the Police Act already allows the Commissioner to transfer a non-executive police officer from one non-executive police officer position to another non-executive police officer position if the position to which the officer is transferred entitles its holder to a lower level of remuneration than the officer's former remuneration and:

- (i) the officer consents to the transfer at the lower level of remuneration, or
- (ii) the officer requested the transfer or the transfer is made pursuant to an order under section 173

The Police Association of NSW is of the view that the Police Act should include a general provision allowing an executive officer to be moved to a commissioned officer position. The NSW Police Force considers it would be beneficial for the Commissioner to have this discretion. An example of when such a provision would be used is when an officer wishes to leave the executive service, but not the Police Force, so they have more time to spend with their family, or to relocate for family reasons.

It is appropriate for the Commissioner of Police to have the power to flexibly move staff where there is a staffing need and a particular staff member wants the transition. This power is available to other Government sector agencies and employees. The power should be

discretionary but should not be used where the officer was removed from the position under s181D (i.e. for discipline reasons) or for medical reasons.

Given the voluntary nature of reinstating an executive officer to a commissioned officer, no compensation should be payable. However, the transfer should not affect the continuity of service of the person that is transferred, or any accrued rights to leave.

**Recommendation 5:**

The Police Act be amended to include a provision giving the Commissioner the discretion to reinstate a sworn executive officer to commissioned officer ranks when:

- the officer agrees to the appointment;
- the officer was not removed or being considered for removal from the position under s181D; and
- the officer was not removed for medical reasons.

An executive contract is to provide (or is deemed to provide) that no compensation is payable on termination of the contract of employment if the officer is transferred to a vacant non-executive police officer position.

The transfer does not affect continuity of service or rights to leave.

### 6.3 Public Interest Disclosures Act

In discussions and in correspondence, issues concerning the *Public Interest Disclosures Act 1994* (PID Act) were raised.

The NSW Ombudsman argues that there are a number of inconsistencies between the PID Act and the Police Act. However the review of the Police Act is not the forum to deal with the range of issues relating to the operation of the Police Act and the PID Act.

The NSW Ombudsman has suggested that s206(4) of the Police Act be amended in the interim to use the PID Act over the Police Act where there is conflict. This is still a significant amendment and should be further considered.

Section 6A of the *Public Interest Disclosures Act 1994* establishes a steering committee. One of the committee's functions is to provide advice to the Minister on the operation of this Act and recommendations for reform. It is recommended that the Minister write to the Steering Committee requesting they examine this issue.

The Police Association of NSW has recommended the Steering Committee consider:

- the full impact and implications of this proposed reform; and
- refer its assessment to the working group before any recommendations are made.

**Recommendation 7:**

The Minister write to the Steering Committee requesting they consider and recommend reform to harmonise the PID Act and the Police Act.

#### **6.4 Police Officers with Criminal Convictions and the *Australian Human Rights Commission Act 1986 (s 71)***

Under the *Australian Human Rights Commission Act 1986* an employer cannot discriminate against someone because of a criminal record. An exemption applies if the person's criminal record means that they are unable to fulfil the inherent requirements of the job.

A criminal record check is one test the Commissioner undertakes when assessing police officer applicants. Section 71 of the Police Act allows the Commissioner to make inquiries into a person's integrity before appointing them to the position of a police officer, indicating that a person's particular criminal record may affect the inherent requirements of being a police officer. However, there is no equivalent provision in the Police Act for individuals who obtain a criminal record during their employment.

Consequently, consideration should be given to introducing a specific amendment to the Police Act that allows the Commissioner to take into account an individual's criminal record in order to assess their integrity.

The Police Association of NSW is of the view that this amendment should be limited to applicants only. However the need is broader than this as criminal record of an individual while they are employed may still go to their integrity.

***Recommendation 8:***

Amend the Police Act to specify that the NSW Police Force may take into account an applicant or employee's criminal record and its impact on suitability as a police officer and in determining eligibility for employment.

## **6.5 Recognised Law Enforcement Officers (s207B)**

Section 207B of the Police Act allows police officers from the Australian Federal Police and other States and Territories to be appointed as recognised law enforcement officers. Recognised Law Enforcement Officers are generally given the same powers as a NSW Police Officer. Recognised Law Enforcement Officers are often brought into NSW to deal with emergencies and cross border issues.

Increasingly, crime is crossing borders, not just state borders but international borders. The nature of crime is rapidly changing and it would be beneficial for the legislation to allow some flexibility in the appointment of a recognised law enforcement officer. For example, Australia works very closely with New Zealand in emergency situations, and it may be useful for a New Zealand officer to be appointed as a recognised law enforcement officer.

The NSW Police Force supports amending s207B to permit other categories of person to be appointed under Regulation.

The Police Association of NSW does not support this reform, as they are concerned that any new category of Recognised Law Enforcement Officer should be seriously considered and negotiated; and that s207B should only extend to sworn officers who are subject to an appropriate disciplinary system (this is the current standard in the Act). The Police Association of NSW does however suggest amending the provision to allow international sworn officers to be recognised law enforcement officers.

A regulation making power is consistent with allowing greater flexibility to address emergencies, while at the same time providing for serious consideration and negotiations on the inclusion of groups. Any regulation would be subject to oversight by the legislature.

***Recommendation 9:***

Amend s207B to allow the Regulation to direct what categories of persons may be permitted to be recognised law enforcement officers.

## **6.6 Charges payable for attendance at sporting events, escorts and other services (s208)**

Based on the NSW Police Force 'user pays policy', the NSW Police Force is currently applying user pays charges to a number of events/activities not covered by the Police Regulation, and therefore not enforceable by the Commissioner.

The NSW Police Force suggests the Regulation specifically list categories of the functions and events that the NSW Police Force may charge for, including but not limited to:

- special events , which involve crowd management or containment;
- vehicle and pedestrian management services where police powers are exercised to promote public safety for exclusive use and benefit of an activity organiser or coordinator;
- water police escorts or presence on the water;
- aviation branch assistance;
- deployment of Police Dogs;
- criminal records checks for employees and applicants;

- interviews with police for the purposes of providing information to legal representatives and for the purpose of civil litigation;
- information and reports for insurance investigations and other commercial purposes;
- provision of police officers, including but not limited to, provision of access to or the filming and interviewing of police officers, and other services to the film industry;
- intellectual property, training and consultancy, where there is a need for police expertise;
- technical and forensic services;
- mounted Police Escorts; and
- performances of the Police Band.

The NSW Police Force also propose extending the ‘fees and charges’ the Commissioner is entitled to demand to include “Cancellation fees to cover administration and stand by costs incurred by the NSW Police Force in planning and preparing for the delivery of user charge services which are cancelled or postponed by the applicant (providing less than 36 hours notice to NSW Police Force).

This proposals enshrines current processes and policy in legislation, therefore I would recommend it be progressed.

***Recommendation 10:***

Amend the Police Act and Regulation to reflect the NSW Police Force’s current policy regarding charges payable for police services.

## **6.7 Protection from personal liability (s213)**

Section 213 protects police officers from civil litigation. A member of the NSW Police Force is not liable for any injury or damage caused by any act or omission of the member in the exercise, in good faith, of a function conferred or imposed under any law.

The unique nature of policing increases the exposure of police officers to civil claims. Police need to be able to perform their duties in good faith without fear of being personally sued.

Officers of the NSW Police Force are increasingly deployed outside of NSW and in some cases overseas. For example, in 2010/11 151 NSW Police Force officers were deployed to nine countries, including 122 officers to New Zealand following the Christchurch earthquake. Officers were also deployed to the Northern Territory to protect the President of the United States, to Queensland following the floods, and Victoria following the bushfires. Civilian employees are also deployed on occasion. In 2011 several intelligence officers were deployed to Western Australia for the Commonwealth Heads of Government meeting.

The Police Act may not provide immunity from civil liability when the officer has been deployed outside of NSW. Some coverage may apply when the jurisdiction the officer is deployed to has civil liability coverage that can be extended to officers of other jurisdictions – as does NSW, see s207E (4) of the Police Act, which provides recognised law enforcement officers (i.e. officers from other jurisdictions) with the same protection from liability as NSW police officers.

Consequently, before an officer is deployed outside of NSW, the Minister for Police and Emergency Services writes to the President of the Police Association NSW and commits to ex-gratia assistance to satisfy in full, any judgement, including costs, sought personally against any NSW Police Officer who is deployed. The commitment is made so long as the officer acted in good faith and as part of their duties. The letter of comfort is consistent with the Premier's memorandum on ex-gratia legal assistance 99-11.

Every police officer or civilian officer should feel assured they will be supported where they have acted appropriately during a deployment. A legislative solution provides confidence for officers and avoids a case by case solution.

While the issue of civil liability is currently being discussed at a national level, it can be resolved through the actions of individual jurisdictions in order to produce a more expedient result for NSW Police Force members.

As the NSW Police Force notes in its submission, NSW cannot stop other jurisdictions' laws from applying to members of the NSW Police Force, and therefore cannot simply extend the exclusion contained in s213 of the Police Act to apply when members of the NSW Police Force are in another jurisdiction.

The Police Act could however provide that the Crown will indemnify a member of the NSW Police Force against any civil liability (including reasonable costs) the officer incurs because of conduct the officer engages in as a law enforcement participant, as long as that conduct was entered into in good faith. The Police Association support civil protection for officers performing cross border duties.

There have only been three civil claims against police officers deployed in other jurisdictions: for one matter the Commonwealth was the nominal defendant, the Commonwealth largely indemnified NSW for the second, and the proceedings for the third were not continued. Therefore the financial burden on the state in implementing a provision of this nature would be minimal.

In addition, paragraph three of the Police Assistance in Neighbouring States/Territories in Australia Deed 1999 in relation to "exceptional and emergency situations" provides that "The requesting Minister shall fully indemnify the Minister providing assistance for liability arising from personal injury, death, public risk, property damages, litigation (including associated expenses, costs and legal representation)...." thereby further reducing the States potential financial liability.

**Recommendation 11:**

The Police Act be amended to provide that the Crown will indemnify a member of the NSW Police Force who is working in another jurisdiction against any civil liability (including reasonable costs) the officer incurs because of conduct the officer engages in as a law enforcement participant as long as that conduct was entered into in good faith.

## 6.8 Remove references to HealthQuest (s216AA)

The body HealthQuest no longer exists yet is referred to in the Police Act. Amendments to the Police Regulation make clear that public service medical assessment processes apply to members of the NSW Police Force. References should therefore be to the “nominated medical assessor” as set out in clause 15 of the GSE Regulation.

**Recommendation 12:**

References to HealthQuest should be replaced with a reference to an independent medical officer.

## 7. Other matters considered

### 7.1 Response to the High Court's decision in *Commissioner of Police v Eaton* [2013] HCA2 (8 February 2013)

The decision of the *Commissioner of Police v Eaton* [2013] HCA2 (8 February 2013) concerned a challenge to the Commissioner's power to dismiss probationary constables and the extent to which the Industrial Relations Commission had jurisdiction to consider the dismissal under its unfair dismissal jurisdiction. It should be noted it was accepted that a decision to dismiss a probationary constable under s80(3) of the Police Act is reviewable for jurisdictional error.

Ultimately the High Court found that there is no jurisdiction to hear an unfair dismissal claim for probationers dismissed under s80(3) of the Police Act.

In making its decision, the High Court considered s218 of the Police Act, which states that the *Industrial Relations Act 1996* is not affected by anything in the Police Act and does not limit section 44 or 89 or any provision of the *Industrial Relations Act 1996*. The court pointed out that the reference to s89 should actually be a reference to s88. This error is to be remedied by the *Government Sector Employment Legislation Amendment Bill 2013* (Schedule 3, cl38). This Bill has currently not passed through Parliament. If the Bill does not proceed the issue should be addressed in any legislation coming from this review.

The High Court noted that:

*"sub-s (1) of s218 is now patently erroneous. The IR Act is affected by Pt 9 of the Police Act, as has been pointed out. Part 6 of the IR Act does not automatically apply to claims by police officers for unfair dismissal. Section 181E in Pt 9 of the Police Act permits the making of such a claim, but with the modified processes which Pt 9 provides."*

Ultimately the High Court noted that s218 of the Police Act leaves intact the power of the Industrial Relations Commission to deal with industrial matters concerning police officers, unless especially restricted by a provision of the Police Act.

The NSW Ombudsman supports amending or repealing s218 of the Police Act in line with *Commissioner of Police v Eaton [2013] HCA 2*.

The Police Association of NSW recognises the law in this area has been settled by the *Commissioner of Police v Eaton [2013] HCA 2* (8 February 2013) and sees no reason for further action.

The NSW Police Force considers that no changes should be made to s80 and s218.

It is considered that as the High Court has now ruled on this issue no legislative amendments are required.

## **7.2 Injury of probationary constables**

The Police Association of NSW proposes the Police Act include a right of review for a probationer dismissed in circumstances where they are unable to fulfil the inherent requirements of the position due to injuries suffered whilst on duty and therefore unable to be confirmed under cl13 of the Police Regulation.

The NSW Police Force does not support this proposal. The proposal has the potential to extend the NSW Police Force's obligations. Under the proposal an officer who has not demonstrated his or her operational competence in frontline policing would be provided with non-operational duties for the duration of his or her career.

Section 80(3) of the Police Act has been used twice since 1 September 2008 to dismiss probationary constables in these circumstances. There is a public expectation that police (particularly on entry to the Police Force) are able to fulfil all operational duties of a police officer. The NSW Police Force considers the proposal does not meet this expectation.

Given the limited use of the provision and the difficulties that it would create for the NSW Police Force this proposal is not recommended.

### **7.3 Inherent requirements (cl14 & 16)**

The Police Association of NSW proposes amendments to cl14 and cl16 of the Police Regulation to permit promotion to the rank of constable and senior constable when an officer is unable to perform the inherent requirements of a position but can be otherwise suitably employed.

The NSW Police Force does not support the proposal as it has the potential to extend NSW Police Force's obligations to probationary officers who cannot demonstrate the ability to fulfil operational requirements and have never demonstrated that ability.

The NSW Police Force notes the proposal concerning promotion to the rank of Senior Constable requires further consideration, as these officers should have demonstrated an ability to fulfil operational requirements previously.

Given the recent changes to the police promotions system as a result of the Wright review and the different positions of the NSW Police Force and the Police Association of NSW this proposal is not supported.

### **7.4 Recovery of overpayments to members of the NSW Police Force**

On occasions a mistake may be made in paying members of the NSW Police Force. As at 31 January 2014 the NSW Police Force had \$1,608,749.59 owing to them in overpayments. The NSW Police Force has asked the review to consider whether amendments to the Police Act could facilitate easier recovery of overpayments.

Section 118 of the *Industrial Relations Act 1996* prevents any deduction from an employee's remuneration (such as to recover an overpayment) unless the employee has consented in writing, or it is set out in an industrial instrument. Neither the Crown Employees (NSW Police

Force Administrative Officers and Temporary Employees) Award nor the Crown Employees (Police Officers) Award contain provisions allowing overpayments to be rectified without consent.

In the absence of consent, any overpayment to a member of the NSW Police Force must be recovered under the *Civil Procedure Rules 2005* and in the appropriate court depending on the size of the claim.

Rather than rely on obtaining individual consent each time an overpayment needs recovering, the NSW Police Force has suggested amending the Police Act, the Police Regulation 2008, or the relevant Awards to introduce a faster process, which would reduce costs and increase efficiency recovering overpayments.

The Police Association of NSW opposes any change to the current approach. The Police Association of NSW argues that recent changes to Death and Disability have resulted in a multitude of both overpayments and underpayments due to the complex interaction of salary, worker's compensation and income protection. Problems relating to overpayments (and underpayments) could be compounded should there be an automatic recovery process.

Data from the NSW Police Force shows that worker's compensation and Death and Disability payments are part of the problem, but the majority of overpayments are due to late notification of changes to hours, allowances, and leave. This suggests that a greater emphasis on timely management of these issues could avoid the problem.

The recovery of overpayments is a whole of Government problem and a preferable approach would be for a whole of Government solution, such as amending the *Industrial Relations Act 1996* itself. Any process would need to include appropriate safeguards to ensure recovering overpayments does not unreasonably impact the affected members (such as through recovering an excessive amount from each pay).

## 7.5 Permit Oral Fluid testing as part of drug testing regime

NSW Police Officers (not civilians) are subject to a statutory regime of drug and alcohol testing. The Police Act and the Police Regulation 2008 detail the procedures for conducting drug and alcohol testing. In summary, an authorised person may require any police officer who is on duty in accordance with a roster to undergo a breath test, or submit to a breath analysis, for the purpose of testing for the presence of alcohol, or to provide a sample of the police officer's urine or hair (or both) for the purpose of testing for the presence of prohibited drugs.

The NSW Police Force through the Professional Standards Command is conducting a trial of saliva testing for drug testing of police officers.

The Police Association of NSW supports the trial and dependent on the results, suggests the Act and Regulation be amended as part of this review process.

The Police Association of NSW sees the benefits of saliva testing:

- Does not require bathrooms facilities, therefore allowing tests at any location.
- Less invasive than urine or hair.
- Simpler to administer – cost and time.
- Could allow for a broader range of 'testing officers'.
- Some scientific advantage within the 'detection window' and more likely than urine to show affectation.

The NSW Police Force opposes legislative change at this stage because the program is still being piloted. It is noted however that in the future this may be brought forward if saliva testing provides a suitable alternative method for drug testing.

## 7.6 Authorised person (s217)

Section 217 of the Police Act states that the Minister may appoint any person (an authorised person) to inquire into, and to report to the Minister on, any matter on which the Minister wishes to be advised in relation to the management and administration of the NSW Police Force.

The Inspector for the Police Integrity Commission raises in his submission that there may be a conflict of interest in the Inspector being appointed as an “authorised person”.

Section 217 specifically refers to an “authorised person” – the focus being on the appointment of a specific person, as opposed to the appointment of a position. Given this section is generally used in significant circumstances, it is best that there is flexibility in determining who is the most suitable person to appoint in each individual circumstance, allowing any potential conflict of interest to be considered on a case by case basis.

## **7.7 Unauthorised release of confidential information**

As the collection and analysis of intelligence information becomes a more common part of daily policing activities, one of the issues to consider is whether the Act ensures confidential police information is appropriately protected.

The Police Act does not currently include a specific offence relating to the improper disclosure of information by the NSW Police Force. Both the NSW Ombudsman and the Police Integrity Commission support the creation of such an offence. A proposal for a statutory offence of releasing confidential police information was first raised in 2007 as a recommendation in the Police Integrity Commission’s report into Operation Mallard.<sup>1</sup> At the time, however, it was believed existing laws and management practice were sufficient to deal with this type of misconduct.

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<sup>1</sup> Report of Operation Mallard, released 19 December 2007, available at [www.pic.nsw.gov.au](http://www.pic.nsw.gov.au)

It is an offence for a member of the NSW Police Force (sworn and unsworn officers) to disclose confidential information for gain or advantage (for example, in return for receiving a bribe), and is punishable by up to 7 years' imprisonment or 200 penalty units or both (section 200).

There is also the common law offence of misconduct in a public office, which would apply to a police officer that has disclosed confidential information.

The *Privacy and Personal Information Protection Act 1998* (PPIPA) makes it an offence for a public official (including a member of the NSW Police Force) to intentionally disclose or use personal information, which the official has or had access to in the exercise of his or her official functions, other than in connection with a person's lawful functions or duties (section 62). However, this offence only relates to 'personal information', as defined. The maximum penalty for this offence is 2 years' imprisonment or a fine of 100 penalty units.

It is considered that there are currently enough mechanisms to ensure that the release of confidential information in inappropriate circumstances is an offence. Consequently, it is not recommended that a specific offence be implemented at this time.

## **7.8 Temporary appointment to vacant position at higher rank (s67)**

Section 67 of the Police Act states:

*"the Commissioner may appoint temporarily to a vacant position of a non-executive police officer a police officer who is on the relevant promotion list for the rank or grade concerned, or is in the process of gaining the requisite qualifications for placement on that list."*

This section only requires that an officer be in the process of gaining requisite qualifications for placement on a promotions list. The NSW Police Force argues this is too broad as there is no requirement that the officer actually be successful in going on to obtain the requisite qualification.

The Police Association of NSW sees no reason to amend s67. It considers the purpose of the provision is to provide options to the NSW Police Force to fill positions temporarily from a broad pool. Further, it notes that this issue was not raised in the Wright Review of the promotions system.

I also note that s 67 gives the Commissioner discretion: he need not appoint an officer to a position temporarily if it is not appropriate to do so.

## **7.9 Employee protections**

The Police Association of NSW ask that consideration be given to a unified approach to maintaining worker's compensation entitlements, WHS protections, and the insurance benefits available under the police death and disability scheme when performing cross-border duties.

The Police Association of NSW has not raised specific instances of when this issue has caused difficulty. The matter of whether an injury is on duty or not is addressed under insurance or worker's compensation laws and it is therefore not a matter for the Police Act.

The Police Association of NSW also seeks assurance that any injury occurring in the course of cross border duties would be deemed an on duty injury. This has consequences for worker's compensation and work health and safety laws that are beyond the scope of this review.

## **7.10 Discipline and oversight agencies**

The Police Association of NSW suggests there should be clarity on which discipline system applies to officers performing cross border duties. The Police Association of NSW also seeks clarity regarding the powers that oversight bodies have in investigating an officer performing duties in another jurisdiction.

Legislatively, the NSW Government cannot exclude the role of oversight bodies or disciplinary functions imposed by other States or Territories, or where relevant, other nations.

I understand that the Standing Council on Police and Emergency Management National Policing Senior Officers Group has been progressing the issue of cross border civil liabilities generally and it may be appropriate for that group to also consider the issues raised by the Police Association of NSW.

## 8 Conclusion

The history of the Police Act demonstrates that the Act has undergone some very major changes since it was made. These changes have been in furtherance of the same goal - police reform.

The Royal Commission was a major influence on the first wave of reforms in the mid and late 1990s.

Variouly Government policy, industrial reform, case law and community desire for an honest and effective police force have been powerful factors in the process of change to the Act.

The long title of the Police Act is to “establish the NSW Police Force, to provide for the management of the NSW Police Force and for the employment of its members of staff; and for other purposes.” It is achieving this aim, but there are a number of reforms that may be implemented to ensure the Act continues to respond to the ever rapid and changing environment we live in.

To ensure the Act is kept up to date and modern, my last recommendation is that s222 of the Police Act be amended to ensure that another review of the Act is conducted in five years time.

***Recommendation 12:***

Section 222 be amended to require another Act review in five years time from enactment of recommendations from this review.

## Appendix A: Recommendations of the 2006 Review not adopted

### Chapter 4 – The Commissioner of Police

1. Amend Sections 24(1) and 28(2) of the Act to remove the Governor from the appointment processes and provide for the Minister to appoint and remove the Commissioner (for consistency with Section 12(1) and 77(1) of the PSEM Act.

### Chapter 5 – Senior Executive Service

2. Amend Section 36 and 51 of the Act to remove the Governor from the appointment process by having the Minister on recommendations from the Commissioner appoint and remove a Deputy Commissioner or Assistant Commissioner.

### Chapter 6 – Non Executive Officers of the NSW Police

3. Amend Section 82 of the Police Act to remove the right to make an application under part 6 of Chapter 2 (Unfair Dismissals) of the Industrial Relations Act 1996 from officers who resigned after being nominated for removal under Section 181D of the Police Act.

### Chapter 9 – Complaints about conduct of Police Officers

4. Replace section 125 by a provision to the following effect:

Responsibility for the handling of complaints

The Commissioner has the following functions under this Part:

- (a) To receive and assess complaints
- (b) To take appropriate action on complaints in a timely and effective manner
- (c) To provide information to the Ombudsman, complainants and police officers the subject of complaint about matters dealt with under this Part where appropriate

The Ombudsman has the following functions under this Part:

- (a) To receive and assess complaints
- (b) To monitor the handling of certain complaints
- (c) To determine whether complaints have been properly dealt with

- (d) To investigate certain complaints and related issues
- (e) To provide reports to complainants, the Commissioner and the Minister
- (f) To inspect Police records with respect to the handling of complaints
- (g) To keep under scrutiny the systems established within the NSW Police for dealing with complaints

The Police Integrity Commission has the following functions:

- (a) To receive complaints
- (b) To refer complaints to the Commissioner of Police and the Ombudsman
- (c) To provide information to the Ombudsman, complainants and police officers where appropriate
- (d) To investigate or take over the investigation certain complaints where it considers it appropriate to do so. (To the extent that the investigation of a complaint is not treated as a complaint for the purposes of Part 8A except as directed by the Police Integrity Commission or as directed by the regulations.)

Subject to a proviso that the legislative statement to be read subject to the Act to prevent readers thinking that the statement supersedes the more specific provisions of the Act.

5. Section 148 be retained subject to section 148(1) being amended by the replacement of the words “any person’ with the words “a police officer of former police officer”.

#### Chapter 10 – Offences relating to NSW Police

6. Create an offence in Part 10 of the Police Act for sending SPAM messages by computer to NSW Police or otherwise interfering with the operation of electronic communication to or within NSW Police.

#### Chapter 12 – Ministerial Inquiries

7. Amend section 127 of the Act to give the Minister for Police broader powers to establish committees and advisory bodies. The provision would have the following elements:
  - The Minister may appoint such councils committees and advisory bodies as the Minister may consider appropriate
  - A council committee or advisory body appointed shall have such functions as the Minister may from time to time direct.

- A council committee or advisory body appointed shall consists of a person appointed as chairperson by the Minister and such other persons appointed by the Ministers as the Minister thinks fit.
- The Chairperson and other members so appointed shall hold office for such term as the Minister may specify in respect of each of them in the instrument of their appointment and any such instrument may be terminated by the Minister at any time.
- The Chairperson and any other member of a council committee of advisory body appointed shall each be entitled to be paid such fees and allowances (if any) as may be from time to time determined in respect of the Chairperson or member by the Minister
- The office of a member of a council committee or advisory body appointed shall for the purposes of any Act be deemed not to be an office or place of profit under the Crown
- Any matter or thing done or omitted to e done by a council committee or advisory body any member of such council committee or advisory body or any person acting under the direction of the council committee or advisory body does not if the matter or thing was done or omitted to be done in good faith for the purposes of conducting any activities in conformance with the terms of reference of the council committee or advisory body subject to a member or a person so acting personally to any action liability claim or demand.

## Appendix B: Amendment to the Police Act since the last review

Year	Legislation	Principal Amendments
	<i>Police Amendment (Miscellaneous) Act 2006</i>	<p>Implemented amendments arising as a result of the statutory review of the <i>Police Act 1990</i>.</p> <p>The Act:</p> <ul style="list-style-type: none"> <li>• Renamed “NSW Police” as the “NSW Police Force”.</li> <li>• Made further provision for the testing of police officers for the presence of alcohol, drugs and steroids as a result of Operation Abelia, eg: <ul style="list-style-type: none"> <li>➢ Extended testing to steroids on a targeted basis.</li> <li>➢ Allowed off-duty police officers to be recalled to duty for the purpose of testing.</li> <li>➢ Required mandatory drug and alcohol testing for any officer involved in a critical incident, and extended the definition of such critical incidents (“mandatory testing incidents”).</li> </ul> </li> <li>• Simplified and streamlined the management of complaints against police officers, eg: <ul style="list-style-type: none"> <li>➢ Removed the distinction between Category 1 and Category 2 complaints</li> <li>➢ Rationalised the requirements for referral of complaints between the Commissioner of Police, the Ombudsman and the Police Integrity Commission.</li> </ul> </li> <li>• Omitted the Part relating to the Protective Security Group, which was disbanded.</li> <li>• Made amendments to provide greater consistency in the determination of police senior executive positions and public sector executive positions generally.</li> <li>• Reintroduced the granting of commissions by the Governor to officers of the rank of Inspector and above.</li> <li>• Increased imprisonment for offences for non-police officers wearing a police uniform from 6 months to 2 years (s.203)</li> <li>• Removed the 2-year statute of limitations for an indictable offence under s. 200 (bribery and corruption offences).</li> <li>• Transferred the offence of impersonating a police officer into the <i>Crimes Act 1900</i>; and increased imprisonment for the offence from 6 months to 2 years. A new aggravated form of the offence, where</li> </ul>

Year	Legislation	Principal Amendments
		<p>the person purported to exercise some power of a police officer, was introduced with a maximum penalty of 7 years imprisonment.</p> <ul style="list-style-type: none"> <li>• Allowed the regulations to place on police trainees the same responsibility for confidentiality as applies to members of the NSW Police Force.</li> <li>• Required the Minister to review the <i>Police Act 1990</i> as soon as possible after 5 years from the date of assent to the Act.</li> </ul>
2007	<i>Police Amendment Act 2007</i>	<p>Implemented further amendments arising as a result of the statutory review of the <i>Police Act 1990</i>, which were not implemented by the earlier <i>Police Amendment (Miscellaneous) Act 2006</i>. The Act:</p> <ul style="list-style-type: none"> <li>• Made further amendments to align the <i>Police Act 1990</i> with the <i>Public Sector Employment and Management Act 2002</i>, including provisions about the appointment of staff (such as the appointment of an acting Commissioner) and the employment of temporary employees.</li> <li>• Improved management of complaints about police, including: <ul style="list-style-type: none"> <li>➢ Clarified that complaints made directly to the Police Integrity Commission or the Ombudsman do not have to be entered into the complaints information system unless so directed by either agency.</li> <li>➢ Clarified that the power to investigate a complaint includes the power to take any action necessary to resolve the complaint, including alternate dispute resolution.</li> <li>➢ Conferred on the Commissioner an express power to take no further action in relation to a complaint; and enabled the Ombudsman to request the Commissioner to review any decision to take no further action.</li> <li>➢ Enabled the Ombudsman to report on and publish any matter arising from its functions to the Minister and Commissioner.</li> </ul> </li> </ul>
	<i>Road Transport Legislation (Breath Testing and Analysis) Act 2007</i>	Enabled the concentration of alcohol revealed by a breath test or breath analysis to be measured by reference to alcohol in the breath as well as in the blood. (s. 211A)
2008	<i>Statute Law (Miscellaneous Provisions) Act 2008</i>	<ul style="list-style-type: none"> <li>• Permitted the Commissioner or the Ombudsman, when deciding whether a complaint against a police officer needs to be investigated, to use additional information from the complainant and any existing relevant, readily accessible information. (s.141 (1A))</li> <li>• Clarified that the preliminary assessment of whether a complaint is to be investigated is not an investigation of the complaint. (s.141(1B))</li> </ul>

Year	Legislation	Principal Amendments
2009	<i>Statute Law (Miscellaneous Provisions) Act 2009</i>	Clarified the authority of the Commissioner to enter into commercial contracts or arrangements for the carrying out of works or services or the supply of goods or materials involving the NSW Police Force. (s.8(4A))
2010	<i>Relationships Register Act 2010</i>	A de facto partner of a student of policing (in relation to the special risk benefit) to be defined as per the <i>Interpretation Act 1987</i> . (s.216AA (6))
	<i>Industrial Relations Amendment (Public Sector Appeals) Act 2010</i>	Reflected the repeal of the <i>Government and Related Employees Appeal Tribunal Act 1980</i> and transfer of the functions of the Government and Related Employees Appeals Tribunal (GREAT) to the Industrial Relations Commission.
	<i>Police Legislation Amendment (Recognised Law Enforcement Officers) Act 2010</i>	<ul style="list-style-type: none"> <li>Enabled police officers from other jurisdictions to be recognised as law enforcement officers in NSW (Part 10B).</li> <li>Afforded "recognised law enforcement officers" (previously known as special constables) the powers and responsibilities of police officers under the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i>.</li> <li>Allowed the Commissioner to appoint such officers; to vary or revoke the appointment; and to require the officer to undertake an oath or affirmation of office.</li> </ul>
2011	<i>Statute Law (Miscellaneous Provisions) Act 2011</i>	Made amendments so that the employment of persons in the NSW Police Force is consistent with other public sector employees under the <i>Public Sector Employment and Management Act 2002</i> , for example in relation to appointment of non-executive administration officers; and eligibility lists.
	<i>Public Interest Disclosures Amendment Act 2011</i>	Reflected new "public interest disclosure" (previously known as "protected disclosure") in protection against reprisals at s.206 (2B).
	<i>Police Amendment (Death and Disability) Act 2011</i>	<ul style="list-style-type: none"> <li>Rescinded the existing industrial award-based scheme for death and disability payments to police officers injured at work or off-duty.</li> <li>Replaced that scheme with a new scheme with entitlements to death and disability payments in accordance with an approved insurance policy (Part 9B).</li> <li>Removed the jurisdiction of the Industrial Relations Commission to make or vary industrial instruments that provide for death and disability payments in respect of police officers.</li> </ul>
2012	<i>Crimes Amendment (Consorting and Organised Crime) Act 2011</i>	Reflected revised consorting offences under the <i>Crimes Act 1900</i> in the list of offences at s.207A (4d) (police participating in integrity testing programs deemed not guilty of certain offences).

Year	Legislation	Principal Amendments
2013	<i>Government Sector Employment Act 2013</i>	Omits Part 6A, Division 3, Promotional appeals by non-executive administrative officers to the Industrial Relations Commission and makes related amendments to section 88 of the Police Act. The Act has not yet commenced.
	<i>Police Legislation Amendment (Special Constables) Act 2013</i>	Repeals the <i>Police (Special Provisions) Act 1901</i> to abolish Special Constables and replace them with non-executive administrative officers, who are appointed by the Commissioner of Police, and are subject to the same integrity and other testing as sworn police officers.
	<i>Independent Commission Against Corruption and Other Legislation Amendment Act 2013</i>	Allows for the vetting of police officers and provides appropriate safeguards.
	<i>Royal Commissions and Ombudsman Legislation Amendment Act 2013</i>	Amends the exemptions in s165 to the rule that the Ombudsman and officers of Ombudsman not competent or compellable witnesses in respect of certain matters.
2014	<i>Police Amendment (Police Promotions) Act 2014</i>	The details of this Bill are discussed in the background of this paper.

## Appendix D Table - Possible areas of reform

Area	Proposal
Allow the Commissioner to appoint a member of the PSES to a Commissioned Officer position (s52).	Provide the Commissioner with a power to allow for the transfer of an officer from a PSES position to a Commissioned Officer position for reasons other than poor performance or disciplinary matters.
Terms of office for non-executive commissioned police officers (ss74 – 79).	Allow the suspension of the operation of commissioned officers' contracts in circumstances where, as a result of disciplinary action under s173, the officer may be temporarily suspended from rank (or reduced in rank), but with the opportunity to return after satisfactory completion of a conduct management plan.
Appointment and promotion of Constables (s80).	Confirm the Eaton decision.
Fingerprinting for crime scene elimination purposes (s96A).	Confirm arrangements for use of fingerprints in crime scene elimination. Consider application of these requirements for civilian employees.
DNA sampling be used to determine suitability for employment (s96B).	Allow recruits to have their DNA taken and used to determine their employment suitability.
DNA sampling for crime scene elimination purposes.	Develop a system in which a Police Officer's DNA may be easily eliminated from the investigation. This may be done by developing a DNA elimination database for sworn officers and consideration should also be given to extension to civilian employees who may attend crime scenes.
Definition of complaints (ss121, 122 and 127, and cl.49 of the Police Regulation)	Create a clearer and simpler definition of complaints by consolidating definitional provisions into a single section of the Act and establishing a simple administrative process for resolving disagreements about whether a matter constitutes a 'complaint'
Vexatious complainants	Review and consider bolstering the ability for the Police not to pursue vexatious complaints.

Allow verbal complaints (s127).	Amend s127 to specifically enable complaints to be made orally.
Complaints made via Local Courts (s127 and 133).	Remove the ability to make a complaint to the Local Courts on the basis that in practice the provisions are not used.
Ministers and MPs making complaints on behalf of constituents (s135 and s136).	Allow Ministers/MPs to elect whether to receive updates on complaints made on behalf of their constituents or determine that future correspondence is to be directed to the complainant only.
Providing reasons for Commissioner's decision not to investigate a matter (s139(4)).	Clarify that notifications of decisions not to investigate a complaint should include reasons for the decision.
The use of information requested under s143 for investigative purposes (s143).	Clarify whether the information obtained by the Ombudsman under s143 can subsequently be provided to NSWPF for the purposes of investigating the complaint, or used by the NSWPF and/or the Ombudsman in investigating and reporting on the matter.
Commissioner's discretion to commence proceedings against an officer (s 148)	Clarify the scope of the matters that the Commissioner may take into account in determining whether to approve the institution of criminal proceedings against a police officer.
Provide reasons for the decision to discontinue proceedings (s148A(4))	Notify the complainant not only of the decision to discontinue investigations but the reasons for that decision.
Action in response to complaint (s150).	Require the Commissioner to provide reasons for the findings of the investigation and for any action taken or to be taken.
Clarify the scope of the Ombudsman's oversight role (s151).	Confirm that the Ombudsman's oversight of Part 8A complaint investigations includes oversight of action taken or to be taken as a result of the complaint.
Review future and past action (s154)	The Ombudsman can currently ask the Commissioner to review his/her decision concerning any action to be taken as a result of an investigation. Extend this to include action that has already been taken.
Investigation of complaint under the <i>Ombudsman Act 1974</i> (s156)	Enable the Ombudsman to investigate only some of the matters contained in the complaint, rather than all matters contained in the complaint.

Ability of police officers employed by the Ombudsman to give evidence (s165)	Amend to clarify that the general immunity established by s165 extends to any police officers employed by the Ombudsman.
Privilege (s170).	<ul style="list-style-type: none"> <li>a. Consider whether s170(2) should be amended to provide further clarity about what documents are admissible and other related issues.</li> <li>b. Consider whether the decision in Baff requires a legislative response.</li> </ul>
Delegate authority to issue a “show cause” notice under s181D(3)(a).	The power to issue a show cause notice and the power to dismiss someone cannot be exercised by different people. It is proposed that this power be able to be separated, so that the authority to issue a show cause notice can be delegated, but the Commissioner would retain responsibility for issuing a final order.
Review of the loss of confidence decision (s181E).	Harmonise the test applied by the Commissioner under s181D and the test applied by the Industrial Relations Commission under s181E.
Proceedings on a review (s181F).	Limit the IRC’s role to “reviewing” the evidence considered by the Commissioner at the time he made his decision, rather than the IRC commencing a new hearing.
Recovery of overpayments to members of the NSW Police Force.	Allowing the automatic recovery of overpayments with appropriate safeguards.
Protection against reprisals (s206).	<ul style="list-style-type: none"> <li>a. Extend the statutory obligation to report conduct and the protections against reprisals to unsworn members of the NSW Police Force. Also, consider whether the section should be expanded to address situations where the person only believes or suspects that the Police Officer made a protected allegation.</li> <li>b. Consider increasing the penalty under s206 from 50 penalty units or 12 months imprisonment, to 100 penalty units or imprisonment for two years to be consistent with the penalty under s20(1) of the Protected Interest Disclosures Amendment (Public Interest Disclosures) Act 2010.</li> </ul>
Reporting of misconduct/criminal activity obligation (clause 49 Police Regulation)	Implement reporting obligation similar to section 11 of the ICAC Act ie. “suspects on reasonable grounds”, rather than the current requirement that a “genuine belief” is held.

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Recognised Law Enforcement Officers (s207B).	Amend s207B to permit other categories of person to be appointed under Regulation (may include New Zealand police etc)
Protection from personal liability (s213).	Provide extra-territorial operation to s 213 to provide civil protection to officers deployed outside NSW.
Remove references to HealthQuest (s216AA)	Replace references to HealthQuest with an independent medical officer.
Interaction between the Police Act and the Industrial Relations Act (s218).	Amend or repeal s218 as per the High Court decision of Eaton.

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